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REMEDIES

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BY

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DURHAM, N. C.

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STATE JOURNAL PRINTING COMPANY
PRINTERS AND STEREOTYPERS,
MADISON, WIS.

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INTRODUCTION

CHAPTER 1.

REMEDIES WITHOUT JUDICIAL PROCEEDINGS—SEC. 1. REMEDIES BY OPERATION OF LAW.—(a) *Remitter*. If the true owner of the fee be dispossessed and barred of his right of entry and thereafter the possession, or right of possession, devolves upon him by operation of law, under some defective title, this possession or right of possession under the defective title is, by mere operation of law, merged, so to speak, into his former good title—thus restoring his impaired title to its pristine perfection. This is brought about by the spontaneous and instantaneous operation of law without the participation or consent, even, of the owner. *Mutatis mutandis*, if one be in the wrongful possession of land and the true title to the freehold devolve upon him by *operation of law*, his wrongful possession is merged, as it were, into his freehold title. These automatic workings of the law are called **REMITTER**. Remitter only operates when the title or possession or right of possession devolves by operation of law, and never when such rights or circumstances arise by act of the party. (1). Somewhat analogous to remitter is the case of the true owner of a chattel whose right to recover the possession thereof by legal process has become barred by the statute of limitations. Should he, even by his own act, gain possession of such chattel, such possession merges into and again perfects his title. (2). (b) *Retainer, Lien, etc.* As no one can sue himself, an executor or administrator would have been at a great disadvantage under the old law, which gave priority to those creditors of a decedent who first brought an action against his personal representative. To obviate such an injustice the law gave to claims of the personal representative, against his decedent, priority over claims of other creditors of the same class. This priority is called the right of **RETAINER**, because the personal representative may retain the amount due to himself before paying anything to the other creditors whose claims are of no higher dignity than his own. (2) **STOPPAGE IN TRANSITU**. The vendor of a chattel has a right to retain possession thereof until the price is paid—he has a vendor's lien for the price. This is a common-law lien which exists only so long as the vendor retains possession of the chattel—parting with the possession discharges the lien. As a delivery to a common carrier is, ordinarily, a delivery to the consignee, it follows that such a delivery by the vendor is a delivery to the vendee and an extinguishment of the vendor's lien. But, by the common law, if such vendor, after delivery to the carrier, discovers that the vendee is *insolvent*, he may forbid the carrier's delivering the chattel to the vendee and may retake it into his own possession. This is called the right of **STOPPAGE IN TRANSITU** which is, in effect, a right to revoke the delivery to the vendee and thereby to revive the vendor's lien conferred by the law. (2). In a number of instances the common law and the statutes of the several states confer upon a creditor who has possession of the chattels of his debtor, the right to retain such possession until his claim is paid. In such cases the creditor is given a **LIEN** upon such chattels. This lien is waived and lost by voluntarily parting with such possession. (7). (c) *Removal of Trade Fixtures*. A tenant may remove trade fixtures provided he do so during his term. (8).

SEC. 2. REMEDIES BY THE ACT OF THE PARTY INJURED.—(a) *Self-defense*. One may so far "take the law into his own hands" as to defend person,

spouse, children, servants and other dependents, master, dwelling, lands, and chattels. This is the law of SELF-DEFENSE. This law justifies an act, not excessive in its force, done in the honest and reasonable belief of immediate danger. If under such circumstances, one injure the assailant, no liability, civil or criminal, follows. The right exists under all circumstances (except where the assailant is acting in the lawful exercise of his rights, see note at 13 and case at 17); but nice questions arise as to the degree of force that may be lawfully exerted in the exercise of such right. The degree of force varies with the nature of the act resisted and the circumstances attending it. If one be assaulted *in his dwelling* he is not required to retreat, but may use such means as are necessary to repel the assailant from his house or to prevent a forcible entering into the house, even to the taking of life. But life must not be taken if the assailant can be otherwise arrested or repelled. If the attack be in itself *felonious and of a violent character*, the defense of self, family, and property may be as complete as is necessary. Such felonies as murder, rape, burglary, robbery, and the like, may be repelled by force, and no retreat is required, but, per contra, the assailant may be pursued until freedom from all danger is secured—killing the assailant in so doing is justified. If the attack be *not felonious* in design, the person attacked must do all that is reasonably within his power to avoid the necessity of extreme resistance—by retreating to the wall if to retreat be safe. In Wisconsin the common-law rule as to retreating to the wall—the “flight rule”—is no longer the law. In all cases of violent assault, if the circumstances be such as to naturally induce the belief that the assailant intended to do, and had the power to do, great bodily harm, or to kill, the person assaulted, *if not himself legally at fault*, may kill his adversary if necessary. Self-defense is no excuse for acts done in resisting and openly defying an officer in the lawful exercise of his duties. (9-15). One may be the aggressor—may commit an assault—in the defense of spouse, child, dependents, etc., but an assault *in the first instance* to defend the possession of chattels, etc., is not justifiable, for in such cases the doctrine of *molliter manus* applies. (15). A person is not required to stand quietly and suffer himself or his horse to be bitten by a dog, nor to give the dog “a fair fight.” The dog may be killed if there be reasonable ground to suppose that such a course is necessary to prevent its biting the man or his horse. But to pursue and kill the dog after all danger is over, is not lawful. (16).

A husband may “protect his honor.” That is, he may use such force as is necessary to take his wife from one in whose company she is, if there be reasonable ground to apprehend that his dishonor will be the result of his failure to exert such right. If the husband find one in the act of adultery with his wife and kill him on the spot, it is only manslaughter; and so it is though “the situation be not the very act, but severely approximate thereto.” (19). Considerable latitude is allowed one in using force in resisting an unlawful restraint of his liberty. (20). Urgent necessity justifies many entries upon land and interferences with personal property that would, but for such excuse, have been trespasses. This doctrine applies with special force when human life is in danger. If the owner of premises unduly resists the exercise of the rights or privileges growing out of this doctrine and damages result therefrom, he will be liable therefor. He may not lawfully carry to such extremes his right to defend his premises from intruders (23 and see 77). The defense of premises from *simple trespasses* will not justify the infliction of serious bodily harm by means of spring guns, etc. (25); or ferocious dogs (31). But one may guard his premises with dogs who are let loose only at night and at such part of the premises as no one may be reasonably expected to enter at night for any lawful purpose (33). The proprietor of a hotel may refuse admission to his premises to all persons other than those entitled to enter as proper guests and those having legitimate business with a guest. Persons simply desirous to solicit the patronage of the guests may be ex-

cluded, and discrimination may be lawfully made in favor of some persons soliciting such patronage. Persons intruding upon such premises may be forcibly excluded and put off of the premises should they refuse to leave after being requested to do so—after the *molliter manus* rule has proven ineffectual, but no more force must be used than is necessary. (34). As the public authorities have only an easement in a public road, the fee remaining in the abutting owners, and as the general public have only the right to pass along the road, such an owner may lawfully use force to drive off an armed and boisterous trespasser who is using indecent language in the public road but in front of his dwelling. The rule of *molliter manus* does not apply to one who is acting in belligerent defiance. (38). A man's house is his castle to which he may, with force, refuse admittance to all, and from which he may exclude all who refuse to leave. But officers charged with the execution of *criminal process* do not come within this rule, though those charged with the execution of *civil process* do. Whether a permit or license to enter for the purpose of seizing chattels leased, or mortgaged, or conditionally sold, can be revoked and the entry of such licensee forcibly resisted, and whether after entry he may be forcibly evicted, are questions on which the courts differ. (38). There is a force *in law*, as where any entry is made upon the premises of another without permission, and a force *in fact*, as in burglary, or breaking open a door or gate. If there be only force *in law*, the trespasser must be requested to leave before hands can be laid on him to evict him, but if there be force *in fact* it is lawful to oppose force to force and no request to leave need be made before resorting to force. So an attempt by force *in fact* to take chattels from one's possession may be resisted with force without any previous request that the aggressor desist. (41). If a trespasser or unwelcome visitor invade one's dwelling without force, he must be requested to leave before resorting to force to eject him. If he does not accede to such request, the owner should lay hands gently upon him, and if he still refuses, such force may be used as is necessary to evict him—care being taken to use no more force than is necessary. If the intruder defiantly stands his ground (armed with a deadly weapon?) the doctrine of *molliter manus* does not apply, but force may be resorted to at once. (42). At common law one was permitted to capture and confine domestic animals trespassing on his premises. This was called the right of distress damage feasant. Somewhat similar remedies are allowed by statute in practically all of the states. (43). It seems that all may kill a trespassing dog that is known to be an egg-sucking and sheep-killing dog—for such an animal is a nuisance and may be destroyed as such. The civil liability of one who kills another's dog, as a nuisance, does not necessarily depend upon whether the dog was in the very act of killing sheep, or the like, but whether the killing of the dog was a fair act of prudence—reasonable regard being had to the relative values of the dog and of the property to protect which the killing was done. (45). Trespassing horses, cattle, etc., may be driven from one's premises and, if this be properly done, no liability results from such driving; but if savage and powerful dogs be set upon them and they be injured in consequence, the owner may recover damages because of the excessive force used. The fact that no injury to the animal was *intended*, is no defense, for even a lunatic is liable for his trespass against the person or property of another. (48). A valuable domestic animal—such as a high-bred bear—may not be killed for past acts of trespass damage feasant; because that is to take vengeance, and "vengeance is mine, saith the Lord;" nor can such animal be killed to prevent anticipated mischief, for that may never happen; nor is the killing justifiable because the animal is difficult to capture when such attempt is made while he is in the act of doing damage. (49). (b) *Recaption of property*. One may defend his possession and title to chattels. If A goes upon B's land and undertakes to carry away B's chattels B may interfere to stop it and use sufficient force for that purpose. But he must not assault A *unless resisted*, and he must

not use unnecessary violence. (50). If A be lawfully in possession of B's chattels—as if A distrain B's cattle damage feasant—A may forcibly resist B's attempt to carry off such cattle. If one be in the actual adverse possession of the chattels of another, the true owner cannot lawfully retake such chattels by force. His attempt so to do may be resisted with force. (52). If A and B be together, and A obtain possession of B's money or chattels by force or fraud B may regain his momentarily interrupted possession by the use of reasonable force, short of wounding or the employment of a dangerous weapon. It has been held that B would have the same right even after a considerable time had elapsed between the wrongful taking and the recaption. (53). If A's chattels be stolen or otherwise illegally taken from him, he may pursue and retake them wherever they be found unless they be deposited upon the lands of one not a participant in the taking—and even in that case he may enter such premises and retake his goods in case of theft and hot pursuit. So, from necessity, one whose cattle escape upon the land of another may follow and drive them back, unless the escape of the cattle occurred under such circumstances as to be itself a trespass. In many instances one has an implied license to enter upon another's premises to take chattels—e. g. permission to keep chattels on another's premises involves a license to enter for their removal; so of a sale of chattels which are at the time on the seller's land; but no such license arises if the seller is to deliver the goods elsewhere. The mere fact that A's chattels are on B's land, does not justify A's entry to take them. The bailor has no right to enter the bailee's premises to take the thing bailed, without the bailee's permission; and so it is with mortgaged chattels left on the premises and in the possession of the mortgagor, in the absence of some special provision to that effect in the mortgage. It has been held that a mortgage of chattels which are on the premises of the mortgagor when the mortgage is executed, is a *sale* of chattels then being on the premises of the seller, which sale carries with it the implied license to enter the premises and take the chattels; but that such license would not extend to other premises to which such chattels might be subsequently removed. (55). (c) *Entry*. An entry that will revest a divested estate must be an *open entry* under claim of right, so as to give notoriety to the matter. (59). An entry effected by unlawful force and breach of the peace is effectual as far as the title is concerned, and a plea of *liberum tenementum* is good against any civil action for such invasion—*feri non debet sed factum valet*. (60). An entry on part of a tract of land is effectual as to all of it except such portion as may be in the actual possession of an adverse claimant. If the true owner enter peaceably he cannot be treated as a trespasser; nor can one in wrongful possession maintain an action against him as such. If the true owner enter upon land held adversely the legal possession is in him notwithstanding the presence of the adverse claimant, for where two are *on* land the law adjudges the *possession* to be in him who has the title. (60). According to some authorities, a tenant at sufferance may be forcibly evicted by the landlord; and, in such event, if no more force than necessary be used, no civil action will lie against such landlord, though he may be liable to *indictment* for a forcible entry (62); but others hold that such a ruling, while doubtless correct as the law stood in the semi-barbarous period of feudal tenures, has no place in the law of this civilized period, and that one so forcibly evicted is entitled to nominal damages, at least, even against the true owner, for the trespass; to *actual damages* for injury done to his person or goods; and to exemplary damages if the trespass be committed in a wanton and reckless manner. (66, and compare 67). Mere *occupants* of premises—such as domestic servants, college professors, nurses, etc., as distinguished from *tenants who have an estate in the premises*—may be evicted by force, care being taken not to commit a breach of the peace in so doing. (70). The owner of a pew in a church may so far exercise his prerogatives—as a member of the church militant—as to forcibly evict, in person or by the aid of the

mercenary forces of the police, another worshipper who has taken a seat in such pew and refuses to vacate when requested so to do. (71). (d) *Abatement of Nuisance*. Although the usual course is to redress a public nuisance by indictment, yet every one may remove such nuisance if personally incommoded thereby. (73). A bridge across a navigable stream, unless sanctioned by the government in the legitimate exercise of its authority, is such a nuisance as may be removed by any person who is impeded thereby in his rights of navigation. The same is true as to obstructions placed in public roads. (73-74). But the unlawful sale of liquor in a store, while it may be a public nuisance, is not to be abated by the zealous opponents of such traffic—because they are not so *directly* injured thereby as to come within the rule of law which permits individuals to abate public nuisances. An individual may physically abate a *private* nuisance, injurious to himself, when he could also bring an action; and he may remove a *public* nuisance when it obstructs his individual right: but strangers, who are not obstructed in their individual rights, have no such power as to public nuisances. This is a distinction sometimes overlooked in judicial opinions. The right to abate public nuisances is never entrusted to individuals by way of vindicating the *public* right, but solely for the relief of the person whose right is obstructed by such nuisance. (75). Somewhat allied to the subject of abating a public nuisance, is the right which the law gives a traveller to go across private lands when the public road is so obstructed as to make such a course a necessity. Such right is not to be exercised for *convenience* merely, nor when other public ways could have been selected and the obstruction avoided. It is confined to cases of inevitable necessity or unavoidable accident, arising from sudden and recent causes. (77, and see 23). The congregating of barking and pugnacious dogs near one's premises, is such a nuisance as he may abate by killing the dogs, if such a course be reasonable or necessary under the circumstances. (80). One may abate a private nuisance as stated *supra*, and for the purpose of so doing he may enter the premises of the one who maintains such nuisance after failing to obtain relief by other means. (81-82). So one may cut off—*up to his line*, but no further—the limbs and roots of trees which project into and above his soil. (82). It is *said* to be the rule of the *common law* that a lower proprietor may so raise the level of his land as to pond back *rain* water upon the upper proprietor, while the *civil law* forces the lower proprietor to submit to the flow of such water according to the natural shape of the earth. Some courts adopt the one law and some the other. (83). (e) *Distress for Rent*. This was a species of self-help afforded landlords by the common law. It permitted them to seize the chattels of the tenant and hold them until the rent was paid—a *proceeding* in which the landlord is a judge in his own case, contrary to the solid maxim of common law, says Lord Coke; and a *power* which is tyrannical and may be made an engine of oppression almost irreconcilable with the spirit of American laws and institutions, says Judge Stevens. Not all chattels could be distrained for rent—for fixtures, growing crops, perishable articles such as milk, sheaves and shocks of grain, goods held by the tenant as bailee to be worked on, beasts of the plow, implements of husbandry, and instruments of a man's trade were exempt. (87).

SEC. 3. BY AGREEMENT OF PARTIES. (a) *Accord and Satisfaction*. An accord is a satisfaction agreed upon between the party injuring and the party injured, which, *when performed*, is a bar to all actions upon that account. It must be advantageous to the creditor and he must receive an actual benefit from it; it must be accepted as a satisfaction; and it must be followed by the performance of everything which the party agreed to do. An accord not followed by a satisfaction is no bar. (89). (b) *Arbitration and Award*. This is a method of settling disputes out of court by submitting the matter in controversy to persons selected by the contending parties or under their sanction and agreeing to abide by their judgment, which is called an award. This remedy was of common-law origin. Originally persons, though no legal proceedings were pend-

ing between them, were permitted to submit any matter of dispute to arbitrators and the award was enforced by action on the award or on the bond given for its performance. If an action was pending between the parties and they agreed to submit the controversy to arbitrators, the award was made a *rule of court* and its performance enforced by attachment. By 9 & 10 Wm. 3 an award, made in a controversy about which no action was pending, could also be made a rule of court; but this statute did not abolish the other remedy of action upon the bond to abide by the award—it simply gave an additional remedy. (90). The courts became jealous of the arbitrators, and ruled that an agreement to refer all matters of dispute to arbitrators, where no action was pending, was void; because it tended tooust the jurisdiction of the courts. The conclusion finally reached is: An agreement to arbitrate, which has the effect to prevent the suffering party from coming into a court—or, in other words, which ousts the courts of their jurisdiction—cannot be supported: but an agreement that no action shall be brought until arbitrators shall have settled the amount of damages, or the time of paying it, or any matters of that kind which do not go to the root of the action, are valid. (91-93). There is a marked distinction between a reference under the Code practice and a submission to arbitration. A reference is simply a method of trying a pending case before a referee instead of before the court and a jury. The referee must report the testimony, find the facts and the law, and report his conclusions to the court for approval or disapproval: but arbitrators need not find the facts nor need they even follow the law, for they are a law unto themselves. (94).

CHAPTER II.

REMEDIES BY JUDICIAL PROCEEDINGS.—SEC. 1. CRIMINAL AND CIVIL PROCEEDINGS DISTINGUISHED. Actions are either civil or criminal. If the proceeding is by *indictment* it is criminal; when by *action* or *other mode*, it is civil. All criminal proceedings are prosecuted in the name of the state; but all proceedings prosecuted in the name of the state are not criminal; for the state may prosecute a civil action or authorize individuals to prosecute such actions in its name—"State ex rel." A bastardy proceeding is a mere police regulation intended to secure the public from the expense of rearing a child and, hence, is not a criminal action or proceeding. (96). A peace warrant is a preventive remedy to keep down an impending and threatened breach of the peace, etc. It is per se a criminal proceeding. (97). Proceedings to punish one for contempt of court are criminal in their nature and governed by the principles applicable to criminal proceedings. When a court commits a person for contempt the adjudication is a conviction and the consequent commitment is an execution. Contempt of court is a specific criminal offense. Its punishment is sometimes by indictment and sometimes by summary proceedings. Some courts draw a distinction between proceedings to punish for criminal contempt and proceedings *as for contempt* to enforce civil remedies; but this distinction is rather for the regulation of the practice than for changing the *nature* of the proceeding to punish for contempt. (98-102). One cannot be forced to give evidence against himself in such proceedings. (101). The court may submit a disputed fact to a jury in proceedings for contempt, but the respondent has no *right* to a jury trial. (102). When a criminal prosecution is gotten up upon the initiative of an individual and such prosecution is found by the court to be frivolous and malicious, it has long been the practice to mark the instigator as prosecutor and to tax him with the costs. Such summary proceedings are criminal in their nature, yet, like contempt proceedings, they violate no fundamental right of the individual who is made to suffer thereby. (103). An action to collect a penalty—whether it be at the suit of the state or *qui tam*—is as much a civil action as an action for money had and re-

ceived. Penal actions have never been put under the head of criminal law. (106-108). The state's *counsel* cannot enter a *nol. pros.* to a *qui tam* action, except for its part of the penalty; but the legislature may repeal the statute imposing the penalty and thereby destroy the informer's right to recover. However, *after judgment* has been rendered, the legislature cannot, by a repeal of the statute or otherwise, take away from the informer his share of the penalty—for the judgment is a vested right of property. (110).

SEC. 2. WHEN BOTH CRIMINAL AND CIVIL ACTIONS LIE. MERGER. Under the old law, in gross and atrocious crimes the private wrong was swallowed up in the public wrong—that is, all civil remedy was suspended until the indictment for the crime had been disposed of. But in crimes of an inferior nature the private injury could be redressed by civil action regardless of the criminal prosecution. (111). In the case of a public nuisance any person who sustained *special damage* could sue for the same, and an indictment would lie also. In cases in which the civil remedy was suspended until the criminal indictment was disposed of, the civil action of the person injured could be maintained as soon as the criminal prosecution was disposed of—whether by conviction or acquittal. The refusal of a grand jury to find a true bill was a sufficient disposition of the criminal prosecution within this rule. (113).

SEC. 3. CHANGE OF REMEDY BY STATUTE. A state may regulate at pleasure the mode of proceeding in its courts, and this it may do in actions *ex contractu* as well as *ex delicto*; but it cannot affect pre-existing contracts by so changing the remedy as to destroy *all* remedy or to burden the proceedings with new conditions and restrictions to such an extent as to make the remedy hardly worth pursuing. Such radical changes in the remedy violate the constitutional provision forbidding a state to impair the obligation of contracts. (115).

CHAPTER III.

REMEDIES CONCERNING REAL ESTATE.—SEC. 1. WRITS OF ENTRY, ASSIZE AND RIGHT, and SEC. 2. EJECTMENT PRIOR TO THE CODE PRACTICE. Under the very ancient English law, the remedies for the recovery of a freehold interest in land were; Writ of Entry, Writ of Assize, and Writ of Right. The writs of Entry and Assize were *possessory actions*, in which only the right of *possession* was adjudicated; but by the Writ of Right the *title* was determined. At this period of the law the only remedy of lessee for years in case he was wrongfully ousted by the lessor, was by writ of covenant on the breach of contract, whereby he was enabled to recover his term as well as damages; but if dispossessed by a stranger, his remedy was by a writ of *ejectione firmæ*, which was a mere personal action of trespass, whereby he was enabled to recover damages only and not the possession of the land. Later on, the lessee was given a more complete remedy by the writ of *quare eject infra terminum*, whereby he was enabled to recover both the possession of the land and damages from any person whomsoever for ousting him. These ancient remedies were all supplanted by the action of Ejectment, which "is an ingenious fiction for the trial of titles to the *possession* of land. In form, it is a trick between two to dispossess a third by a sham suit and judgment. The artifice would be criminal unless the court converted it into a fair trial with the proper party." In this action the plaintiff was John Doe upon the demise of the real plaintiff, and the defendant was Richard Roe. The action was commenced by filing a declaration setting forth that the real plaintiff had demised to John Doe certain premises for a term of years; that by virtue of this demise John Doe had entered and was possessed of the demised premises; and that Richard Roe with force and arms had ejected John Doe from such premises. Upon filing this declaration, the real plaintiff was required to serve a notice upon the person in possession of the premises to the et

fect that such declaration had been filed and that he must appear in the action and defend his rights, otherwise judgment would be entered against Richard Roe and he, the person in possession, would be turned out of possession. The real plaintiff was required to give a bond, payable to the clerk of the court, conditioned for the prosecution of the action with effect, or otherwise to pay all costs and damages awarded on failure so to do. Should the party in possession desire to defend the action he was required to confess the lease, entry, and ouster set forth in the declaration, and to plead not guilty to the charge of his having forcibly evicted John Doe. This was called the *Consent Rule*, because it was entered upon the records of the court that these things had been consented to by the real plaintiff and the real defendant in the action. The only process in the action was the notice above mentioned which was served by the sheriff together with a copy of the declaration. After entering into the consent rule, the real defendant entered a formal plea of not guilty and put himself upon the country. But, before being allowed to plead, the real defendant was required to give a bond, payable to John Doe, conditioned that he should answer the action and abide by the judgment which might be rendered therein. If the plaintiff had a verdict, judgment was rendered against the real defendant that John Doe recover against him the unexpired term in the lands described in the declaration, together with costs and damages. Upon plaintiff's motion it was also ordered that a writ of possession issue. If the verdict was in favor of the defendant, judgment was rendered in his favor for costs against the real plaintiff and the sureties on his prosecution bond. If judgment were rendered for the plaintiff, as above, he brought a new action against the real defendant for the rents and profits during his occupancy of the land. Originally the rents and profits were recovered in the action of ejectment, but, in order that that action might not be hampered with this inquiry—which would be labor lost should the plaintiff fail to obtain a verdict—the practice grew up to enter a verdict for merely nominal damages; leaving the plaintiff to institute a subsequent action for the rents and profits. This subsequent action was called *Trespass for Mesne Profits*. (119–132).

In the action of ejectment the demise to John Doe could not be laid in a dead man, because the lessor of the plaintiff was the real plaintiff in the action and a dead man cannot sue; and for the further reason that the lessor of the plaintiff was required not only to have title at the date of the demise, but *title* and right of entry at the commencement of the suit. These a dead person cannot have, for at the death of a man the title passes out of him into his heirs or devisees, or, in case of a chattel interest, into his personal representatives. (132). The action was *commenced* when the notice, with a copy of the declaration, was *served*, and not when the declaration was *filed*. If the person served with the notice *failed to appear and defend the action*, the real plaintiff was required to show that such person was in possession of the land in order to recover any judgment in the action; but if the person notified *defended the action*, or if any other person applied to make himself a defendant and *defended the action*, the plaintiff was not required to prove that the defendant was in possession. (133). Ordinarily the real defendant is required to admit *Lease, Entry, and Ouster*, and this was called the *General Consent Rule*; but as one cotenant cannot recover against another, in ejectment, unless an *actual ouster* be proven, in such cases the defendant applied to the court, upon affidavit, for leave to enter into a *Special Rule*—by which he was permitted to admit only the lease and entry, *but not the ouster*. However, if he denied that the real plaintiff had *any title*, he was required to enter into the *general consent rule*. (138). Before the Code practice was instituted, the plaintiff could not recover upon an equitable title, neither could the defendant set up an equitable title as a defense. (139). The plaintiff had to recover upon the strength of his own title, and not upon the weakness of his adversary's. He was always required to prove a clear legal right of *possession*.—whether such right was based upon a freehold title, or a

chattel interest, or upon a mere right of occupancy. It was immaterial how minute his interest, provided it were a legal interest carrying with it the right of possession. If the defendant could show that the legal right of possession was in some third person, the plaintiff was defeated in the action. But where both plaintiff and defendant claimed title under the *same person*, neither was allowed to deny that such person had title, unless he could connect himself with a title superior to such common source of title. (140-141). A landlord whose tenant was sued in ejectment had a *right* to be made a defendant, either in place of the tenant or jointly with him: save in this instance no third person could become a defendant *except by consent of the plaintiff*. (143). Under the old law, a landlord let in to defend could make no defense which his tenant could not have made: but a defendant let in *by consent* was not restricted to the defenses of the party actually in possession. Under the Code practice, a landlord is no longer restricted to the defenses to which his tenant is confined. (145).

In the action of trespass for mesne profits the plaintiff recovered up to the time of trial, and not simply to the time the action was commenced; and so it is in actions to recover real property under the Code practice (but as to this, see note at page 176, which says that the old practice was otherwise). (146-147). As the old action of ejectment was strictly a possessory action, the judgment was not an estoppel in respect to the title and, consequently, the parties could continue to bring ejectment against each other *ad infinitum* by simply changing the date of the alleged demise. Thus, the party in possession, though successful in every instance, might be harassed and vexed, if not ruined, by a litigation constantly renewed. To put an end to such litigation courts of equity interfered and closed the controversy by injunction. (148).

SEC. 3. EJECTMENT UNDER THE CODE PRACTICE. As has been said, under the old practice the right of property in land could only be determined by the writ of right, for the right of possession alone was determined by the writs of entry and assize. A judgment in the writs of entry and assize was conclusive and an estoppel in any subsequent action under these writs: but the action of ejectment, which supplanted these ancient remedies—called real actions—worked no estoppel as to future actions of ejectment. The action of ejectment has in its turn been relegated to the historical department of the law, being superseded by a simple action to recover real property under the Code practice. To speak of this action under the Code as an action of ejectment, is simply to use a figure of speech. The Code action combines all that was of any practical good in all of its predecessors—for it can be used as a mere possessory action or as an action to try the title to the freehold, at the election of the plaintiff. In whatever way it is used it works a complete estoppel quoad the title alleged in the complaint. If the plaintiff allege a mere right of possession, the estoppel extends only to such possession: but if he allege title in fee, or other freehold estate, the estoppel is complete as to such estate. (151-157). While the Code is very liberal in permitting all persons to become parties who are interested in the subject matter of an action, still it will not permit one who claims title paramount and adverse to both plaintiff and defendant, to come in as a party to an action to recover real estate, unless by consent of the parties. A landlord may come in as a matter of right and defend an action brought against his tenant. (158). The tenant is not permitted to dispute the title of his landlord. Under the old practice a tenant with an equitable title in himself could assert such title by a suit in equity, though he could not set it up as a defense at law. Under the Code practice he may set up such defense in his answer without resorting to the circumlocution of a separate action. This right of the tenant to set up an equitable defense is confined within conservative limits. (160-161). Although neither the United States nor a state can be sued without its permission—except in so far as the 11th amendment applies to a state—still, this doctrine has no application to officers and agents of either government who are in possession of and hold real estate by

virtue of their official positions. An action to recover such real estate may, therefore, be maintained against such officials. (162). One cotenant may sue alone and recover the whole of the common property from one claiming adversely to his cotenants as well as himself, though he prove title to only an undivided interest. This he is allowed to do to protect the rights of his cotenants against trespassers and disseisors. If the defendant show title to an interest in the premises, and be not a mere trespasser or disseisor, one cotenant who sues alone will recover his undivided share; and this he may do though he claim the entire estate instead of his proper undivided share. One cotenant can not maintain an action against another cotenant for the possession, or title and possession, of their undivided land, unless an actual ouster be proven or admitted by the pleadings. (163-166). The action of ejectment would not lie to recover a mere easement; but it would lie to recover the roadbed of a railroad, because the right of way of a railroad stands in a different category from that of an ordinary easement. Whether these principles govern actions to recover real property under the Code is a question not entirely free from difficulty. (166-169. See 11 L. R. A. (N. S.) 129). By statute a summary and inexpensive remedy for ejecting tenants by sufferance is afforded. This remedy is usually termed a Summary Proceeding in Ejectment, of which justices' courts, or other inferior courts, are given jurisdiction. This remedy is confined to the eviction of those who are strictly *tenants* by a demise, and does not extend to such tenants as mortgagors in possession, vendors and vendees in contracts for the sale and purchase of land, and the like. (169-172). In those states in which the mortgagee still has the legal title, he may maintain ejectment, or its successor under the Code, against the mortgagor. (172). An equitable title is sufficient in the prosecution or defense of an action to recover real estate. (173-174). Damages and rents and profits up to the time of trial, and not merely up to the commencement of the action, are recovered in the same action that is brought to recover the land, and not by a separate action as under the former practice. (175).

SEC. 4. BETTERMENTS.—At common law one who put improvements upon another's land was the absolute loser of the money and labor thus expended, under the maxim *cujus est solum, etc.* This was so notwithstanding the utmost good faith of him who thus improved another's land thinking, and having every reason so to think, that he was expending his money and labor upon his own land. In the course of time the courts of equity afforded some relief in such cases, though the relief thus given was far from being complete. Now, the matter is fairly adjusted by statute. Such improvements are called Betterments. (176).

SEC. 5. SLANDER OF TITLE.—To make disparaging remarks about another's title to real estate, is denominated Slander of Title, by a figure of speech in which the title to land is personified and made subject to many of the rules applicable to personal slander. An action lies to recover damages for such slander; but to maintain such an action it is essential to establish: (1) The falsity of the words published or spoken; (2) the malicious intent with which they were uttered; and (3) that actual pecuniary loss or injury was suffered therefrom—which loss or injury must be the natural and legal consequence of the words uttered. These things must be alleged in the complaint and proved at the trial. (178-182).

SEC. 6. REMOVAL OF CLOUD UPON TITLE, AND QUIETING TITLE.—With the exception of the action for slander of title, the common law afforded no remedy to one in *possession of land*, should another claim a title to, interest in, or charge upon, it. While he might recover damages for the slander of his title if he could prove an actual loss in consequence, such action could not be maintained against one who set up a *bona fide* claim, because of the absence of malice. Equity affords a remedy by permitting the person in possession to file a bill to quiet the title or to remove a cloud upon the title. To maintain such a suit, a complainant must show: (1) That he is in possession of the property; (2) that he has

established his title by successive judgments in his favor in repeated actions of ejectment between himself and the defendant. Upon these facts appearing, the court will grant a perpetual injunction to quiet the possession of the plaintiff against any further litigation from the same source. This practice has proved so beneficial that in many of the states statutes have been passed affording a like remedy in all cases where the party in possession, and sometimes when he is out of possession, seeks to clear up his title and remove any cloud caused by an outstanding deed or lien which he claims to be invalid, and which is a menace to his peaceable occupation of the land, or an obstacle to its sale. The statutory remedy is generally broader and, consequently, more effectual than that afforded by courts of equity. Care must be taken, in seeking such relief, that the plaintiff do not allege such a state of facts as to show that his fears with regard to his title are utterly groundless and idle, for the law has no remedy for hysterics. (182-186).

SEC. 7. CONFUSION OF BOUNDARIES AND POSSESSION.—When the boundary line between two adjacent land owners was once plain, but afterwards became confused by reason of the misconduct of one of the parties, or when some relation between the parties makes it the duty of one of them to preserve the landmarks and they have become confused by the neglect or fraud of the one charged with that duty, a remedy is afforded in equity which is called Confusion of Boundaries. This relief consists in declaring the right of the complainant and in directing a commission to go upon the land and mark the boundary line. (186). In North Carolina, for nearly a century and a half there have existed statutes, called Processioning Acts, by which it has been attempted to afford a cheap and summary remedy for establishing boundaries. After running the gauntlet of adverse judicial construction and legislative amendment, this remedy has at last developed into a special proceeding of practical utility—it “is now, and will remain, a cheap and speedy method of settling a boundary, where only the boundary is in question, and should be encouraged.” (188). [But land owners should remember that “the cheapest is not always the best” and that “haste makes waste.”]

SEC. 8. REMEDIES RELATING TO THINGS SEVERED FROM THE REALTY.—When the true owner of land recovers possession thereof from one in adverse possession under a claim of right, all *unsevered* buildings, fixtures, *fructus naturales* and *industriales*, pass to him with the land; but not so with things which have been severed, though they be still on the premises. Neither can such true owner maintain trover or replevin against such adverse occupant (or a trespasser or third person, says Pearson, C. J.), or his vendee, for such severed property. His remedy is an action for damages and for mesne profits. (190). But for things wrongfully severed by one rightfully in possession—as by a particular tenant—the reversioner or remainderman may maintain trover or replevin; that is, he may recover damages for the conversion of the thing severed, or may recover the thing itself, even though it be converted into something else—as timber into shingles: provided the change be not too radical—as timber into a boat or house. (192). A mortgagee cannot maintain trover against the vendee of land upon which the mortgagor has built a house partly out of material from a house removed from the mortgaged premises. The mortgagor alone is liable for the tortious removal of the house from the mortgaged premises. (195). But if a house be removed by one in *possession* of land *under a contract of purchase* and such house be permanently fixed to the freehold of a third person—one not in privity with the vendor of the land—the vendor may recover the house in replevin. (197). If a house, detached from land and in process of removal, be tortiously taken by one who thereafter fixes it permanently upon land which he subsequently sells to a bona fide purchaser without notice, the former owner of the house may recover it in replevin. To constitute a chattel an immovable fixture, it must be attached to the land by the *owner* of such chattel (198). That a house may be recovered in replevin after being perman

ently fixed to other lands, may be a doubtful question. That it may be so recovered after removal to other land but *before being permanently attached thereto*, seems to admit of no doubt. (200). Trover will lie for a house torn down and removed from mortgaged land and rebuilt upon the land of a third person who *buys with notice of the facts*. The mortgagor's recovery in such action will be the value of the removed house. (200). [It may not be improper to say that the law governing the remedies for the wrongful severance of things pertaining to realty is not in a perfectly satisfactory condition. Each of the various courts and writers that have undertaken to determine or elucidate the subject feels confident of right and accuracy—upon the same principle that every crow thinks its offspring the whitest. The cases selected seem to the editors to be a fair and practical presentation of the law—and further these deponents say not.]

SEC. 9. WASTE.—Originally, the only remedy for waste was *at law*: against the holder of legal particular estates at the suit of the reversioner or remainderman in fee or in tail; and only single damages could be recovered except in the case of guardian in chivalry who forfeited his guardianship. The remedy was extended against all particular tenants by the statutes of Marlbridge and Gloucester. The statute of Gloucester permitted the recovery of treble damages and also the place actually wasted. By statute Westminster 2 a remedy for waste was given to joint tenants and tenants in common against their cotenants. Of course no injunction issued from a court of law: but, while an action to recover land was pending, the law courts issued a writ of estrepement pendente placito commanding the sheriff to put a stop to all waste during the pendency of the action; and, after judgment was rendered in any real action and before possession was delivered by the sheriff, a writ of estrepement was issued to the sheriff commanding him to stop any waste prior to the execution of the writ of possession. Originally the remedy at law for waste was the old writ of waste; but that fell into disuse and was finally abolished by 3 and 4 William IV. This old writ was used to a limited extent in this country, but was superseded by an action on the case in the nature of waste, for the recovery of damages only, and by the equitable remedy of injunction. The action on the case could be maintained not only by a remainderman or reversioner in fee or in tail, but also by remaindermen and reversioners for life or years, and would lie not only against a particular tenant but against a stranger who committed depredations. The remedy in equity was, and is, an injunction to stay future waste and a mandatory injunction not only to stay future waste, but to force the defendant to repair injuries theretofore committed, where practicable to do so. Equity goes still further and, under the doctrine of Equitable Waste, will forbid a tenant who holds without impeachment of waste, or one holding a defeasible fee, to commit acts which constitute "a fraud upon the power to commit waste"—acts of trifling profit to the tenant, but of irreparable damage to the estate in expectancy. The holder of a contingent expectant estate cannot recover damages for waste already committed, but he may have protection by injunction. Cotenants are afforded appropriate remedies both at law and in equity against waste. As equity usually affords complete relief in a matter before it, it will decree an account for waste done, when it orders an injunction to stay waste. (201-209).

SEC. 10. FORCIBLE ENTRY AND DETAINER.—As has been stated in Sec. 2 (e), whether or not the landlord may forcibly enter the premises and eject a tenant at sufferance therefrom, is a question on which the courts do not agree. By statute, in England and in some of the states, a summary and extraordinary remedy is afforded one whose land is taken or detained from him by force and violence. To constitute a forcible entry or detainer, a mere technical trespass, which constitutes force in law, is not sufficient: there must be actual violence or some demonstration calculated to create alarm, if not terror, in ordinary minds. It is not necessary that there should be any assault or battery. (210). For-

cible Detainer is a separate and distinct offense from Forcible Entry and Detainer. The distinction consists in the *lawfulness* or *unlawfulness* of the *entry*. Where the entry is *unlawful*, whether forcible or not, and the subsequent holding is *forcible* and tortious, the offense committed is Forcible Entry and Detainer. But where the original entry is *lawful* and the subsequent holding is forcible and tortious, then the offense is Forcible Detainer. (210). It has been held that a tenant at sufferance who forcibly resists the entry of his landlord commits a "forcible detainment." (212-213).

SEC. 11. NUISANCE.—The doctrine of nuisance is as old as the common law itself. There are two kinds of nuisances: (1) Common nuisance, which affects all the people and is an offense against the state punishable by indictment; and for which one who suffers damage peculiar in kind or degree beyond what is common to himself and others, may recover damages; (2) Private nuisance, which affects one or more as private individuals, and not as a part of the public, and is a ground for a civil action only. Generally a nuisance affects real property, and the law with regard thereto seems to have been originally confined to such property; but modern law takes a much wider range. The old common law remedies for the individual were two: (1) *Quod permittat prosternere*, which was a writ commanding the defendant to permit the plaintiff to abate the nuisance, or show cause against the same. The plaintiff could have judgment to abate the nuisance, and for damages against the defendant; (2) An Assize of Nuisance, in which the sheriff was commanded to summon a jury to view the premises, and, if they found for the plaintiff, to have the nuisance abated, and for damages. These ancient remedies were never in use in this country. Both under the old and modern law the private individual injured by a private nuisance or specially injured by a public nuisance, has, to a limited extent, the right to take the law into his own hands and abate the nuisance (as has been explained in ch. 1, § 2), as well as the additional remedy of resorting to the courts. The modern remedies in the courts are, an action at law for damages, and a suit in equity to forbid, abate, or restrain the nuisance. The action at law for damages is only a half-way remedy sometimes leading to endless litigation; so that the remedy in equity by injunction—plain or mandatory—"is sometimes the only one effective or complete, forbidding, preventing, stopping, abating the nuisance, exercising such restraint, and no more, as the exigencies of the particular case demand." The courts of equity do not administer relief in such cases as a matter of strict right, but of orderly and reasonable discretion according to the right of the case before them, and, hence, will refuse to interfere, but send the party to a court of law, where the payment of damages would be the fairer course to all concerned. (214).

The authority of the attorney-general, or other law officer empowered to represent the government, to file an *Information* in Equity to restrain and prevent a public nuisance, seems to be well established in England. It may be done by him *ex officio*, or upon the relation of interested persons. A similar practice obtains in some, if not all, of the states. (218-219). A private individual may recover damages at law for a public nuisance from which he suffers a *special* damage. (220). The law provides an adequate remedy for the wrong done the general public by a nuisance—which remedy is by indictment or injunction at the suit of the attorney general—and thereby prevents a multiplicity of vexatious private actions. Hence it is, that a private individual cannot maintain an action for a public nuisance unless he show a special damage to himself. But he is not required to prove an injury from which he is the *solo*, or even a *peculiar*, sufferer. While the damage must be *special*, as contradistinguished from a grievance common to the whole public, it may nevertheless be suffered by a number of people, or by even a class of people, and give to each a right of redress. The amount of damages recoverable by them may vary according to the extent of injury suffered by each; but each one of them may maintain an action by showing

the special injury suffered by him—for one who falls into a ditch dug in a public road is not to be prevented from recovering damages, from him who dug the ditch, by the fact that many others also fell into the same ditch. (220). It has also been said that in order for a private citizen to recover for a public nuisance, he must establish some damage or injury special and *peculiar* to himself and differing in kind and degree from that suffered in common with the general public. (222). [There is diversity of opinion quoad "*peculiar*."] Equity will afford relief by injunction in cases of private nuisance, but this relief is always exercised sparingly and with great caution—especially where it is sought to stop, or seriously cripple, a public enterprise because of its being more or less of a nuisance to one or more individuals. (228). A mandatory injunction will be issued to force the removal of a nuisance; but a *preliminary* mandatory injunction will be ordered only in cases of *extreme necessity*. (230). Obedience to a mandatory injunction will be enforced by proceedings in contempt. (232). Successive actions may be brought for damages, from time to time, until the defendant is compelled to abate the nuisance—every continuance of the nuisance after a preceding action being considered a new injury. The first action is regarded as a trial of the question whether or not the thing complained of be a nuisance. Therefore it is proper to allow only compensatory damages in the first action, while exemplary damages are allowed in the subsequent actions; which damages should be so exemplary as to compel an abatement of the nuisance. (232). Ordinarily where a trespass results in a nuisance, successive suits may be brought for its continuance, in each of which the damages are estimated only up to the commencement of the action, in some states; but up to the *time of trial*, in others. Where the building of a railroad is authorized by law and is done with reasonable care and skill, it is not a nuisance, and the company is not answerable, after paying the sum assessed for the land thus appropriated, in any subsequent action. The damages resulting from an appropriation under its charter—both present and prospective damages—may be assessed in one proceeding; and it is the legal right of either plaintiff or defendant to have the permanent damages assessed by demanding such assessment in the pleadings. If either makes such demands the judgment becomes *res judicata* as to all subsequent actions. (234).

SEC. 12. TRESPASS QUARE CLAUSUM FREGIT.—It is an elementary principle that every unauthorized entry upon the lands of another is unlawful and, therefore, a trespass. From every such entry against the will of the possessor, the law infers some damage; if nothing more, the treading down the grass, herbage, or shrubbery. (236). A person having the freehold and right of possession could, under the old, and some modern, authorities, even enter upon lands by force without subjecting himself to an action of trespass *q. c. f.* by the party in possession. The ground of this action is the breaking and entering the plaintiff's close. If the defendant can justify the *entering*, he defeats the action no matter how outrageous his conduct after such an entry. But if the *entry be unlawful*, then misconduct contemporaneous with, or subsequent to, such entry, is only matter of aggravation for which both compensatory and exemplary damages may be recovered. (237-240). But where an authority to enter upon the premises of another is *given by law*, the party becomes a trespasser *ab initio* by misconduct after such entry. Per contra where the entry is under authority or license given by the *party in possession*, misconduct after such entry may be punished in some appropriate action, *but not in trespass q. c. f.* because the doctrine of "*trespasser ab initio*" is confined strictly to those cases in which the right to enter is given *by law*. The reasons given for this distinction have been said to amount to a distinction without a difference. The law confers a right to enter premises upon the customers of innkeepers, shopkeepers, and the like, who undertake to serve the public, and upon officers charged with the service of process—all of whom become trespassers *ab initio* by misconduct subsequent to entry. (240).

Under the English law, an *actual* possession by the plaintiff at the time of the trespass committed is necessary to support this action. But in England all lands are *occupied*, and a trespass cannot be committed but upon the actual possession of some one; while here, a great part of our lands are not occupied by any actual possession, and, if we were to follow the English rule, we should expose such unoccupied lands to be trespassed upon without affording the owner a remedy. Our rule is: "In order to support an action for simple trespass (under the Code) a plaintiff must show actual possession where any person is holding adversely; but, in the absence of adverse occupation, the constructive possession which proof of title draws to him is sufficient." (242). If the plaintiff have a deed covering the locus in quo, his actual possession of a part thereof is actual possession of the whole. The deed ascertains the extent of the possession. If any part be in the actual adverse occupancy of another under an *inferior title*, occupation of a part under the good title extends to and embraces the part actually occupied under such inferior title. (243). Possession alone is sufficient to maintain this action against a mere tort-feasor. (245). The grantee or lessee of *vesturae terrae* or *herbogie terrae* may maintain the action, or ejectment, "though he has not the soil." (246). Trespass *q. c. f.* lies for an injury to an easement; but it cannot be maintained by a city or town for injuries to a public street, if the fee simple in the street be in another. Neither can such owner in fee maintain the action. Such injuries are to be redressed by some other proceeding—such as indictment for a public nuisance, etc. (246–248). However, a city or town may maintain the action against an invader of a market house owned by it in fee. (248). The action may be maintained by the owner of the servient estate against the owner of an easement for an abuse of the rights conferred by the granted easement; and by a tenant against his landlord for an unwarranted entry. (249–250). One tenant in common cannot maintain this action against another for breaking and entering the close owned in common; because each has an equal right of entry, occupation, and enjoyment, and the possession of one is presumed to be the possession of all. But if one cotenant *oust* the other, the other may maintain this action against him. (250). Where there is a permanent injury to the freehold, the reversioner or remainderman may maintain an action on the case in the nature of waste against the tort-feasor; but only the lessee in possession can sustain an action of *trespass q. c. f.* against him. Both the lessee and the reversioner may sue for the same tortious act—the one in trespass *q. c. f.* and the other in trespass on the case. (252). Trespass *q. c. f.* lies against one whose cattle go upon the lands of another and cause injury to crops, etc. (254–256). This action is used in some jurisdictions to try the title to real estate, it being "a common and convenient mode of trying the title to land of which there is a constructive, but no actual, possession." Trespass is essentially an offense against the possession, and, hence, an action therefor can be maintained by one who does not own the fee. This being so, a judgment in trespass *q. c. f.* is not an estoppel as to the title, unless the verdict be upon an issue involving the title; but if the pleadings raise such issue—as they may properly do—a verdict and judgment thereon do work an estoppel as to the title. (257).

SEC. 13. ACTION ON THE CASE FOR INJURY TO REAL ESTATE.—If a stranger break the close of one having the particular estate, and, besides injuring him by taking away his crops, etc., also commits an injury to the inheritance, as by cutting timber trees, or the like, the particular tenant may maintain trespass *q. c. f.* and the owner of the expectant estate may maintain trespass on the case in the nature of waste. (258). The action on the case lies for the disturbance or obstruction of an easement; and also for an increase of the servitude. (259). The distinction between trespass *q. c. f.* and trespass on the case, as regards injuries to realty, is this: where the immediate act itself occasions the injury, trespass *q. c. f.* lies; but where the act itself is not an injury but an injury results in consequence thereof, trespass on the case lies. (260).

SEC. 14. REMEDY IN EQUITY TO RESTRAIN TRESPASSES.—An injunction will issue in equity to restrain a trespass which causes an irreparable injury. Formerly such relief was never afforded until the complainant had established his title to the locus in quo, at law; but that doctrine has been greatly modified in modern times. (261-262). An ordinary trespass—one which does not cause irreparable injury—will not be enjoined unless the defendant be insolvent. (263-264). Continuous and repeated trespasses by a person or his animals will be enjoined. To refuse an injunction in such cases would enable a wrongdoer to force an innocent person to perpetually lease his property for such damages as he might be able to recover in repeated actions of trespass, and deprive him of the right to enjoy his estate. (265).

SEC. 15. REMEDY AGAINST TRESPASSES COMMITTED IN EXERCISE OF RIGHTS CLAIMED UNDER EMINENT DOMAIN.—Where land is appropriated by a corporation having the right of condemnation, the owner may resort to the remedy prescribed by a special statute or to the ordinary common law or Code remedies appropriate to the injuries sustained, at his own election. (266). In controversies growing out of the right to appropriate property under eminent domain it is against the policy of the law to hamper and delay public enterprises by injunction. Per contra, it accords with the law's policy to restrain, by injunction, those who, by force, impede the prosecution of such works.

SEC. 16. REMEDY OF LICENSEE WHO IS EVICTED.—A mere license to occupy realty is revocable at will, even though value be paid for such license. The remedy of one whose license is revoked, and who is excluded or forcibly ejected from the premises, is upon the contract and not in tort. (270).

SEC. 17. REMEDIES ON COVENANTS FOR TITLE.—In contracts for the sale of land, it is the duty of the purchaser to guard himself against defects of title, quantity, incumbrances, and the like, by requiring of the vendor the usual covenants of seizin, right to convey, against incumbrances, quiet enjoyment or warranty, and for further assurance. If he fail so to do, it is his own folly and the law will not afford him a remedy for the consequences of his own negligence. But if there be any actual misrepresentation or other positive fraud on the part of the vendor, with regard to a material matter, the purchaser will be afforded relief. The maxim *caveat emptor* applies, in the absence of fraud, in all courts whether of law or equity. (271). Upon the covenants of seizin and right to convey, no action can be maintained by an assignee of the title, for, if broken at all, these covenants are necessarily broken at the moment of the execution of the deed; and, as they do not run with the land, they do not pass by a subsequent conveyance thereof. The covenants of warranty and quiet enjoyment, on the other hand, do run with the land and may be sued upon by a subsequent purchaser, however remote. (273). The fact that the covenantee had notice of the existence of an incumbrance at the time he accepted his deed, is no bar to his recovery on a covenant against incumbrances. (275). As a general rule a plaintiff can not recover for a breach of the covenants of quiet enjoyment, warranty, and further assurance until there is a breach of such covenants. The measure of damages for breach of the covenants of warranty and quiet enjoyment, and seizin also, is, as a general rule, the same, to wit, the price paid for the land with interest: but in some states the measure of damages is the value of the land at the time of the eviction. (277). It is a well settled rule, that, under the covenants of warranty and quiet enjoyment, the plaintiff must show a lawful eviction in order to maintain his action. But it is not necessary to show that the eviction was under *legal process*. (280-281). When the heir, and when the personal representative, of a deceased covenantee must sue for breach of covenant, is a question which the authorities do not answer very satisfactorily. In this instance resort will have to be had to the methods and scales of *Wouter Van Twiller*. (282-283). There is a well established jurisdiction in equity over certain covenants. A covenantor will be enjoined from disturbing the covenantee in violation

of the covenant; and specific performance of a covenant for further assurance will be decreed. "But we find no case of interference by equity in relation to the covenant of warranty." (285).

SEC. 18. MORTGAGEE'S REMEDIES.—Anciently equity took no part in controversies between mortgagor and mortgagee. If the mortgagee took possession before the day of forfeiture and *was in possession when the default occurred*, he needed no remedy; for the mortgagor's rights were dead and gone, and the most complete title—the legal title, the right of possession and the actual possession—was in him. If the *mortgagor* was in possession when the default occurred, the mortgagee's title was perfect with the exception of actual possession; and this he could obtain by entry followed up, if necessary, by the recovery of possession in an action at law. At a later period equity assumed jurisdiction by permitting the mortgagor to redeem, on a day fixed by the court, by paying the money, notwithstanding the fact that complete default had been made and the mortgagee's title had become perfect at law. As this ruling would have left the mortgagee's title at the mercy of the mortgagor—who might, or might not, elect to redeem—the court permitted the mortgagee to file a bill against the mortgagor to compel him to redeem his land, by a day to be set by the court, or else to forfeit his equity of redemption. This remedy of the mortgagee was called a Bill of Foreclosure. Originally, the practice was to set a day on which the mortgagor was required to pay the debt secured, and thereby redeem his land. Should the mortgagor fail to pay the money by that day, a decree was entered against him whereby he was forever foreclosed of his equity of redemption and the title of the mortgagee was made perfect as against him and his heirs. Later on, the court, instead of decreeing a strict foreclosure, decreed a sale of the land by a commissioner, and out of the proceeds discharged the mortgage debt. If a surplus remained after discharging the debt, interest and costs, it was ordered to be paid to the mortgagor. This last is the modern equity and Code practice. Notwithstanding the remedy of foreclosure in equity, the mortgagee had, and still has, the right to enter upon the premises, or, if necessary, to bring an action at law to recover such possession. He may also disregard the mortgage and bring an action in personam against the mortgagor for the debt. Thus, at the present time, a mortgagee has three distinct remedies in the courts: (1) Ejectment for the mortgaged land; (2) an action or suit to foreclose the mortgage; (3) an action in personam for the debt. Under the Code practice, all of these remedies may be asserted in one action. Under the old practice of strict foreclosure, only the heir of a deceased mortgagor was a proper party; except where an account of the personal property was sought from the personal representative; in which case only could the personal representative be made a defendant. It is still the practice in some jurisdictions to permit only the heir to be made a party; while in others, both the personal representative and the heir are necessary parties. All incumbrancers, whether prior or subsequent to the mortgage, must be joined with the mortgagor as parties defendant. If this is not done, the court should, *ex mero motu*, order them to be brought in as parties defendant. (285–288). After an action of ejectment or foreclosure is commenced, the crops and rents and profits of the land belong to the mortgagee—that is, he is entitled to them. (288). If the mortgage debt be payable in installments, an action at law will lie for each installment as it matures; but a court will not entertain an action or suit to foreclose the mortgage until all the installments are due. (290). The decree or judgment of foreclosure must still set a time within which the mortgagor may redeem his land—which time must be such as will give him a reasonable opportunity to raise the money—before a sale is made under the decree of the court. The decree must direct that the sale be reported to the court and confirmed before the title shall be made to the purchaser. (291). A bidder has only inchoate rights as a purchaser before the sale is confirmed. The sale will be set aside and a resale ordered when, in the sound discretion of the court, due regard being had to the rights

of the bidder—justice and fairness requires such a course. After a sale has been reported, the court will usually order a resale if a responsible person will raise the bid ten per cent, or more, and agree to start the bidding at a resale at such advanced price—security being given for his compliance with his proposition. (294). The mortgagee may purchase at the sale of the commission appointed by the court to make the foreclosure sale: but "it is usual and perhaps necessary for the trustee and beneficiary [mortgagee] to obtain leave of the court to bid, or else to have a confirmation with full knowledge of all the facts appearing."

SEC. 19. REMEDIES OF THE MORTGAGOR AND HIS ASSIGNS.—Both under the equity and Code practice a mortgagor may sue the mortgagee for redemption, and will be allowed to redeem his land after the mortgage has become absolute. The bill or complaint in such a suit should contain a formal offer to redeem by paying whatever sum shall be found due upon an adjustment of the account between the parties. (296). A like right of redemption exists and will be enforced by the courts where it is shown that a deed absolute on its face was in fact intended by the parties thereto to be a mortgage. (297). If a mortgagee sell under a power contained in the mortgage and purchase at his own sale, either in person or through an agent, the mortgagor may still successfully prosecute a suit for redemption against him. (298).

SEC. 20. REMEDY FOR BREACH OF CONTRACT TO PURCHASE, CONVEY, OR DEVISE LAND.—At law the vendor in a contract to convey land recovers damages for breach of the contract. There are two lines of authority as to the measure of his damages—the English Rule, and the Rule of some of the American courts. By the English rule, the measure of damages is the difference between the price fixed by the contract, and the value of the land at the time fixed for the delivery of the deed therefor. Some states adopt this English rule. Other states permit the vendor to recover the whole contract price, with interest thereon, upon his showing that he has tendered a deed to the vendee. (300-304). The vendee may also sue for damages at law upon breach of the contract. The measure of his damages is the value of the land at the time of the breach of the contract to convey. (305). The remedies afforded by a court of law to both vendor and vendee are inadequate. Therefore equity will do full justice to each by requiring a specific performance of the contract. At one while the courts of equity were quite oppressive in requiring practical impossibilities from the vendor. For instance, if a husband contracted to sell his wife's land or his own land discharged of dower, he could be committed for contempt until he procured his wife's joinder with him in a conveyance: so if a person contracted to sell land which he did not own, or to which he had but an imperfect title, he would be committed until he procured title or perfected such title as he had, and then conveyed the premises according to his contract, unless he showed that, after strenuous efforts on his part, it was impossible to perform his contract. These harsh rulings have about passed away. The present rule is, that specific performance of a contract to buy or sell real estate will be decreed as a matter of course in plain cases, but when hardship would result from such a decree, it is a matter of discretion with the court. (306). While an oral contract to purchase or convey land is void under the Statute of Frauds, still equity will decree specific performance of such contracts if they have been in part performed. Such relief is based upon fraud. The part performance must be established by acts palpable and evident to the senses of all, such as absolute and visible possession of the premises by the vendee and his making lasting improvements thereon. This is the doctrine of Part Performance. It does not hold in North Carolina. (309). When specific performance of an oral contract cannot be decreed because the facts will not justify the application of the doctrine of part performance, equity will afford the oral vendee some relief anyhow. It will decree compensation to the amount of the purchase money paid by him and interest thereon, and also for all beneficial and lasting improvements which he may have put upon the premises. (311 and 309). The oral

vendee is entitled to such reimbursement although he is out of possession when he seeks such relief. (311). It is a clearly recognized principle, that if there is only a partial failure of performance by one party to a contract to convey, for which there may be a compensation in damages, the contract is not put an end to: but if the vendor can convey only an insignificant and immaterial part of what is bargained for, equity will not compel the vendee to take that portion even at the corresponding reduction in price. However, if the vendor can substantially comply with his contract, and the part as to which he cannot perform it, is of such a character as to admit of compensation being made to the vendee for such failure, equity will enforce specific performance of the contract so modified. (313). Specific performance of the award of arbitrators will be decreed when the subject matter of the award is realty; and so of a contract to devise realty. (314-315). The vendor, in a contract to convey, occupies practically the same position as a mortgagee. He has several remedies: (1) An action in personam, at law, to recover the price; (2) ejectment, at law, to get possession of the land; (3) specific performance in equity. Equity will decree that the vendee specifically perform his contract by paying the price by a time fixed by the court, and that, upon his failure so to do, the land be sold by a commissioner and the proceeds thereof applied to the payment of the amount due the vendor, together with interest and costs.—the surplus to be returned to the vendee. The vendor may prosecute all of these remedies at the same time, and, under the Code practice, in the same action. As a mortgage will not be foreclosed until all the installments of the debt secured are due, so specific performance will not be decreed until all installments of the price are due: but each installment may be sued on at law as it matures. (315-318).

SEC. 21. WRIT OF ASSISTANCE.—This writ may be termed an equitable *habere facias possessionem*, for it only issued from a court of equity under the old practice. Under the Code practice, it issues from any court having jurisdiction to sell real estate. Its use is to put one into possession who has purchased at a judicial sale and, having fully complied with the terms of sale, has received a deed from the commissioner. The writ is obtained by a motion in the cause based upon affidavit that the person in possession is a party to the cause, or holds under such a party, and refuses to surrender the possession. (318).

CHAPTER IV.

FORMS OF ACTION TO ASSERT RIGHTS OTHER THAN THOSE CONCERNING REAL PROPERTY.—SEC. 1. ACTIONS EX CONTRACTU AND EX DELICTO DISTINGUISHED.—A constitutional provision forbidding imprisonment for debt except in cases of fraud, forbids such imprisonment in all actions *ex contractu* unless fraud be established: but it does not forbid such imprisonment in actions of pure tort. (320). It is said that there is no thoroughly satisfactory definition of a tort. Ordinarily, the essence of a tort consists in the violation of some *duty due to* an individual, which duty may sometimes arise out of a contract, but is a thing different from the mere contract obligation. In such cases the violation of such duty becomes a tort for which an action *ex delicto* will lie. "A breach of contract may be so intended and planned; so interwoven into a scheme of oppression and fraud; so made to set in motion innocent causes which otherwise would not operate, as to cease to be a mere breach of contract, and become, in its association with attendant circumstances, a tortious and wrongful act or omission." Where a breach of contract involves a tort, the contract may be waived and redress be had in an action of tort. *Mutatis mutandis*, if a transaction involve both a tort and a breach of contract, express or implied, the tort may be waived and redress had in an action *ex contractu*. Thus, if chattels be tortiously taken and sold, the owner may ratify such sale

and recover the price obtained by the tortfeasor, in assumpsit for money had and received. In such cases the owner has the option to sue either in tort or in contract. (321-328). A failure to perform its contract with a city to maintain a certain fire pressure, subjects a water company to an action of tort by a citizen injured by such failure, although such citizen be not a party to the contract. (328). At common law it was of vital importance that a plaintiff select the proper remedy. The intricacies and mischiefs of that system of procedure have been supplanted by the Code practice under which there is but one form of action. If the complaint set out such facts as entitle the plaintiff to relief, the court will, under the Code practice, give the appropriate relief without quibbling over the questions of form and whether or not the action is, or should be, *ex contractu* or *ex delicto*. (330). It often happens that a plaintiff has an election to sue in either contract or tort. By the skillful exercise of this election he may recover from one *non sui juris* for a tort growing out of a contract, although he could not recover on the contract itself. Some courts sustain and some repudiate this doctrine. (333-339).

SEC. 2. ACTIONS EX CONTRACTU.—(a) *Covenant*.—"Covenant" at common law is an action upon a deed. It is only because a deed requires a seal that this action lies upon an agreement under seal. It is a question whether the instrument be or be not a deed that governs. All sealed instruments are deeds. But even at common law the action would sometimes lie against a party to an instrument although he had not affixed his seal thereto—e. g. one who accepts a sealed lease containing covenants upon his part. There were other exceptions growing out of the customs of London and other local customs. An action of debt would also lie upon a sealed instrument for a *certain sum of money* due thereon; if the amount due was not fixed and certain but had to be ascertained in the way of damages for breach of the agreement set forth in the deed, covenant was the sole remedy. (338). (b) *Debt*. The action of debt is founded upon an express or implied contract in which the certainty of the sum appears. It lies upon every express contract to pay a sum certain. It does not lie upon a contract to pay or deliver things other than money, such as lumber, cotton, etc. (339). (c) *Account*. If one be indebted to another for a number of items due by account, or for a balance in the latter's favor where there are mutual accounts, the creditor's remedy is assumpsit at law. But if the account be so complicated as to render it impractical for a jury to deal with it, assumpsit will not lie—the remedy being an action for account at law, in which the trial is had before auditors; or a bill in equity will lie. The jurisdiction of equity in matters of account extends to those cases, and to those only, in which the action of account lies at law. Both remedies are confined to those cases in which the accounts are too extensive or too complicated to admit of a trial by jury. (341-344). (d) *Assumpsit*. The action on the case usually called Assumpsit is founded on a contract express or implied. "Case" is a generic term which embraces many different species of actions. There are two, however, of more frequent use than any other form of action whatever—these are assumpsit and trover. The strict legal denomination of the action of assumpsit is "Trespass on the Case upon Promises." This form of action originated, like many others, under the statute of Westminster 2. (344). Under the strict practice at common law, assumpsit would not lie on a sealed instrument so long as that instrument remained in full force; because covenant (or debt) was the appropriate remedy. However, there were instances in which assumpsit would lie on a sealed instrument or, at least, on causes of action growing out of, or intimately connected with, such instruments. These instances would appear to be exceptions to the above rule; but it would be heresy to call them such. (346).

SEC. 3. ACTIONS EX DELICTO.—(a) *Trespass Vi et Armis*. All of the authorities concur in the position that whenever an injury is committed by the immediate act complained of, the remedy is by *Trespass Vi et*

Armis; in other words, if the injury suffered be the *immediate result* of the tortious act, Trespass Vi et Armis lies, and it is immaterial whether the injury be wilful or not. The dividing line between trespass vi et armis and trespass on the case is the difference between immediate injury and consequential injury. If the injury be done by the act of the party himself at the time, or he be the *immediate cause* of it, trespass vi et armis is the remedy though the act causing the injury happened accidentally or by misfortune. (348). Trespass q. c. f. and trespass vi et armis may be joined as separate counts in the same action, as the form, pleas, and judgment in the two actions are the same. Trespass vi et armis will lie for any unlawful interference with another's person or chattels provided it be accompanied with force actual or implied. (349). (b) *Trespass on the Case*. This action originated with the Statute Westminster 2. It lies for any cause of action for which covenant or debt will not lie. It is a genus which comprises many species, the most prominent of which are assumpsit and trover. It is in the nature of a bill in equity and whatever is right in justice and conscience will sustain or defeat the action. (350). It is based upon very general principles and is designed to afford relief in all cases where one man is injured by the wrongful act of another and no other remedy is provided by law. (350). When the *act itself* is complained of, trespass vi et armis is the proper action. Where the *consequences only* are complained of, trespass on the case—usually abbreviated to "Case"—is the proper action. That is, trespass lies where the injury is immediate—case where it is consequential. "It sometimes requires an exceedingly nice perception to be able to trace the dividing line" between the two remedies. In some cases, although the injury be immediate, the plaintiff has his election, and may waive the trespass and bring case for the consequential damage—as if one take another's horse, the latter may elect to bring trover (which is an action on the case) instead of trespass vi et armis. But to maintain case, the plaintiff *must waive* his ground of complaint on account of the trespass. (351). Wherever there is a contract and a common-law duty incident to the employment which is the subject of the contract, a party to the contract may recover either in tort or in contract for a breach of such contract. There is some confusion in the authorities as to what is meant by the common-law duty as distinguished from duties and obligations imposed by the contract itself. In some instances an action will lie for failure to perform the common-law duties incident to a contract in favor of one who is not a party to the contract. (353). (c) *Trover*. Trover is an action ex delicto. It is one of the forms of trespass on the case. In form, it is a fiction; in substance, a remedy to recover the value of chattels personal wrongfully converted by another to his own use. The form supposes that the defendant *may have come lawfully by the possession of the goods*, and it lies where in fact his possession was acquired lawfully. If a taking be wrongful and by trespass, by bringing trover the plaintiff waives the trespass and admits the possession to have been lawfully gotten; and, hence, no damages can be recovered in such action for the *trespass in taking the goods*. Trover is an action of tort. The whole tort consists in the wrongful conversion. Two things are necessary to be proved in trover, (1) that the property converted was that of the plaintiff; (2) a wrongful *conversion* by the defendant. (355). (d) *Replevin*. The action of replevin is founded on a tortious taking and detaining. It is analogous to an action of trespass; but is, in fact, a proceeding in rem to regain possession of the chattels in controversy, and in part a proceeding in personam to recover damages for the wrongful taking and detention thereof—not for their value. In England there were two kinds of replevin—one at common law and the other under the statute of Marlbridge. (355). By the common law, a *taking* by the defendant was necessary to sustain the action—"We command you that you cease to be replevied the cattle of B which D *took* and unjustly *detains*," was the language of the writ. Without a trespass by the defendant, the writ could not be used. It

the defendant came into possession by bailment, the plaintiff was driven to an action of trover or detinue; and it was by detinue alone that the possession of the specific property could be regained. (358). *(c) Detinue.* Detinue is defined, in the old books, as a "remedy founded upon the delivery of goods, by the owner, to another to keep, who will not afterwards deliver them back again." To sustain the action it must be shown that the defendant came *lawfully* into the possession of the goods—either by delivery to him or by his finding them. In modern times the action is allowed in every case in which the owner prefers to recover the specific property rather than damages for its conversion, and no regard is paid to the manner in which the defendant acquired the possession. The unlawful detaining is the sole foundation of the action. (359). The judgment in detinue should be conditional; it should adjudge that the plaintiff recover the specific articles or the value thereof, if the specific articles can not be had; and such also is the direction to the sheriff in the distringas issued to enforce the judgment. There is no seizing of the chattels sued for until after the final judgment; but in replevin the property is seized immediately upon the commencement of the action. Replevin is, therefore, the only certain remedy for the recovery of the specific chattel. (360, 361).

SEC. 4. FORMS OF ACTION UNDER THE CODE PRACTICE.—Under the Code practice, there is but one form of action in civil cases. In that action many ancillary remedies may be obtained, i. e. Arrest and Bail, Claim and Delivery, Injunction, Attachment, and Appointment of Receivers. Those ancillary remedies need not be asked for even if the party be entitled to them; and if they be improperly asked for, they are simply denied, which denial does not affect the action itself. The distinction between the present system of procedure and that formerly in force is, that under the old system there were distinct forms of action for the redress of various injuries, and so much regard was paid to the *form* of the action, that, however meritorious the cause, a mistake in the selection of the remedy sent the plaintiff out of court. The common sense of mankind has caused the old system to be abrogated in most of the states and countries of the English speaking race. The distinction between actions at law and suits in equity and the forms of all such actions are abolished in most jurisdictions, and all relief is afforded in the one form of civil action above mentioned. There are torts and contracts, and legal rights and equitable rights, just as there used to be; but there are not several forms of action, nor separate courts of law and equity. One court administers both law and equity, and all rights are asserted in a single form of action. The Code practice is neither a modification nor a simplification of any of the common law modes of procedure. It practically abolishes all of the common law forms of action, and adopts the equity practice with some slight modifications. (362-365).

CHAPTER V.

INJURIES TO PERSONAL SECURITY, TO PERSONAL LIBERTY AND TO PRIVILEGES.—SEC. 1. REMEDIES FOR THE DEATH OF A PERSON. APPEALS OF DEATH. LORD CAMPBELL'S ACT.—At common law there were three occasions upon which the courts inquired of the killing of a human being: (1) Indictments, which were prosecutions brought in the name and behalf of the king; (2) Appeals of death, which were proceedings brought, not by the king nor in his name, but in the name and for the benefit of private individuals; (3) Inquisitions against deodands. An appeal was an accusation by one private subject against another for some heinous crime. It was a private process for the punishment of public crimes which originated in a custom, derived from the ancient Germans, of allowing a pecuniary satisfaction, called a weregild, to the party injured or to his relations. Such proceedings were never regarded as a violation of Magna Charta: but were considered "a noble remedy and a badge of the rights and liberties of Englishmen." An acquittal

in this proceeding was a bar to a subsequent indictment for the same offense; but an acquittal on an indictment was not a bar to a subsequent prosecution of an appeal for the same offense. By the Statute of Gloucester, an appeal of murder "must be sued out within a year and a day after the death" of the victim. Appeals were abolished by 59 George III. The remedy was never in *use* in this country, except in Maryland; though the *right* existed in Pennsylvania also. (366). Except where an appeal would lie, the maxim *actio personalis moritur cum persona* applied, and no recovery could be had for the death of a human being—neither husband, wife, parent, child, nor master could recover for the loss consequent upon the death of spouse, parent, infant child, or servant, where the death was caused by the wrongful act or negligence of another. This state of the law was remedied in England by Lord Campbell's Act in 1846, by which those dependent upon one who was killed by the wrongful act or negligence of another were given a remedy. The maxim of the common law, while the subject of criticism by text-writers, seems to have been fully adopted and in force in this country. Statutes of like character with Lord Campbell's Act exist, perhaps, in all the states; though the provisions of such statutes differ in important particulars. (369).

SEC. 2. PREVENTIVE REMEDIES.—*Peace Warrant*. This is a summary remedy by which one may be required to give bond for keeping the peace and for his good behavior. It is a criminal proceeding instituted by one individual against another, and is generally regulated by statute. (374). It seems to be a rule prevailing everywhere, that an injunction will not lie to prevent a threatened crime. Formerly the courts would not interfere by injunction except where some *property interest* was involved; but, now, there seems to be a disposition on the part of some courts to enjoin acts which interfere with purely *personal rights*, such as paying improper attentions to a man's wife, and the like. (375).

SEC. 3. THREATS.—The extortion of money by threats of *bodily hurt* is indictable at common law, and an action on the case lies for pecuniary damages consequent upon such threat. A mere vain fear produced by a threat will not sustain the action; neither will a threat of injury to property—it must be a threat to injure the person. Sickness brought on by terror caused by a threat of arrest and imprisonment in the penitentiary, is such an injury as will sustain the action. (381). Trespass lies for legal acts which become trespasses by accident. The lawfulness or unlawfulness of the original act, is not controlling—for one is liable if he strike another by accident while defending himself from a third person; but is not liable, in the absence of special damage, for throwing a log into a highway. The true question is, whether or not the injury resulted directly and immediately from the act. If it did, trespass will lie though the injury be not instantaneous. The intervention of a free agent will relieve the one who did the original act, unless such free agent acted upon a natural impulse of self-defense,—such as throwing off a lighted squib that falls upon him. (382.) It is not necessary, to constitute an assault, that actual violence be done to the person. If the party threatening the assault have the ability, means, and apparent intention to carry his threat into execution, it constitutes an actionable assault. Striking the horse upon which one is riding, or upsetting a chair or carriage in which one is sitting constitutes an assault. (383). Boisterous language which, however, negatives the intention to strike, does not constitute an assault; and this is so although there be some demonstration of force. Thus, where the plaintiff placed his hand upon his sword and said, "If the time were not assize, I'd run you through, sir, your eyes," this was not an assault. (384). If one lift up his cane or fist at another in a threatening manner, or strike at him with his fist or any weapon—being within striking distance, but miss him, it is called an "unlawful setting upon one's person," and is an assault for which an action of trespass lies. (385). Entering the sleeping room of a female at night and leaning over her with a proffer of criminal sexual intercourse, the aggressor being so near as to excite fear and up-

prehension of force in the execution of his purpose, constitutes an actionable assault. If the plaintiff was so frightened and shocked in her feelings as to injure her health, she could recover damages for such injury. (385). In civil actions for assault and battery the defendant may show, in mitigation of damages, the provocation proceeding from the person assaulted. But the provocation must be so *recent* as to raise a fair presumption that the assault was committed in the heat of blood produced by the provocation. (386). The fact that the plaintiff invited the assault by insulting language or provoking conduct will not bar a recovery; and so it is when parties fight by consent. However, matters of provocation may be considered by the jury in assessing damages. In civil as in criminal actions, provocation is a mitigation, not a defense. (388). The maxim *volenti non fit injuria* applies to actions for assault and battery, etc.; but the rule has this qualification—the act assented to must be lawful. One can not lawfully authorize another to beat him. (389). Even the ceremonies of a benevolent society are indictable and actionable if they culminate in laying hands upon a member who forbids it. (390). Formerly, a woman could not recover for her own seduction, but in some states the courts have overruled that doctrine. (391). The least touching of another in anger is a battery; so is administering a deleterious drug, in jest. (391). In actions of tort compensatory damages are allowed, which are to compensate the *plaintiff* for the injury suffered; when proper ground is established therefor, punitive or exemplary damages are also allowed for the *punishment* of the defendant and for an example to others. (392).

SEC. 5. INJURIES TO THE PERSON RESULTING FROM NEGLIGENCE. If an injury result from the *immediate* act of another—whether the act be wilfully or negligently done, or whether the injurious effect be intended or merely accidental—trespass *vi et armis* is the remedy. But if the injury be not the immediate result, trespass on the case is the remedy. (394). A common carrier of passengers owes to the passenger the duty to be careful. This duty is incident to the contract as a matter of law. The right to maintain an action for the breach of such duty, does not depend upon the contract, but is founded upon the common-law duty to carry safely. The passenger may sue upon the contract of carriage, where there is one; which action would be *ex contractu*; or he may bring an action of tort for the negligence, if he prefer so to do, which action would be *ex delicto*. (395). Negligence is a failure to do what a reasonable and prudent person would ordinarily do under the circumstances, or doing what such a person would not have done under the circumstances. The essence of negligence may lie in either omission or commission. One who by his own negligence suffers an injury cannot recover from another for such injury. If the injury be caused entirely by the negligence or improper conduct of the defendant, the plaintiff can recover; but if the injury proceed from the negligence of the plaintiff—that is, if the misfortune would not have happened had it not been for plaintiff's negligence—plaintiff cannot recover. (397). However, if the defendant be negligent and the plaintiff be guilty of contributory negligence, the plaintiff can recover, *notwithstanding his contributory negligence*, if the defendant could have avoided the injury by the exercise of proper care after being aware of the plaintiff's negligence. This is called the doctrine of "The Last Clear Chance." (399). While there is some conflict of authority upon the question, the weight of authority seems to hold that no recovery can be had for injuries caused by *fright* if there be no *immediate* personal injury. Such results as nervous disease, blindness, insanity, or even a miscarriage, are too remote to sustain an action under this rule. The courts seem to be unaware of, or unable to comprehend, the common aphorism "you had as well kill a man as scare him to death." (401). In some states it is held that mental anguish, caused by the negligence of another, may be considered in fixing the damages incident to such negligence. In other states this doctrine is repudiated. In discussing this "mental anguish" doctrine, Mr. Henry A. Page put this pertinent inquiry to the courts, "How much per ang?" (402).

SEC. 6. INJURIES TO HEALTH.—“Injuries affecting a man’s health are wrongs or injuries *unaccompanied by force*, for which there is a remedy in damages by special action on the case.” Such action lies although the injury to the plaintiff be caused by a *public* nuisance, or by administering deleterious drugs, or by selling unwholesome food, or by selling any dangerous article for ordinary use—such as illuminating oils, stove polish, medicine, etc. Where full notice is not given of the dangerous qualities of the article sold, the manufacturer or wholesaler of such articles is liable to one who purchases from the retailer. So of one who knowingly lets an infected house without notifying his lessee of the infection. (406-411). A professional man is liable for injuries resulting from malpractice. Under the Code practice, such actions may be in tort or in contract at the election of the plaintiff. (412).

SEC. 7. INJURIES TO REPUTATION.—Trespass on the case is the appropriate remedy for injuries resulting from libel and slander. A libel is a malicious publication expressed either in printing or writing, or by signs or pictures, tending to blacken the memory of the dead or the reputation of the living, and to expose them to public hatred, contempt, or ridicule. A libel is indictable as a crime, and also the subject of a civil action for damages. In the absence of a statute, proving the truth of the matter published—which is called justifying—is no defense to either the criminal or civil action for a libel; the maxim of the law being, “the greater the truth, the greater the libel.” (413-415). The distinction between libel and slander is this, libel is written or printed; slander is only spoken: or, as it is sometimes expressed, a *la Irish*, written slander is libel, while oral libel is slander. Every libel will sustain a civil action for damages unless the defendant be protected by privilege: but such is not the case with slander. Some words will support an action of slander without proof of *actual* damage suffered therefrom—such words are said to be “actionable per se.” Unless the words spoken be actionable per se, it is necessary to show that the plaintiff suffered some *actual* loss or damage by reason of the slander, or his action will fail. The slander of women by imputations of unchastity is not actionable per se, unless such unchastity would work a forfeiture of property—such as land given to a woman upon condition to be forfeited should she become unchaste. This drop of “the essence of wisdom” of the common law has been partly wiped up with modern statutes making such slanders a crime. (415-418). By the English rule, words, to be actionable per se, must impute a *crime for which corporal punishment may be inflicted in a temporal court*. In this country, it is held, in some of the states, that words are actionable per se which, if true, will subject one to an indictment involving *moral turpitude*, or subject one to an *infamous punishment*; while in other states the English rule is practically followed. But in some states words are held to be actionable per se if they convey an imputation upon one in the way of his profession or occupation. Words malicious and false and uttered with intent to injure one, and which do injure him, are actionable whether defamatory or not, e. g. to call a man a dissenter, is not defamatory: but to do so in a small prejudiced community, with intent to injure his trade, is actionable if such injury results therefrom. Such words may not support a technical action for slander, but they will support an action of some kind—the name of the action is of no consequence. (418). Any written slander constitutes a libel. Many charges which, if merely spoken, would not support an action for slander, will, if written, support an action for libel. Words of mere ridicule or contempt, which only tend to lessen a man in public esteem or wound his feelings, will, if written, support an action for libel. (421). Some words are not actionable though highly defamatory, because spoken or written under such circumstances as to render the party uttering them immune to either criminal or civil actions therefor. Such immunity is called Privilege, and such utterances are called “Privileged Communications.” Privilege is of two kinds, absolute and qualified. Absolute privilege shields one from all liability, criminal and civil, no matter how false and malicious the charges may be. This absolute privilege extends only to utterances upon the floors of Congress and the state legis-

latures, reports of military or other officers to their superiors in the line of duty, to everything said by a judge on the bench, by a witness in the box, and the like. Qualified privilege does not give absolute immunity: for the person slandered or libeled may recover, in spite of the privilege, upon proof that the words were not used in good faith, but that the defendant took advantage of a *privileged occasion* to falsely, artfully, and knowingly defame him. To overcome this qualified privilege, falsehood and express malice must be shown. Honesty of purpose is essential to qualified privilege, and to constitute honesty of purpose the defamatory words must be uttered, not merely on an *occasion* which would justify making them, but also from a *sense of duty and with a belief that they are true*. The character which a master gives a servant upon inquiry by one who proposes to employ such servant, criticism of public officers, letters to a department of government protesting against the appointment of one to office because of disqualifying matters charged, are instances of qualified privilege. (422). Words uttered in church trials, of or to a *member*, are within the rule of qualified privilege: aliter as to such words uttered of or to a *stranger*, it seems. (425). In this age and country to pronounce an anathema against, and to excommunicate, a member of a church can have no such temporal ill effects, in the eye of the law, as to be actionable per se, or to exclude such acts from the protection of the doctrine of qualified privilege. (426). In the absence of a statute, what is called "freedom of the press" confers upon publishers and editors no greater exemption from liability for libel than the law accords to all other persons. Liberty of the press simply protects publications from censorship. (428). In cases of defamation, the defendant may show previous provocation received from the plaintiff, provided such provocation originated in, or be closely connected with, the same subject matter out of which the defendant's alleged libel or slander arose. The defendant may show that he spoke the defamatory words in a moment of heat and passion, under provocation from the plaintiff immediately preceding his utterances. Under such circumstances, all acts, etc., constituting parts of the *res gestae* may be shown in mitigation of damages. Heat and passion alone do not mitigate; but when such emotions are directly attributable to contemporaneous provocation by the plaintiff, they do mitigate the damages. The rule which allows provocation to be shown in mitigation of damages is confined to recent provocation and to those cases in which the matter offered in mitigation of damages is explanatory of the meaning of the language complained of and of the occasion of writing it—all being parts of a connected and continued controversy. (430-434). Prior to "Fox's Libel Act," only the question, whether, or not, the defendant published the alleged libel, was submitted to the jury, in the trial of indictments for libel. Whether, or not, the publication was libelous was decided by the judge—the jury had nothing to do with it. Fox's Act changed this, and required the whole matter to be submitted to the jury—just as in all other criminal prosecutions. This act has been adopted by legislation or by judicial decision in this country. (434). Formerly under the English practice, an injunction would not issue to restrain a libel; but, by statute, such practice is now allowed in that country. Except in cases of boycott, the courts of this country seem to follow the original English practice. (438).

SEC. 8. DEPRIVATION OF LIBERTY.—(a) *Habeas Corpus*. This writ is as much a palladium to-day as it ever was. It was in use before the days of Magna Charta; but it became so little respected as to no longer afford substantial protection to English subjects. This was remedied by the great Habeas Corpus Act which gave to this remedy the fullest and strongest scope. It has been said that habeas corpus was neither a civil nor criminal action; that there are no parties to the proceeding except, nominally, the person detained of his liberty and the person by whom he is detained; that it is error to characterize the proceeding as a cause or action; that it is nearly allied to a proceeding in rem; that it is not designed to obtain redress *against* anybody, and no judgment can be entered *against* anybody; and that, technically speaking, there is no plain-

tiff and no defendant. But it is said by the Supreme Court of the United States that habeas corpus proceedings are, to all intents and purposes, civil actions, both under the common-law and Code practice. (439). One under sentence by the final judgment of a court of competent jurisdiction will not, ordinarily, be discharged by habeas corpus; but if there be a want of jurisdiction in the court, or if its action be unconstitutional or in the execution of an unconstitutional law, or if its judgment be *void* as distinguished from *erroneous* or *voidable*, one in custody under the final judgment of a court, will be discharged by habeas corpus. (444). Mere error in a judgment cannot be reviewed in habeas corpus proceedings. (446). The writ is not a writ of error, though in some cases it may be used, in connection with the writ of certiorari, for that purpose. The character of the restraint or imprisonment necessary to sustain the writ, is not satisfactorily defined. Confinement under both civil and criminal process may be relieved; wives restrained by husbands; children withheld from those entitled to their custody; persons held in arbitrary custody by private individuals,—as in madhouses; those under unlawful military control; may all obtain relief by this writ. But there must be something more than a mere *moral* restraint—such as telling a person to “consider himself under arrest.” There must be actual confinement, or the present means of enforcing physical restraint. (446). One who is in the custody of state officials under criminal process may be discharged, on habeas corpus, by a Federal court when the alleged cause of detention is for an act done in discharge of his duty as a United States official. The writ lies to discharge one in custody under process of a state court, when such action of the state court is in violation of the constitution, or of a law or treaty, of the United States; but this use of the writ is exercised with caution and as a matter of discretion rather than as a matter of course, even in those cases in which the jurisdiction clearly exists. (450). But a state court cannot discharge a prisoner in custody under the authority of the United States. (451). No appeal lies either by the state or a petitioner from the ruling of a judge that there is, or is not, probable cause, or admitting, or refusing to admit, to bail. But if the judge declines to hear evidence because an indictment for a capital offence has been found against the petitioner, his ruling becomes a question of law reviewable by appeal, certiorari, or writ of error—according to the practice of the appellate court. An appeal *does lie* in cases involving the custody of children and others forcibly detained by individuals, and not under legal process. A prisoner may appeal from the circuit court of the United States to the supreme court thereof, where his petition alleges that he is imprisoned in violation of the constitution of the United States; but such appeals are restricted to those cases provided for by statute. (453). (b) *False Imprisonment*. False imprisonment is the illegal restraint of the person of any one against his will. It was regarded as a heinous offense and visited with severe punishment at the common law. As it necessarily included a technical assault, and usually included a battery also, the indictment charged assault and battery and false imprisonment. There may be a false imprisonment without touching the person, as where an officer exhibits a warrant to a person and desires him to go before a magistrate, which request is complied with without further compulsion. This is an imprisonment because the person yields to what he supposes to be a legal necessity, and if the officer's action was unwarranted by law, such imprisonment is a false imprisonment. (456). At common law there are two remedies for an illegal arrest: (1) *Trespass vi et armis* where there is no legal excuse or justification for the arrest—as where it is made without legal process or under void legal process; (2) *trespass* on the case where the arrest is made under process which is erroneously issued, but is not absolutely void. Absolutely void process will protect neither the officer serving it nor the suitor who procured it to be issued. If the process be erroneously issued, but not void, it will protect the officer making the arrest; and it will also protect the suitor who procured it to be issued, in an action of *trespass vi et armis*, though it will not protect him in an action of *trespass on the case* in the

nature of malicious prosecution." where the want of probable cause and malice exist. Under the Code practice, an action of trespass vi et armis and an action of trespass on the case in the nature of false imprisonment, may be joined in the same action and set up in the same complaint—that is, the relief afforded by both of these common-law remedies will now be afforded in one single and simple civil action. (457). In an action for *malicious prosecution*, malice and the want of probable cause must be alleged and proven; but not so in an action for false imprisonment. There is a marked distinction between the two injuries. For malicious prosecution the common-law remedy was trespass on the case. If one is imprisoned *under legal process* issued in an action instituted and carried on *maliciously and without probable cause*, it is malicious prosecution; but if the imprisonment be *without legal process*, it is false imprisonment. No proof of malice, or want of probable cause, is necessary to make out a case of false imprisonment—such proof cannot take the place of want of legal process. (459). If a *judicial officer*, whether possessed of a general or a special jurisdiction, act erroneously, or even oppressively, in the exercise of his authority and within his jurisdiction, an *individual, at whose suit he acts*, is not answerable therefor—he is not to be held for the error or misconduct of such officer. But if a judicial officer having *only a special or limited jurisdiction*, exceed his authority and act in a case of which he has *no jurisdiction*, no person can justify under such proceedings—much less the suitor who instituted them. (460). (c) *Malicious Prosecution and Abuse of Legal Process.* The foundation of an action of Malicious Prosecution is the *express or implied malice* of the defendant. Whoever institutes legal proceedings against an innocent and unoffending person—which proceedings charge a person with a crime injurious to his fame and reputation and tends to deprive him of his liberty—and whoever maliciously causes a person's arrest, or brings groundless accusations against him—which entail expenses incident to defending himself,—is liable for damages in an action of trespass on the case. The injuries which will support an action for malicious prosecution are: (1) Injury to a man's fame—as if the subject matter of the prosecution be scandalous; (2) where a man is put in danger to lose his life, limb, or liberty by the prosecution; (3) damage to his estate—as where he is forced to expend money to defend himself against the charge. (461). If one procures another to sue a third person without cause, an action lies against him who procured the bringing of such suit: but not against the plaintiff therein. An action against one who stirs up vexatious litigation, cannot be sustained unless it be shown that there was *no cause* for the action which he procured to be brought. (462). Where *probable cause is absent*, malice is implied when a criminal prosecution is instituted: but the *want of probable cause* can not be implied from *the most express malice*. If the person prosecuted be guilty, the prosecutor is not liable for malicious prosecution—no matter how malicious his motive; neither does such action lie though the person prosecuted be *innocent*, if the evidence against him be sufficient to establish probable cause and the prosecutor honestly believes the charge to be true. (463). If one person cause another to be arrested without process, it is a trespass and false imprisonment. So, if he arrest him upon process which is *void* in itself, or *void* for want of jurisdiction in the court issuing it. An action for malicious prosecution, on the other hand, is a special action on the case for the use of *valid* process of law from *malicious motives*. It *presupposes valid process*. (464). To sustain an action for malicious prosecution it is necessary to show, (1) that the prosecution has terminated by the acquittal or discharge of the accused; (2) that in instituting the prosecution the prosecutor acted without probable cause; and (3) that he was actuated by legal malice, i. e., by improper or sinister motives. *Want of probable cause and the existence of malice*, either express or implied, *must both exist concurrently* to entitle the plaintiff to recover. *If probable cause be shown*, the defense is perfect notwithstanding the fact that the defendant was actuated solely by malice in instituting the prosecution against the plaintiff.

How much weight, as proof of probable cause, shall be given to a judgment of guilty, which judgment is subsequently reversed for error, is a question not settled in an entirely satisfactory manner. It has been held that probable cause is fully established by a verdict and judgment of guilty, although upon appeal a contrary verdict and judgment be rendered in a higher court: and that, if it appear that the alleged malicious prosecution was before a court having jurisdiction and was then decided against the defendant—nothing appearing to fix the prosecutor with any unfair means in conducting the prosecution—such judgment establishes probable cause. If there be a conviction before a magistrate, even,—he having jurisdiction of the subject matter—it will be conclusive evidence of probable cause, unless the conviction be obtained by undue means. It is an irrebuttable presumption of law that every judicial tribunal, acting within its jurisdiction, acts impartially and honestly. This rule applies to the court and its judgment, and not to litigants in the court. (466). An action lies for the "*Abuse of Legal Process*," whether the process be civil or criminal. Such action is based upon misconduct in the execution of valid legal process—process which is justifiable and proper in its inception. For example, if, after an arrest under valid civil or criminal process, the party arrested be subjected to unwarrantable insult, indignities, or cruelty, or be otherwise treated with oppression and undue hardship, he may maintain an action in tort against the officer and against others who unite with the officer in doing the wrong. Perhaps the most frequent form of such abuse of legal process is that of working upon the fears of the person arrested for the purpose of extorting money or other property, or of compelling him to sign some paper, to give up some claim, or to do some other act demanded by those controlling the prosecution. (470). It is said that there is a distinction between the malicious prosecution of civil actions and the malicious prosecution of criminal actions. In the last named the prosecutor is much more favored than in the first; for the prosecutor of a public wrong is protected, provided he has probable cause, however malicious his motives. (472). An abuse of legal process consists in employing such process for some unlawful object, not for the legitimate purpose for which such process was intended by law. If process, either civil or criminal, be thus *misused*, this is an *abuse* for which an action will lie. In such action it is *not necessary to show either malice or want of probable cause* in causing the process to issue, *nor that the proceeding has terminated*; and it is immaterial whether such proceeding was baseless or not. (473). The authorities frequently confound the action for the *Abuse of Legal Process* with that for Malicious Prosecution, although these actions are essentially different. (475). Exemplary damages are allowed in actions for false imprisonment if the defendant act wantonly or with criminal indifference to civil obligations. (478). (*d*) *Liability of officers in Actions for False Imprisonment, Malicious Prosecution, and Abuse of Legal Process.* An independent judiciary is justly regarded as essential to the public welfare and the best interests of society. Hence, for acts done in the exercise of judicial authority clearly conferred, a judge shall not be held liable to any one in a civil action, so that he may feel free to act upon his own convictions uninfluenced by any apprehension of ill consequences to himself. Judges of courts of record of superior or general jurisdiction are not liable to a civil action for their judicial acts, even when such acts are malicious, corrupt, and in excess of their jurisdiction: but judges of inferior and limited jurisdiction are not protected when they act beyond the limits of their jurisdiction. (479). A ministerial officer has a line of conduct marked out for him by the law, and he has nothing to do but to follow it, while a *judicial* officer, on the other hand, must necessarily exercise judgment and discretion in discharging his duties. Hence it is, that a *ministerial* officer is held liable, in a civil action, for any failure to follow his prescribed line of duty: while a *judicial* officer is exempt from a civil action, under the rule above stated. No action will lie against a justice of the peace for a *judicial* act, as distinguished from his ministerial acts; provided he act

within his jurisdiction. It is not always easy, however, to distinguish between judicial and ministerial acts. (481). Executive officers, being obliged to execute process, are protected in the proper discharge of their duty if the process issue from a court or magistrate having jurisdiction of the subject matter. If the magistrate proceed unlawfully in issuing the process, he may be liable: but the officer who executes it is not. The executive officer is protected even when the process under which he acts is voidable for irregularity or mistake in its issue: but not where it is apparent that the process is *void for want of jurisdiction in the magistrate*. (483). One who is wilfully denied, or hindered in, his right to vote, by officers who ought to receive his vote, may maintain an action, against such officers—to assert his right and to recover damages for the injury. To sustain the action, there must be proof of malice, express or implied, on the part of the officer. The action does not lie for a mere error of judgment, when their motives are pure and untainted with fraud or malice. (487). Where the question of one's right to vote is held to be a judicial question, as is the case in some jurisdictions, no liability rests upon election officers for refusing to allow one to vote—the rule applicable to judicial, as distinguished from ministerial officers, is applied in such jurisdictions. (488).

CHAPTER VI.

INJURIES GROWING OUT OF RELATIVE RIGHTS.—SEC. 1. HUSBAND AND WIFE.—(a) Habeas Corpus. Whatever may have been the former law, it is now settled, that a man has no legal right to restrain his wife of her liberty by confining her to his house, etc. He may interpose between her and an improper companion for the purpose of "preserving his honor:" but he has no right to imprison her. Therefore, she will be freed from such imprisonment or confinement, by habeas corpus, and set at liberty to go where she pleases. (490–495). **(b) Seduction.** The husband may recover damages, in trespass *vi et armis* or trespass on the case, against one who has sexual intercourse with his wife—whether the wife assented thereto, solicited it, or was forced. It is the defilement of the marriage bed—the corrupting of the wife's body rather than her mind—that constitutes the essential wrong. Seduction of the wife and the loss of her service and affections, are mere matters of aggravation of damages, and not essentials to a recovery. (495). There must be positive proof of an *actual* marriage to sustain an action of crim. con. (497). A wife cannot maintain an action of crim. con.: but in some states she can maintain an action against anyone—man or woman—who wrongfully induces her husband to abandon her, or to send her away, or to withdraw his support. (498). **(c) Enticing and Harboring.** Either trespass or case lies for the wrongful enticing or harboring the wife. (501). The husband may maintain an action against one who permanently or temporarily alienates his wife's affections, although such conduct be unattended by sexual intercourse or abandonment. (501). But if a husband's ill-treatment of his wife be such as to justify her leaving him for fear of bodily harm, he can maintain no action against one who harbors her. (503). Neither can he recover of one who induces his wife to abandon him because of his brutal treatment. Parents are allowed greater latitude than others in the matter of inducing their daughters to abandon their husbands for ill-treatment, and in inducing those who have abandoned their husbands for such cause, to refuse to return to them. But unless the husband's conduct be such as to justify such interference, he may maintain an action against anyone—parents included—who induces his wife to leave him, or who induces her to remain away from him after having left him. For the mere harboring of the wife, unattended by enticing or inducing her to refuse to return to him, no action lies. (503–507). As at common law a wife could bring no action in the law courts without the joinder and assent of her husband, she was without any remedy against one who induced her hus-

band to abandon her. But where the statutes of a state permit her to sue alone, she may maintain an action against one who entices her husband to abandon her or induces him to refuse to return to her. What constitutes such a wrongful exercise of influence over the husband, is determined by practically the same rules which govern in cases of enticing and persuading a wife to leave, or remain away from, her husband. (507). The husband may recover damages sustained by him as the result of a battery upon his wife, or of a wilful sale to her of a dangerous or deleterious drug. (509). For a tort committed upon the wife, two actions will lie—one by the husband alone for the loss of service, expenses, etc., the other by the husband and wife jointly, for the wife's suffering and the injury to her person. There are statutes in some of the states which allow but one action. These statutes permit all the damages incident to, and growing out of, an injury to the wife, to be recovered in the same action. (511). In the absence of an express statute, the wife can maintain no action against her husband for injuries to her person suffered at his hands. (513). Under the English law, there is no precedent, except in a few extreme cases, where any court has granted a maintenance to the wife except in divorce proceedings, or as an incident to divorce. It seems to be a general rule that the granting of a maintenance to the wife out of the husband's estate, is not an original but an incidental matter—incidental to divorce. However, of late years it has been held in many states that such maintenance will be allowed by courts exercising equitable jurisdiction, where the wife brings an action for that purpose, although she is not seeking a divorce. (515). A wife may recover damages for the mutilation of her husband's corpse. (517).

SEC. 2. PARENT AND CHILD.—(a) *Habeas Corpus*. The courts of equity have jurisdiction to dispose of the custody of minor children. The courts will not deprive parents of such custody unless it plainly appear that the court, in the careful exercise of such power—having due regard to the natural rights of the parent and the mental, moral, and physical welfare of the child—should place the child in the custody of some one else. This jurisdiction is generally exercised in this country by any court or judge having jurisdiction in matters of habeas corpus. When a child, servant, or wife, is brought before the court on habeas corpus and it appears that such person has sufficient discretion to make a suitable selection of the person with whom it prefers to reside, the court will allow such selection to be made, and will see that the person is not hindered in taking up his or her abode with the custodian so selected. But where there is a want of such discretion, the court awards the custody to some suitable person of its own selection. (520). (b) *Enticing and Harboring Children*. A father occupies the dual relation of parent and master of his minor children, within the rules of the law. Therefore, he may maintain trespass on the case against one who knowingly entices such children from his service, or who knowingly retains and employs them after they have left him. It is necessary to a recovery that it be proven that the defendant knew, at the time of enticing, employing, or harboring, that the child thus enticed, etc., was the servant of the plaintiff. (524). In the days of feudal tenure, the father could recover the value of the marriage from one who *abducted* his minor *heir*: but it was said in 1858 that in modern times there was no case in England or America of a recovery by a father for *abduction* simply; though he can recover where there has been an actual or constructive loss of his child's services as a result of its abduction. The action rests upon the right to the services. A loss of services is presumed from an abduction or enticing, etc. One standing in loco parentis may maintain such action. (526). (c) *Seduction*. A father may maintain either trespass vi et armis or trespass on the case for the seduction of his daughter—minor or adult—when she is also his servant. Theoretically he recovers as master—for any trifling service by the daughter will sustain the action, and punitive damages are allowed. The relation of master and servant is presumed when the daughter, whether adult or minor, resides with

the father or is under his control. In some states the law on this subject has been changed by the courts, and the father—and in some instances the mother—is allowed to recover *as parent*—the fiction, that the recovery must be based on the relation of master and servant, being abolished. One standing in loco parentis may recover for seduction. (527-535). At common law, the maxim *volenti non fit injuria* debarred a recovery by a female for her own seduction. By statutes in some states, and by decisions in others, the law on this subject has been radically changed and the female may recover in such cases, especially when the seduction is accomplished under promise of marriage. Where a daughter is allowed to recover for her own seduction, her father may also recover—the recovery in the one action being no bar to the recovery in the other. (535). (d) *Death or Injury of Child by Act of Another. Right of Parents to Recover for.* While the father may recover for the loss of services and for expenses resulting from the tortious injury of his minor child by another, he cannot, in the absence of a statute, recover anything if such child be killed—at least, nothing beyond loss of services previous to the child's death. (537). For such an injury to the child as does not entail loss of services or expense upon the father, the child alone can recover. For an injury that merely causes loss of services or expense to the father, the father alone can recover. Where the injury causes suffering or injury, or both, to the child, and also entails loss of services and expense upon the father, both the child and the father can recover—the action by the one is no bar to the action by the other. (538-539). An injury to a minor child while employed by another, will not sustain an action by the father where there is no wrongful act or negligence of the employer; and this is so although the employment was not with the father's permission. (540). (e) *Parent's Right to Earnings of Child.* Where a parent wholly abandons his child, he forfeits his right to the child's services and earnings—such conduct is one of the methods by which emancipation is worked. (541). At common law, the father is entitled to the services and earnings of his minor children while they live with and are supported by him, or are in his custody or under his control. The mother is not so entitled at the common law. The common law doctrine as to the mother's rights has been greatly relaxed in modern times, and the tendency of the modern decisions and statutes is to place a widowed mother in the shoes of the deceased father quoad the custody, services, and earnings of her minor children. It has been held that a mother may recover for her minor child's services even in the father's lifetime, if the father assigns to her, or abandons in her favor, his paternal rights and duties. (542). The right of a father to the services of his sane child ceases at twenty-one. It has been said that an adult child may elect still to remain unemancipated. In such case the father continues liable for his child's support and entitled to its services and earnings. However this may be with sane adult children, it is certain, according to the ruling in New Jersey, that an adult child who is non compos is not emancipated per se upon arrival at age and, if it continue to live with the father, the father's rights to its services and earnings are uninterrupted. Whether emancipation has taken place at the child's majority, is a question of fact, not of law. (544). The father may permit his minor child to take and use its earnings. This is called emancipation. Emancipation puts an end to the father's rights. Emancipation may be express or implied; entire or partial; absolute or conditional; in writing or oral; for the whole minority or for a shorter term. It does not enlarge the minor's capacity to contract—it simply precludes the father from asserting his parental rights. If one employ a minor with notice of its non-emancipation, payment of the wages to the child is no defense to the father's action for such wages; and, mutatis mutandis, payment to the father will be no defense to the minor's action, if his emancipation be known to the employer. (546). Marriage emancipates a minor daughter, and the tendency of modern decisions is towards common sense and holding the same thing with regard to a minor son. Not only may emancipa-

tion be effected by contract between parent and child, but also by cruelty, neglect, abandonment, etc., on the part of the parent—leaving the child to shift for itself, or treating it so badly as to justify its leaving. So, acting in so depraved a manner as to make it improper for the child to continue to live with its parents, will work an emancipation. An emancipation once made is irrevocable without the child's consent. (547).

SEC. 3. MASTER AND SERVANT.—(a) *Master's Liability to Servant on Contract.* A servant, who is wrongfully discharged, has his election of the following remedies: (1) He may treat the contract as rescinded and immediately bring quantum meruit, but in such action he can recover only for the time actually served; (2) he may sue at once for the breach of contract, in which case he can recover only his damages up to the commencement of such action; (3) he may treat the contract as existing and sue at each period of payment for the salary then due; (4) he may wait until the end of the contract period, and then sue for the breach, in which case the measure of damages will be his stipulated salary diminished by such sum as he has actually earned, or might have earned by a reasonable effort to obtain other employment; (5) if his wages be payable in installments, he may sue on each installment as it matures, or he may sue on several matured installments at the same time—in one action or in separate actions. A judgment will be an estoppel as to all installments due at the time suit is brought—whether such installments be actually embraced in the action or not. A servant who is wrongfully discharged, or who quits for proper cause, must exercise reasonable diligence in seeking employment of a *not lower grade*. His recovery will be diminished by the amount so earned or which might have been earned. The burden is on the master to show what was, or could have been, thus earned by the servant. (549). If there be an *entire* executory contract of hiring and the servant perform a part of it and then wilfully refuses, without legal excuse, to perform the rest, he can recover nothing, according to the older decisions. The manifest injustice of refusing all compensation in such cases has caused the courts to relax this stringent rule. The modern ruling is, that if the master has derived any benefit from the labor done and if, by the contract of hiring, the wages are payable in installments, the servant may recover the installments actually earned. In still other particulars the common-law doctrine of "Entire Contracts" has been equitably modified. (555).

(b) *Master's Liability to Servant in Actions Ex Delicto.* In 1837, the "Fellow-servant" doctrine originated in England in the ruling by Lord Abinger (Sir James Scarlett). It was adopted in South Carolina in 1841; was applied to railroads in England in 1850; and has taken possession of America since that time. In many states it has been abolished by statute as far as the employes of railroads are concerned. The doctrine, in a *modified form*, was adopted by the Supreme Court of the United States in the Ross Case. That court subsequently overruled the Ross case and adopted the doctrine in its *ultra form*, in Conroy's case. In 1906, an act of Congress was passed abolishing the doctrine as to the employes of carriers engaged in interstate commerce. This act being declared unconstitutional in part, another act of Congress was passed, in 1908, which reenacts the act of 1906 in terms which remove its unconstitutional features. In its *ultra form*, this doctrine shields the master from all liability for injuries suffered by his servant where such injury results from the act or negligence of the fellow-servant of the injured person—all employes of a common master in the prosecution of the same general undertaking being considered fellow-servants. In its *modified form* all servants of the common master are not held to be fellow-servants within the rule; but an upper servant who has a certain amount of dominion and control over others, is held to be the common master's alter ego, whose acts or negligence towards another employe, render the common master liable to the injured servant. This modified form of the doctrine has practically supplanted the original and *ultra form*. The whole doctrine has been the subject of caustic criticism by

able judges—one of whom says, that the "reasoning of that learned but somewhat eccentric judge, Lord Abinger, is but one of the many instances of how little some of the most shining talents of the advocate appear to prepare the possessor for the office of the judge." The doctrine is said to be based upon no settled principle of the common law, and to be tainted with the effluvia of serfdom, villeinage, and other obsolete brutalities of the English common and statute law toward servants. The statutes which abolish the whole doctrine as to the employes of railroads and other carriers—leaving it in operation as to the employes of other masters—have been held to violate no clause of the Federal Constitution or other fundamental principle of law. (557-567). It is an elementary rule in the law of negligence, that the master owes the duty to furnish proper tools and appliances to his servant. Where there is one appliance only which is approved and in general use for performing a certain function, it is the master's duty to use it. Where there are several appliances used for the same purpose, all of which are approved and in general use, the master fills his duty if he exercises reasonable care in making a selection. It is the master's culpable negligence, and not a mere error of judgment on his part, which renders him liable in such cases. (567-570). (c) *Remedy of the Master Against the Servant.* Under the English common and statute law prior to 1848, the condition of an employe was almost servile. Until that date the master's remedy against the servant was confined to a criminal prosecution; while that of the servant against the master was confined to a civil action. But this has all been changed, and nowhere are the rights of workmen and servants, of all ages and sexes, so admirably protected as they are in England at the present time. In 1875 statutes were passed in that country which have been aptly described as "The Workman's Charter of Liberty." "Then, for the first time in the history of that country, did the employer and the employed sit under equal laws." By the Federal Constitution and statutes, all persons under the dominion of the United States are fully protected against slavery in all of its forms—peonage, the coolie system, and all other attempted evasions of the 13th amendment. Imprisonment for debt—that is, for non-performance of any obligation arising out of a contract made by a person,—is now forbidden by the constitutions of practically all the states; though, until recent years, imprisonment of debtors was common to both England and America. "No person shall be imprisoned for debt except in cases of fraud," means that no one shall be imprisoned for a cause of action ex contractu; but it does not shield one from imprisonment for the non-payment of a liability arising out of a pure tort. Statutes making it a crime for a laborer or tenant to violate his contract with his master or landlord, are but attempted evasions of the constitutional provision above quoted, and are void. The legislative power to make acts criminal and punishable by imprisonment, cannot be extended to an invasion of the rights guaranteed to the citizen by the constitution. Such statutes are in violation of the 13th amendment to the constitution of the United States, and of the act of Congress known as the Peonage Statute. The contracts of apprentices, sailors, and soldiers, are sui generis and not within the constitutional provisions, State or Federal, above referred to. Statutes making it criminal to violate a contract of hiring would, possibly, be valid, as far as the 14th amendment is concerned, if aimed at master and servant alike. A statute making it criminal for a servant to obtain money or advances under a contract of hiring,—which contract he enters into for the purpose of defrauding his master and with the fraudulent intent never to perform it—would be valid, it seems. (570-575). The specific performance of a contract to perform personal services for another will not be decreed, except, possibly, in the case of apprentices, sailors and soldiers. "Neither the servant nor the master is subject to have enforced against him a specific execution." However, in certain peculiar instances, one who has contracted to serve another will be enjoined from serving anyone else during the contract period. (575, and see 712). (d) *Master's Right to Exoneration Against the*

Servant. Where either master or servant is mulcted in damages, by a third person, in consequence of the negligence of the other, he is entitled to exoneration. (578). (e) *Remedies of Both Master and Servant Against Third Persons.* "At common law, in England, the master might bring an action at law for damages against a third person for any loss he might have sustained by reason of such third person's unlawfully injuring or interfering with his servant, but this power was only to be exercised in the case of a *menial* servant—a domestic *infra moenia*." But this statement that the law in such cases is confined to *menial* servants, must be taken cum grano salis, if, indeed, it is not to be entirely repudiated. (580). An action on the case lies against one who entices a servant to quit the master's service; and it has been said that trespass vi et armis lies where the servant is taken away by force. (582). Whatever may be the law as to *injuries inflicted* upon a servant, it seems to be well settled that one who *entices* a servant from his master is liable to the master in damages, *no matter what the grade of service*—whether it be *menial* or one of much dignity. The master's rights in such cases are derived from the law governing contracts, and not merely from the law governing the relation of master and servant. The law which renders the enticer liable "extends impartially to every grade of service, from the most brilliant and best paid to the most homely." The enticer is liable if he knows of the existence of a valid contract of service; he cannot shield himself by playing the part of a "chivalrous protector of defrauded ignorance,"—for, in the eyes of the law, he is known by the homely epithet of "officious intermeddler." "Interference with such relations can only be justified under the most special circumstances and where there cannot be the slightest suspicion of a spirit of mischief-making or self-interest." (583). The unlawful interference between master and servant sometimes reaches the magnitude of a private nuisance and will be stopped by injunction—for instance, the intimidation of employes by strikers. (586). A servant may maintain an action for damages against an intermeddler who knowingly and maliciously causes his discharge from employment. (589). It is said at page 591, that, while it is frequently stated by text-writers and in judicial opinions that a master may recover for the seduction of his female servant, yet, no case can be found in which such a recovery was had, unless the plaintiff was, not only the master but also, the parent, or one standing in loco parentis. Since this volume, with the exception of this introduction, has been printed, the editors have been furnished, through the courtesy of Mr. G. H. Burroughs, of Toronto, with the headnotes to *Ford v. Gourlay*, 42 U. C. Q. B., 552; from which it appears that the plaintiff did recover for the seduction of his female servant although he was not related to her, nor did he stand towards her in loco parentis. The case holds that while none of the special grounds for compensation which may be considered in the case of a parent, apply in the case of master or employer; still, the master is not restricted to the recovery of his actual pecuniary loss, but his damages depend very much upon the position in his household occupied by the person seduced.

(f) *Remedy of Third Persons Against the Master for the Acts and Negligence of his Servants.* Until a comparatively recent date it was held that the master is not liable for the *wilful* trespasses and torts of his servants—the limit of his liability being for the negligence or unskillfulness of his servant. (592-595). But, by the modern decisions, the master is liable not only for the negligence and unskillfulness, but also for the wanton, wilful, and malicious acts of his servant done in furtherance of the master's business, and while on duty. (595).

CHAPTER VII.

INJURIES TO TANGIBLE PERSONAL PROPERTY.—SEC. 1. REPLEVIN, DETINUE, AND ALLIED REMEDY IN EQUITY. One who has possession of a chattel by virtue of either a special or general property therein, may maintain either replevin or trover; but one who has possession of a chattel simply for another, e. g. a servant for the master, can maintain no action against one who disturbs such possession. (598). The gravamen of the action of detinue is the *detention* of chattels. The plaintiff must prove three things: (1) Property in himself; (2) an unlawful detention by the defendant; and (3) the value of the property detained—but the *unlawful detention* is the main and principal point in issue. (599). A judgment in an action of detinue is conclusive as to the title between the parties and their privies; but the judgment is no bar to a subsequent action for the same chattel against the same defendant or against a third person, unless and until the judgment has been satisfied. (600). *Actus dei nemini facit injuriam*—there is a loss, but it is *damnum absque injuria*; therefore, if the chattel be destroyed by the act of God *pendente lite*, the loss falls upon the plaintiff in detinue if the property were his. There is a marked distinction between detinue and trover; though, in many cases, the plaintiff has an option as to which he will bring. The basis of detinue is a *continuing* title in the plaintiff; and the alleged wrong consists wholly in the wrongful *withholding of the possession* of his goods from him. In trover the alleged wrong consists in the *conversion* of chattels which were *once* the property of the plaintiff but which have been *made the property of the defendant* by the defendant's wrongful conversion. If, after being thus converted, the chattels be destroyed *pendente lite* by the act of God, the loss falls upon the defendant. In detinue the jury must find the *present* value of the chattel—the value at the *date of their verdict*. (601). Under the Code practice, the action of "Claim and Delivery" is said to be substituted for replevin and detinue. In such action the value of the property must be assessed as of the time of the trial—for the value stands in lieu of the property, should it turn out that the property cannot be returned. The defendant cannot compel the plaintiff to accept the assessed value, if there can be a return of the property in specie; nor can the plaintiff compel the defendant to pay the assessed value, if he offers to return the property. This is so notwithstanding any deterioration in the value of the property. It may be that, if it appear on the trial that the property has been *destroyed*, the jury could so find, and ascertain the value of the property *at the time of the taking* and render a verdict for such value with interest thereon as damages for the taking and detention. If the property has deteriorated during the unlawful detention, the jury should assess the *damages resulting from the taking and detention*—an element of which is the deterioration between the time of taking and the time of trial. (603). The Code remedy for the recovery of specific chattels is sometimes called an "Action of Claim and Delivery." Properly speaking, there is no such action. The remedy thus called is an action to recover the possession of personal property, and is in the nature of the actions of detinue and replevin under the common law practice. "Claim and Delivery of Personal Property" is an ancillary remedy, but not essential to the action. This ancillary remedy is peculiar to the Code practice. It gives to the main action something of the nature of the common-law action of replevin. "Claim and Delivery" of the property may be omitted and the action may be simply to recover the possession of the *specific* chattel—as in replevin or detinue; or to recover the *value* of the property—as in trover or trespass. In any case, Claim and Delivery is but ancillary to the main action. (605-607). It is only in extraordinary cases that equity will interpose in controversies concerning chattels: but equity will compel the restoration of chattels to the true owner where damages would be a mockery rather than justice—e. g. a faithful

family slave endeared by a long course of service or early association, or a rare piece of bric-a-brac, such as the silver altar piece remarkable for a Greek inscription and dedication to Hercules, or the like. (608).

SEC. 2. TROVER.—Trover is an action *for damages* for the *conversion* of chattels, and not for the specific recovery thereof. The defendant cannot force the plaintiff to accept the chattel in controversy; and so it is in actions in the nature of trover under the Code practice. To sustain trover, the plaintiff must establish both title and possession, or the right of possession. It is one of the characteristic distinctions between trover and trespass, that trespass may be maintained on possession; but trover *only on property and possession*, or right of possession. Trover is to personalty what ejectment is to realty—in both, *title* in the plaintiff is indispensable. Title may be presumed from possession, and such presumption will sustain trover without proof of title against all the world. Yet such presumption may be rebutted. If rebutted, the plaintiff's action fails. If the defendant prove *title* in a third person, the plaintiff's action fails notwithstanding his *possession*. It has been said that any bona fide possession will sustain the action against a mere wrong-doer. Where the plaintiff has a title founded simply upon a bona fide possession, the defendant cannot defend himself by showing that a third person—with whose title defendant does not connect himself—has a better title than the plaintiff. (609-611). "If there be a deprivation of property to the plaintiff, it will constitute a conversion though there be no acquisition of property to the defendant. If property be lost by a bailee, or stolen from him, or be destroyed by accident or by negligence, trover will not lie—trespass on the case being the proper remedy under such circumstances. To sustain trover, the defendant must have been an actor and have made an injurious conversion; or have done an actual wrong." (612). A conversion consists either in an appropriation of the chattel to the defendant's own use and beneficial enjoyment; or in its destruction; or in exercising dominion over it to the exclusion of the plaintiff or in defiance of his right; or in withholding the possession from the plaintiff under a claim of title inconsistent with his right. It is not every tortious act affecting the property of another that amounts to a conversion: thus, cutting down another's trees *without taking them away*, is a trespass, but it is no conversion. (613). The bare possession is sufficient to maintain an action of *trespass* against a wrong-doer, for the gist of that action is an injury to the possession; but in trover, the injury done by the trespass in taking is waived, and the plaintiff supposes he has *lost* his property, and therefore, alleges that the defendant *found* it and wrongfully converted it to his own use. The gist of the action is, not that the defendant *took possession* of the chattel after finding it, but that he wrongfully *converted it to his own use* after taking possession. The measure of damages is the value of the property converted. When the defendant satisfies the judgment in trover, he pays the value of the property, and the title is ipso facto vested in him by operation of law—consequently, except when the property is restored and the conversion was merely temporary, trover can never be maintained unless a satisfaction of the judgment will have the effect of vesting a good title in the defendant. But as to this last proposition the authorities conflict. (614). When there has been a conversion by a sale, the owner may maintain trover, or he may dispense with the wrong and suppose the sale made by his consent and bring an action for the money for which the property was sold, as money had and received to his use. But both of these remedies cannot be pursued in the same action. (617).

SEC. 3. TRESPASS VI ET ARMIS AND TRESPASS ON THE CASE FOR INJURIES TO PERSONAL PROPERTY. The distinction between injuries which will sustain an action of trespass vi et armis and those which will sustain an action on the case—between injuries immediate, and injuries consequential—is very subtle and attenuated. One of the most apt illustrations is thus stated: If A throw a log in the highway and it hits B, B's remedy is trespass vi et armis; but if C come along afterwards and

to injured from falling over the log, C's remedy is trespass on the case. (618). For every tortious act which injures another's property, the perpetrator is liable to the owner in damages to be recovered in trespass *et* *not* *action* or trespass on the case. If the trespass is committed on the property while it is in the possession of the owner, "trespass" is the proper remedy. If while in the possession of another as bailee,—the owner looking but a reversion—case is the proper remedy. Trespass *et* *not* *action* is usually abbreviated to "trespass," and trespass on the case, to "case." (619). Trespass will lie for a direct and violent injury *whether* inflicted by negligence or intentionally. Case also will lie for such an injury if imputed to carelessness, but not if the injury result from a wilful act. (620). An action on the case, on the "custom of the land," lies against innkeepers and common carriers. In this action, such persons are treated as insurers, and are liable,—except for the acts of God and the counties of the state,—without proof of negligence. In which respect this action differs from an ordinary action on the case against a bailee. A recovery in an action on the case may be had against an innkeeper, who is guilty of negligence, in many instances in which no recovery could be had in case "on the custom." For instance, one takes board at an inn under a special contract and his goods are lost; the innkeeper is not liable "on the custom;" but he is liable in a special action on the case if negligence be shown. Case "on the custom" is a remedy restricted to guests of an inn as distinguished from boarders who occupy it an inn under a special contract. "It is sometimes difficult to draw the line between guests and boarders. They frequently run into each other like light and shade." (620). The title of a deputy sheriff to property seized under execution, is a mere special property, it is true; but still his possession is sufficient to sustain trespass *d. b. a.* against a mere stranger. (622). For an injury to a mere reversionary right, *trespass d. b. a.* does not lie; because an actual possession or a right to dispossess possession must be shown. (623). If a bailee misuse the thing bailed, case lies. If the bailee refuse to surrender the thing bailed, or sell it, trover lies. If he destroy the thing bailed, then either trover or trespass will lie. If goods be lent, or delivered to another to keep, and he refuses to return them on demand, trespass does not lie, but trover is the proper remedy. (624). If one injure another's cattle "*with*" a dog, trespass lies; but if the injury be done by the dog, or other animal, without the owner's agency, though in his presence, case lies. "For it was owing to his not hanging the dog on the first notice," is the shibboleth of the bench in actions against owners of dogs for injuries caused by these interesting animals. (625). A special action on the case lies for the libel or slander of another's chattels, provided special damage be proven; but, in the absence of such proof, no action lies. "A tradesman offering goods for sale exposes himself to observations of this kind; and it is not by averring them to be false, scandalous, malicious, and defamatory, that the plaintiff can found a charge of libel upon them," or recover damages therefor, *unless he prove special damage.* (626). "Although there is but one form of action under the Code practice, whether the wrong complained of be one to be redressed, under the common-law practice, by Trespass, Trover, or Detinue, yet, even under the Code practice, the plaintiff's recovery will be governed, to an important extent, by the principles governing these common-law actions." (627).

CHAPTER VIII.

INJURIES TO RIGHTS GROWING OUT OF CONTRACT.—SEC. 1. ACTION OF COVENANT. Covenant lies only upon a sealed contract. If there be no seal, covenant will not lie though the contract contain the statement "signed, sealed, and delivered." It is a disputed point whether covenant or *assumpsit* lies against one who orally accepts a deed poll purporting to contain covenants to be performed by him. (628-630). Either *debt* or *covenant* will lie on a sealed instrument where the amount

due thereon is *ascertained and certain*—liquidated—by the terms of the instrument. So, in ancient times, of penal bonds—the plaintiff could sue in debt for the penalty, or in covenant for damages. (630). Although an infant may voluntarily bind himself an apprentice, yet neither at the common-law nor under 5 Eliz. c. 4, would covenant lie on the obligation of an infant for his apprenticeship—that is, no action at law lay against an infant, upon such obligation, for damages. (631).

SEC. 2. ACTION OF DEBT. The action of debt lay against principals only. It did not lie against sureties. Such was the law at a very early period when the action of debt was the form of action provided for all matters in controversy arising out of mere personal contracts. (632). It has been said that only the precise sum demanded could be recovered in an action of debt; but that is not correct. The rule is not that the plaintiff must recover the sum demanded or not at all; but that the proofs must agree with his allegations. The plaintiff may recover less. The exact sum demanded in the writ need not be found by the jury, when, from the nature of the demand, the amount is uncertain: but when the contract, as stated in the declaration, fixes the amount due, the verdict must agree with the writ, or judgment will be arrested. (634). Debt lies upon a penal bond. By the common-law, the obligor was forced to pay the whole penalty if he failed to comply with the condition at the time specified. This was remedied by 8 and 9 Will. 3. Prior to this act, the obligor had to resort to chancery to be relieved from the penalty upon payment of what was justly due. The statute remedies that evil by permitting no other recovery, at law even, than the actual damages sustained. There is a distinction, however, between the penalty in a bond to secure the performance of conditions, and a statutory penalty secured by bond. In the first case, damages only are recoverable; in the other, the whole penalty is recoverable. (636). It has been held that there is a difference between covenants in general and covenants secured by a penalty or forfeiture. In the latter case, the obligee has his election to bring either debt for the penalty and recover the penalty; or, if he does not choose this course, he may proceed upon the covenant and recover more or less than the penalty. But *can* the recovery exceed the penalty of the bond? This is a question upon which the authorities differ. It has been answered both in the affirmative and in the negative by able judges. (637–640). Debt lies for a penalty given by a statute; and upon the judgment, domestic or foreign, of a court of record or not of record. (640). Debt does not lie for money payable in installments, till the whole debt is due, unless the payment be secured by a penalty. The operation of this rule cannot prove injurious; for, if the contract be under seal, upon non-payment of the installments as they respectively become due, the party has his remedy by action of *covenant*; or, if by parol, by that of *assumpsit*. (642). Debt is preferable to *Covenant* or *Assumpsit* where the plaintiff has his election to adopt any one of the three—because judgment by default final may be entered in debt; whereas the judgment in the other two actions is usually required to be by default and inquiry. (644). Debt is the proper remedy on an official bond in which the state is the obligee. The action must be brought “*State ex rel.*” (645). Summary judgment, rendered without previous service of process or other notice, is a remedy allowed by the law of England and of this country to enforce official bonds and other liabilities of public officers where the recovery is the property of the government. (646).

SEC. 3. ACTION OF ASSUMPSIT. (a) *There Must Be a Contract, Either Express or Implied.* To support the action of *assumpsit* there must be a contract, though it may be either express or implied. If one perform services for another with the intention not to charge therefor, he can, nevertheless, recover the value of his services unless his intention not to charge was known to the other person; but if his good intentions were known to the person served, he cannot recover—for one cannot do an act of charity and afterwards charge for it. (648). A contract to pay for services may be inferred from the conduct of one benefited

thereby—as where he knows that another is working for him with the expectation of being paid for his services, and yet does not notify such man to desist, but accepts the benefit of his labor. (650). Using goods not ordered will subject one to assumpsit for their value. (651). Assumpsit lies for necessary services rendered to one who is insensible; or wholly incapable of taking care of himself at the time; or who is a *bona fide* owner. (653). Labor on a farm is more valuable in the spring and summer than in the winter. Therefore, it would be unjust to permit a farm hand, hired for a year, to labor through the winter months, quit without cause in the spring, and then recover his full monthly wages for the time served. It is well settled that where there is an express contract it must be declared on, and that *quantum meruit* or *valebat* will not lie unless performance of the contract has been prevented by the other party. But it is also said to be settled, that *quantum meruit* or *valebat* will lie on a parol contract which has been *fully performed* by the plaintiff, and that it is not necessary, in such case, to declare upon the special contract. (654-657). Assumpsit lies on an “account stated.” If an account be presented and no objection be made thereto within a reasonable time, assumpsit will lie for the amount of the account, without proof of the sale and delivery of the goods. (657). It is held by some courts that the whole extent of the doctrine of “waiving the tort and suing in assumpsit” is, that one whose goods have been taken from him or unlawfully detained, whereby he has a right to an action of trespass or trover, may, if the wrong-doer *sell the goods and receive the money*, waive the tort, affirm the sale, and bring assumpsit for “money had and received” for the proceeds. It is also said that no case can be shown in which assumpsit lay for goods sold if the goods were taken but *not sold* by the wrong-doer—except against the *executor* of a deceased wrong-doer. (658). It is said by other courts that, while assumpsit is not generally the appropriate remedy, yet, it sometimes lies for the value of goods obtained tortiously; and that there are many such cases in which the plaintiff may waive the tort and sue for goods sold, etc. “As the defendant cannot take advantage of his own wrong, the plaintiff may waive the tort when his goods have come *wrongfully into the defendant’s possession*, and sue for goods sold—treating the defendant, who has wrongfully possessed himself of the goods, as the purchaser.” (659). (b) *Money Had and Received*. Assumpsit for money had and received is “a kind of equitable action to recover back money which ought not in justice to be kept.” It is a very beneficial remedy, and, therefore, much encouraged. It lies only for money which *ex aequo et bono* the defendant ought to refund,—e. g. money paid by mistake; or upon a consideration which totally fails; or got through imposition, extortion, oppression, or undue advantage taken of the plaintiff’s situation, in violation of laws made for the protection of persons in his situation. The gist of this action is, that the defendant, under the circumstances of the case, is obliged by the ties of natural justice and equity to refund the money—in other words, the defendant has money which would burn a hole in an honest man’s pocket, and the law turns out the fire brigade to avert the impending evil. But there must be some *privity* existing between the parties in relation to the money sought to be recovered. This privity may be express or implied. It is express when the defendant has received the money as *agent* of the plaintiff; or where he *consents or agrees* to appropriate money in his hands, belonging to another, to the payment of the plaintiff at the owner’s request. It is implied in those cases only in which the defendant has received money *from* the plaintiff, or money *belonging* to the plaintiff, by mistake; or by means of fraud or duress practiced; or upon a consideration which has failed; or by tortiously converting the plaintiff’s property into money. In other words, the money sought to be recovered in this action upon an *implied* promise, must either be the identical money of the plaintiff of which the defendant has improperly possessed himself; or the proceeds of some property of the plaintiff; or money issuing out of some fund or emolument belonging to the plaintiff. (661-665). This action does not lie to

recover money received by one person, *under a claim of right*, which in law should have been paid to another. (665). Even if a tort be committed in obtaining money, the injured person has a right to waive such tort and sue for money had and received. Such an action is *ex contractu* and not *ex delicto*. E converso, when the breach of a contract involves a tort, the contract may be waived and an action be sustained for the tort. (666). (c) *Money Paid to Another's Use*. To sustain this action of assumpsit for money paid to defendant's use—that is, for “money paid, laid out, and expended” to another's use—there must have been a payment of money by the plaintiff to a third party at the *request* of the defendant and upon his *promise* to repay the amount. Both the request and the promise may be either express or implied. An *officious* payment of another's debt is not such a payment to his use as will support the action. If a purchaser of chattels pay off a lien thereon, such payment is not officious, because necessary to the protection of his title. A subsequent ratification or recognition of a payment is equivalent to a request. (668–669). (d) *Assumpsit for Goods Bargained and Sold, and for Goods Sold and Delivered*. The “Common Counts” are the counts in assumpsit: For money had and received; for money lent; for money paid to another's use; for goods sold and delivered; for goods bargained and sold, etc. Assumpsit for “Goods Sold and Delivered” lies for the price where goods have been *delivered* in consummation of a sale. Assumpsit for “Goods Bargained and Sold” lies for the price of goods sold, but *not delivered*. To maintain a count for goods sold and delivered, it is essential that the goods should have been delivered to the defendant or his agent, etc.; or that something equivalent to a delivery should have occurred. If goods be sold, but *not delivered*, the plaintiff will be non-suited if he has declared only for goods sold *and delivered*, even though the goods be packed in boxes, furnished by the purchaser, ready for delivery; for in such a case the declaration should have been for goods bargained and sold. Even the count for goods bargained and sold will fail when there has been no delivery, unless it appear that there has been a *complete sale and acceptance so as to vest the title* to the goods in the defendant. (669). Assumpsit for the price of goods sold and delivered lies whether the sale be for cash or on a credit. The only difference between a sale for cash and a credit sale is, that on a cash sale assumpsit may be brought at once, while on a credit sale it cannot be maintained until after the time of credit has expired. (671). Where it is agreed that a note or bill, payable at a future day, will be accepted for the price and the purchaser fails to give such note or bill, the seller cannot maintain assumpsit for goods sold and delivered until the time of credit has expired; but he can sue at once for damages for the breach of the contract of sale resulting from the failure to give the bill or note. In such an action he may recover, as damages, the whole value of the goods, unless, perhaps, there should be a rebate of interest during the stipulated credit. The only difference between suing at one time or the other consists in the form of the remedy. (672). A creditor whose demand against his debtor consists of an account of several items, either for goods sold or labor done at different times, may sue upon each item, or upon any number of items, or for the aggregate amount due, in one action or in several actions. As each item is a separate debt there is nothing to forbid a separate action on each item. However, if a plaintiff *wantonly or maliciously* bring a great number of actions on separate items which might have been consolidated into one action, the court will consolidate all of such actions into one, at the plaintiff's cost. If, however, the debt is an *entire* one, consisting of but one item, it cannot be divided and separate actions maintained upon each part. When separate actions are brought upon segregated items of an account, such a “performance” is called “splitting up” the account. (673). When a sale of goods constitutes only one transaction, although a multitude of separate articles may be included in the sale, and nothing appears to indicate that either party intended each item to constitute a separate transaction and cause of action, the account cannot be “split up.” (674).

If the seller tender to the purchaser a statement showing a balance struck, and claim that balance as a debt, the purchaser is held in law to admit the correctness of the balance and to impliedly promise to pay the same; unless he object to such statement within apt time. In the absence of such objection, the balance struck becomes a new and indivisible cause of action—it cannot be split up. (676).

SEC. 4. REMEDIES ON NEGOTIABLE INSTRUMENTS.—At common law indebitatus assumpsit was the sole remedy upon a negotiable instrument; and the plaintiff was obliged to prove the consideration of the instrument. The statute 4 Ann. c. 9, allows the plaintiff to declare in debt upon the instrument itself. Before the statute, the instrument was only evidence of the alleged assumpsit. After the statute, the declaration was in debt upon the instrument and the instrument itself was sufficient evidence to support the action without any further proof of the consideration; and in this respect alone did the statute effect the remedy. The statute does not take away the old remedy, but gives an additional remedy with leave to the plaintiff to pursue either, as he may elect. In *Indebitatus Assumpsit* upon a negotiable instrument, a recovery may be had upon either of several counts: Upon the instrument itself; for money paid, etc., to the defendant's use; for money lent or advanced; for money had and received to plaintiff's use. The action will lie by and against, not only the original parties to the instrument—such as maker and payee; but also by and against those secondarily connected therewith—such as indorser and indorsee. In all counts, and between all parties to the instrument, the instrument itself is presumptive evidence sufficient to sustain the action; but such presumption may be rebutted. Proof of a consideration is not essential; but if the defendant introduce testimony tending to show that the instrument was *nudum pactum*, the plaintiff must show a valid consideration. An action of Debt lies on all negotiable instruments against those *primarily* liable thereon, but not against those *secondarily* liable. (676-679). In actions on negotiable instruments, it is the practice to require the production of the instrument at the trial and to withhold judgment until the instrument is filed of record; but a failure to file the instrument at the trial will not invalidate the judgment—as the filing may be done subsequently *nunc pro tunc*. (679). The remedy on a lost bond, is in equity, because at law the obligor has a right to demand proferet of the bond, and, as no proferet can be made if the bond be lost, the remedy at law is gone. The courts of equity held on to this jurisdiction even after the law courts had dispensed with proferet. The jurisdiction in equity as to lost *negotiable* instruments arose from the right to require indemnity from liability on the paper sued on, in case such paper should afterwards turn up in the hands of another. Recovery may be had at law upon a lost instrument if such instrument be *not negotiable*. Under the Code practice, if it appear that the instrument sued on has not been destroyed, was negotiable, and cannot be produced, an indemnity may be required by the court. (680). In declaring upon an *unsealed* contract it is necessary to allege a consideration or the contract will appear to be *nudum pactum* and the declaration will, consequently, be insufficient. This rule of pleading does not apply to *negotiable* instruments. (681).

SEC. 5. PERFORMANCE OF CONDITIONS, WHEN IT MUST BE ALLEGED. As a general rule, if there be a condition precedent incorporated into an agreement, it is necessary to allege and prove its performance as a prerequisite to the plaintiff's recovery. If there be covenants to be performed by each party at the same time and the same place, such covenants are *dependent* and, to enable one of the parties to maintain an action against the other for a breach of the contract, the party who sues must show that he has performed, or offered to perform, his part; or that there is some legal excuse for his not having done so. But if the covenants be *independent*, such allegations and proof are unnecessary. (682-685).

SEC. 6. SUMMARY PROCEEDINGS TO COLLECT THE PURCHASE MONEY DUE

ON PROPERTY PURCHASED AT A JUDICIAL SALE. A purchaser at a judicial sale may be forced to complete his purchase by a summary order in the original cause; or an action at law may be maintained against him for the price. In some jurisdictions no separate action will be allowed. The modern practice of English courts is to order a resale of the premises at the cost of the purchaser and to hold him liable for the deficiency. Upon a judicial sale the purchaser may be put into possession by a writ of assistance; or he may recover possession by an action of ejectment. The only difference between judicial sales of chattels and those of realty, is, that the property in chattels passes by the sale; whereas on the sale of lands a deed is necessary to convey the title. The rights of the buyer are fixed in both instances, when the bid is accepted by the court by a confirmation of the sale. (685).

SEC. 7. ACTIONS OF DECEIT, AND OF DECEIT AND FALSE WARRANTY. It is said that an action on the case lies for false representations in the sale of property, whereby the vendee is defrauded and deceived, even though the vendor be not aware of the falsity of the representations which he makes. Such representations may be treated as warranties, and assumpsit brought thereon, if the vendee so elect. (690-693). Joinder of deceit and false warranty is permitted under the Code practice; and fraud and deceit and false warranty may be set up as a counterclaim where they grow out of the transaction which is the basis of the plaintiff's action. To sustain an action upon a *false warranty* it is not necessary to prove the scienter. If there be no warranty and the plaintiff relies upon the *deceit*, proof of the scienter is a *sine qua non*. (693). The law implies a warranty of *title* when chattels are sold; but as to the *quality* of the goods no warranty is implied. A mere affirmation as to quality does not amount to a warranty unless it be shown that it was so intended. The remedy on a warranty is *indebitatus assumpsit*; but if there be any fraud in the case, the buyer may bring an action of trespass on the case. Case, indeed, is the only remedy if there be no warranty of soundness. (693). In some jurisdictions it is held that the charge of a fraudulent intent, in an action of deceit, is sustained by proof of a statement made as of the party's own knowledge, which is false—provided the thing stated be not a mere matter of opinion, estimate, or judgment, but susceptible of actual knowledge; and that, in such cases, it is not necessary to make any further proof of an actual intent to deceive. The fraud consists in stating that the person knows a thing to exist when he does not know it to exist. If he does not know that it *does* exist, he must, ordinarily, be deemed to know that it *does not*. A mere belief of its existence will not excuse a statement of actual knowledge. (695). If an unsound chattel be sold, the purchaser must prove either a warranty of soundness or a deceit in order to maintain an action. In regard to a deceit, the distinction is: Where the unsoundness is *patent*,—that is such as cannot be discovered by the exercise of ordinary diligence—*mere silence* on the part of the vendor is not sufficient to establish the deceit, although he knows of the unsoundness—because the thing speaks for itself and it is the folly of the purchaser not to harken thereto. In such cases the scienter must be proven and there must be a false statement, or a resort to some trick to conceal the unsoundness or to prevent an examination. But where the unsoundness is *latent*,—that is, such as can not be discovered by the exercise of ordinary diligence—the *mere silence* of the vendor is sufficient to establish the deceit, provided he knows thereof. (697). There can be no recovery for a false statement alone. Damage also must be alleged and proved. (700). To sustain deceit by false representations three things are essential: The representation must be false; the party making it must know it to be false; the false representation must have induced the vendee to purchase. The measure of damages is the difference between the value of the chattel at the time of the purchase if sound, and its value if diseased at that time. It is immaterial what disposition the purchaser subsequently makes of the chattel—whether he works it off upon some one else and gets more than its value, or whether he gives it

away. (700). "Puffing one's wares"—i. e. expressions of commendation or of opinion, or extravagant statements as to value or prospects, or the like—is not regarded as fraudulent in law: but representations purporting to be statements of fact as distinguished from mere matters of opinion, and which are intended to be, and in fact are, accepted as facts, do not come within the exemption as to "puffing one's wares." A defrauded purchaser has a selection of remedies: He may rescind the trade and recover the price or such portion thereof as he has paid; or set up the fraud as a defense to the vendor's action for the price or such part of it as remains unpaid; or he may hold the vendor to the contract and sue him for damages sustained in consequence of the fraud. But in order to rescind, the purchaser, (1) must do so within a reasonable time after he discovers the fraud or could have done so by the exercise of due diligence; (2) he must disaffirm in toto; (3) he must be able to restore the price; (4) he must have done no act amounting to a ratification. (702). It has been said that no action has ever been maintained by a seller against the purchaser for a cheat brought about by the misrepresentations of the purchaser as to the value of the thing sold. But it has also been said that this doctrine does not go so far as to protect a vendee who knows that there is a gold mine on land he is seeking to purchase and who denies such knowledge when interrogated by the vendor with regard to the matter. (705).

SEC. 8. CONSPIRACY. One may maintain an action on the case against several for conspiring to do, and *actually doing*, some unlawful act to his damage. But no action lies for a *mere conspiracy* unattended with any consequent damage. "A simple conspiracy, however atrocious, unless it resulted in actual damage, never was the subject of a civil action." "An act which, if done by one alone, constitutes no ground of action on the case, cannot be made the ground of such action by alleging it to have been done by or through a conspiracy of several." It is frequently *criminal* for many to combine to effect even a *lawful* end; for it is doing a lawful thing by unlawful means. But that offense is to the *public*, and a private person cannot complain thereof unless it operates to his injury—that is to say, when *as to him* individually the object of the conspiracy is unlawful and its effect an injury. (707).

SEC. 9. INJUNCTION AGAINST BREACH OF CONTRACT. If one sell his business and good will, he may lawfully contract not to engage in the same business in competition with that which he has sold. Such contract is in partial restraint of trade, it is true, but it is one which has been recognized as not inimical to public policy. The remedy of the purchaser and covenantee in such cases is an injunction forbidding the seller to engage in business in violation of his covenant. Contracts of this sort must be no more extensive than is *reasonably* required to protect the purchaser in the enjoyment of the business purchased. (710). Equity will *negatively enforce* the performance of certain contracts of service by enjoining their breach: but their performance positively, by decree of specific performance, is beyond the power of the courts to enforce. (712).

SEC. 10. "BREACH OF PROMISE." Whatever doubts may exist as to the antiquity of the remedy, it has been settled for a long time that an action lies to recover damages for the breach of a contract to marry. (714). Such an action is commonly called an action for "Breach of Promise," and its usual denouement is termed by the elder Mr. Weller a "Conviction o' Breach."

CHAPTER IX.

REMEDIES IN SPECIAL CASES.—SEC. 1. BILLS OF ADVICE TO A FIDUCIARY. When a fiduciary is in doubt as to what course he should pursue in a matter requiring his *immediate* action, he may avoid the evil consequences of error by filing a bill in equity to obtain the advice of the court. The court will advise him, and such advice will be a complete protection and *res judicata* as to all who are parties to the suit.

(716). The courts will not give advice upon such applications except when their *present* action is necessary for the protection of the plaintiff—they will not give an abstract opinion, or leap before coming to the hedge. (718).

SEC. 2. CAVEAT TO THE PROBATE OF A WILL. The proceeding to probate a will, or to oppose or set aside such probate, is not like an ordinary action or special proceeding to which there are regular parties plaintiff and defendant; nor is the purpose of it to litigate a cause which the plaintiff may abandon by suffering a nonsuit, or otherwise. It is a proceeding in rem to which, strictly speaking, there are no parties; and its chief purpose is not to settle the conflicting claims of those claiming under or against the will, but to ascertain whether the supposed testator died testate or intestate; and, if he died testate, whether or not the script propounded, or any part thereof, be his will. Any person before the court may withdraw from the proceeding upon payment of his proportion of the costs; but in that case the script is still left with the court to be disposed of according to law. The persons before the court cannot control or direct the proceedings; that is the sole province of the court. (720). Persons upon whom a notice "to see proceedings" is served, are bound by the proceedings. It is true they may not be actors in the cause, but unless they do something to preclude themselves, they may become active at any time before the judgment is pronounced—for until that is done, any person interested is entitled to be heard for or against the script. The proceeding being in rem, any one may intervene to protect his interest while the thing continues sub judice. (721). When two wills are propounded—the propounders of the one being caveators of the other—the issues as to both scripts may be tried in one proceeding. (722). The status of the executor while caveat proceedings are pending is a matter usually regulated by statute or local practice. (725).

SEC. 3. PARTITION. At common law, partition was effected through the courts by the writ of partition, which has become obsolete. The more usual mode of enforcing partition in England came to be by resort to the courts of equity. In this country it is usually effected by proceedings prescribed by statute, or by the courts of equity or those exercising equity jurisdiction. In the absence of a statute, it would seem that courts of equity have no power to decree a *sale* for partition. Where such a power is conferred, it must be exercised reluctantly, and a sale will be ordered only when it is *necessary* to effect an equitable division. (726–732). Where a designated number of acres of a tract of land is conveyed to one and the residue of the land is given to another,—as eighty acres to be cut off of the north end of a tract—the owners are called "tenants in common with a partial division." As it is necessary that the dividing line be established between them, this will be done by the courts in a proceeding for partition. (732). In this country, lands held for partnership purposes are deemed converted into personalty only to the extent necessary to pay the partnership debts and adjust the partnership accounts. All lands remaining after the debts are paid and accounts adjusted may be divided by partition proceedings. Formerly the same rule held in England, but of late the English courts hold that partnership lands are absolutely converted into personalty and devolve as such on dissolution of the firm. (734). Caveat emptor applies to sales—and not to partition. In sales of realty no warranty is implied. In sales of chattels warranty of title, but not of soundness, is implied. In partition of realty a warranty of title is implied. In partition of chattels a warranty of both title and soundness is implied. If, through mistake, a parcel of land or a chattel be allotted to one of the parties at a valuation based upon an erroneous impression as to the number of acres of land or soundness of the chattel, such party can obtain compensation from the others, in money. In adjusting such matters, the property is valued as of the time of partition; and that value, plus interest to the time of contribution, is the amount the injured party is entitled to receive—less his share of the incidental loss. The jurisdiction for parti-

tion of chattels is in equity. (736). Land is not to be divided so as to give each tenant a share in every parcel of the common property: but it must be so divided that each shall receive an equal share, in value, of the whole. In order to bring about such a result, charges may be made upon allotments of greater value in favor of those of inferior value. Such charges are called *owelty*. (738). The peculiarities of a partition in equity are: (1) That such part of the land as may be more advantageous to a party on account of its proximity to his other land, or for any other reason, will be directed to be set off to him if that can be done without injury to the others; (2) that when the lands are in several parcels, each party will not be given a share of each parcel, but only his equal share of the whole; (3) that where a partition exactly equal cannot be made without injury, a gross sum or a yearly rent may be charged upon the allotments of greater value in favor of the shares of inferior value, as *owelty*; (4) that where one tenant has improved the common property, he shall receive compensation for such improvements—either by having the improved part allotted to him at its value before improvement, or by compensation decreed to be made for his improvements. A tenant in common who has made improvements is entitled to a partition in equity, only when the improvements were made honestly for the purpose of improving the property, and not for embarrassing his co-tenants, or encumbering their estate, or hindering partition. If it appear that the premises cannot be otherwise fairly divided, a sale must be ordered and a proper allowance made out of the proceeds for the value of the improvements put upon the premises. (739). Whatever may have been the old practice, under the present practice the procedure for enforcing *owelty* charges is by a writ of *ven. ex.* issued upon a motion in the cause. Such method should always be observed, except in cases involving complicated litigation. (742). It is well settled, that equity has exclusive jurisdiction of the partition of chattels, even though the defendant denies the plaintiff's title. The entire absence of any remedy at law for the partition of chattels induced courts of equity to assume jurisdiction in such cases. "At what time and under what circumstances this jurisdiction was first assumed, we are unable to state; but that it exists and is exercised by the courts of chancery both in England and the United States, is undisputed." The matter is now generally regulated by statute. (743).

SEC. 4. SALE OF REAL ESTATE AND CHATTELS BELONGING TO INFANTS.—Whatever may be the doctrine of the English court of chancery, or whatever contrariety of opinion may prevail in the different states, as to the jurisdiction in equity to decree a sale of an infant's land, such jurisdiction exists in Alabama. It rests upon the power and duty of the courts of equity to protect infants—to preserve their estates while they are under disability. Reversions and remainders belonging to infants may be thus sold, though the courts act reluctantly and cautiously in such cases. A sale of an infant's realty will be decreed when such sale is necessary for the maintenance and education of the infant or to conserve his interests. The reasons controlling the English court of chancery for repudiating jurisdiction in such cases seem to have been, that on the death of the infant, the course of descent would be interrupted by a sale, and if converted into money the infant could bequeath it during his minority. These reasons subordinate the interest of the infant to that of his heirs; while, in Alabama at least, the court looks only to the care, protection, and advantage of the infant. In some states this matter is regulated by statute. When not so regulated, the ruling of the Alabama court would seem to be the proper one to follow. (744–749).

SEC. 5. INQUISITIONS OF LUNACY.—The custody of the lands of natural fools (idiots) was turned over to the King, by 17 Edw. 2. with a right to take the profits, and the duty to provide for the idiot. Upon the idiot's death the lands went to his heirs. By the same statute the King was made trustee of the lands of lunatics, but without any beneficial interest in such lands. The method of procedure for taking charge of

an idiot's or lunatic's land was a writ to the escheator or sheriff of the county wherein such idiot or lunatic resided. The object of the writ was to ascertain by judicial investigation whether or not the person proceeded against was an idiot or lunatic; for the King's right to the control of such persons and their estates did not commence until office found. Subsequently, authority was given to the Chancellor to issue the writ or commission to inquire as to the fact of idiocy or lunacy, and the method of procedure was by petition suggesting the lunacy, etc. Thus the law came to us from England; and after the Revolution the care and custody of persons of unsound mind and the control of their estates became vested in the people, who have left it to the courts of equity or have regulated it by statute. The *modus operandi* is an inquisition of lunacy, which is an essential step preliminary to assuming control of the person and estate of a non compos. It is a judicial determination that the person proceeded against is one of that class whose care and custody has been delegated to the courts. Although it involves the loss or suspension of civil rights over person and property, it acts only upon the status of the individual. The whole world is bound by the inquisition. The law is set in motion by information, of a more or less formal character, filed with the court by some one who assumes to act in the matter but who does not thereby become a *party* to the proceeding, and who derives no direct benefit therefrom—the advantage to him, if any, is only such as would result if any other person had first acted in the matter. (749). The jurisdiction over the persons and estates of lunatics, etc., which was vested in the Chancellor, is exercised, under the Code practice, by such courts as the statutes designate. The same general principles which prevailed in chancery are retained. The fact of lunacy, etc., must be ascertained judicially before a court can deprive the lunatic of the custody of his estate or submit his person to the control of a committee. The person proceeded against must have legal notice of the proceeding, which notice, as a general rule, must be personally served; though where the insanity is of such an aggravated type as to render personal service harmful or useless, it may be dispensed with. "No precaution should be omitted which may apprise the party of the proposed action and enable him to appear and defend." (754).

SEC. 6. SALE OF REAL ESTATE BY THE PERSONAL REPRESENTATIVE TO MAKE ASSETS FOR THE PAYMENT OF THE DEBTS OF A DECEDENT.—The practice in proceedings for the sale of real estate by a personal representative, to make assets for the payment of a decedent's debts, is regulated by statute in the several states. The cases selected are deemed sufficient to present all important points which usually arise in such proceedings. (757-767).

SEC. 7. CREDITORS' BILLS.—Creditors' bills are of two kinds, General Creditors' bills and Judgment Creditors' bills. General Creditors' bills are for the purpose of winding up the insolvent estates of deceased persons, the affairs of a corporation, and the like. In such cases there are many persons standing in the same situation as to their respective rights in, or claims upon, a particular estate or fund, and the rights of one cannot be determined until the rights of all are settled or ascertained. Of this nature, also, are bills brought to enforce trusts or assignments for creditors, and other instances in which there is a community of interest, or in which the law imposes upon the courts the duty of taking a fund into custody and distributing it according to the respective interests of the parties. In such bills no priority can be acquired by the one who institutes the proceeding or who makes himself a party before others come in. Judgment Creditors' bills are instituted by one or more creditors against a living debtor. Here the field is open to all, and he who institutes the proceeding secures a priority as the reward of his diligence. Such bills are in the nature of an equitable *fi. fa.*, and are entertained in equity for the purpose of subjecting equitable and other interests which cannot be reached and sold under execution at law; and also for removing obstructions to legal remedies, as by setting aside fraudulent conveyances, and the like. When thus used, it

is necessary, under the equity practice, that the creditor should first obtain judgment at law, and that he show that an execution proved ineffectual. This is dispensed with under the Code practice. (767). The rule of the Federal courts of equity is this: "When it is sought by equitable process to reach equitable interests of a debtor, the bill, unless otherwise provided by statute, must set forth a judgment in the jurisdiction where the suit in equity is brought, the issuing of an execution thereon, and its return unsatisfied; or must contain allegations showing that it is impossible to obtain such a judgment in any court within such jurisdiction." This ruling is not affected by the practice of the courts of the state in which the federal court is held—for the equity jurisdiction and practice of the federal courts must remain distinct from their legal jurisdiction and practice. (771). "The court will generally, at the hearing, allow a bill, which has been originally filed by one individual of a numerous class, in his own right, to be so amended as to convert it into a creditors' bill." The filing of a creditors' bill stops the running of the statute of limitations as to all creditors who subsequently make themselves parties and prove their claims. As long as any assets remain undistributed, any creditor is at liberty to come in, prove his claim, and participate in the assets—not disturbing any former dividend: but no one can share in the assets unless and until he makes himself a party to the proceeding and proves his claim. Any creditor who makes himself a party has the right to contest the validity of the claim of any other creditor except that of the plaintiff whose claim is the foundation of the decree. (772). Although the language of the decree be, that those who do not come in as parties by a given time shall be excluded from participating in the fund, yet the practice is to permit a creditor to come in as a party to the proceeding and participate in the fund as long as there happens to be any fraction of the fund in the hands of the court. (775).

SEC. 8. REMEDY OF CREDITORS UNDER 13 ELIZABETH.—Where courts of law and equity are separate, a creditor has his election: (1) To reduce his debt to judgment and sell the property fraudulently conveyed, under execution. If he purchase at such sale, he may bring ejectment and test the validity of the alleged fraudulent conveyance; (2) he may file a bill in equity attacking the alleged fraudulent conveyance, and have a decree for the sale of the property should the fraud be adjudged. If the creditor proceeds at law and purchases the property of the debtor under execution, a court of equity will not entertain a bill, by either the purchaser or the alleged fraudulent donee, to pass upon the validity of the alleged fraudulent conveyance on the idea of removing a cloud from the title. So it is under the Code practice, where the courts exercise both legal and equitable jurisdiction. But some courts hold that one who purchases land under execution may go into equity to attack the title of his debtor's fraudulent donee. In cases where the legal title to the property is such that it cannot be seized under execution, resort to a court of equity is necessary—as where the legal title never has been in the debtor, having been conveyed to another in secret trust for the debtor, with the fraudulent intent to screen it from his creditors. (777-780). Some courts hold that, in the absence of a statute, an administrator cannot maintain an action for setting aside a transfer of chattels made by his intestate with intent to defraud creditors. In such cases the defrauded creditors must themselves proceed against the fraudulent transferee as executor de son tort. Other courts permit the administrator to attack the fraudulent transfers of the decedent. (780).

CHAPTER X.

EXTRAORDINARY REMEDIES.—SEC. 1. HABEAS CORPUS.—This remedy has been sufficiently treated in Chap. 5, § 8, a; Chap. 6, § 1, a, and § 2, a.

SEC. 2. PROHIBITION.—A writ of prohibition issues from the highest common-law courts, and is the proper remedy to restrain a tribunal of

peculiar, limited, or inferior jurisdiction from taking judicial cognizance of a case not within its jurisdiction. The writ is properly sued out in the name of the crown or the state; the only necessary defendant is the tribunal whose proceedings are sought to be restrained, controlled, or quashed; and there is no class of cases in which the authority to issue the writ is better established than those in which courts martial, ecclesiastical courts, or inferior common-law courts assume to take cognizance of criminal prosecutions over which they have no jurisdiction. (783). The writ of prohibition is the converse of mandamus—it *prohibits* action, while mandamus *compels* it. It differs from an injunction in that it issues to a *court* to prevent it from proceeding in a matter, while an injunction issues to a *person* forbidding him to do some act. The writ of prohibition does not lie for grievances which may be redressed, in the ordinary course of judicial proceedings, by appeal, or by recordari or certiorari as substitutes for an appeal. Nor is it a writ of right granted ex debito justitiæ, like habeas corpus; but it is to be granted or withheld according to the circumstances of each particular case. Being a prerogative writ, it is to be used, like all such, with great caution and forbearance, to prevent usurpation and to secure regularity in judicial proceedings, where none of the ordinary legal remedies will afford the desired relief. The writ does not issue to restrain ministerial acts, but to restrain judicial action where such action would be a usurpation not to be adequately remedied by an appeal. The usual course is to issue a notice to the lower court to show cause why the writ should not issue, and to order a stay of proceedings in the meantime. It is never used as a remedy for acts already done, but only to prohibit the commission of an act threatened, or the continued prosecution of a pending proceeding. (785).

SEC. 3. MANDAMUS.—A mandamus was formerly a prerogative writ, but in modern times it rises no higher than an extraordinary remedy, (and in some jurisdictions it has sunk to the low level of an ordinary remedy (see p. 801, near top)). It was introduced to prevent disorder from a failure of justice and a defect of police. Therefore it ought to be used upon all occasions where the law has established no specific remedy though one is needed. If there be a right and no other specific remedy lies, the writ should issue. Writs of mandamus have been granted to admit lecturers, clerks, sextons, scavengers, etc.; to restore an alderman to precedence, an attorney to practice in an inferior court, and to permit one so entitled "to preach in a meeting-house appointed for the religious worship of protestant dissenters commonly called Presbyterians;" and, if no one be so entitled, to force the congregation, stewards, elders, deacons, vestrymen, or whoever possesses the authority so to do, to elect some one to fill the pulpit—for "should the court deny this remedy, the congregation may be tempted to resist violence with force, and a dispute 'who shall preach Christian charity,' may raise implacable feuds and animosities in breach of the public peace, in the reproach of the government, and to the scandal of religion," says Lord Mansfield. (787). There may be found isolated expressions to the effect that this writ will lie only where there is a positive *statutory* duty and an *entire absence* of any other remedy: but these expressions are not a correct statement of the law, for where there is a clear right and no other adequate specific remedy at law exists, the writ should issue. It is the *adequacy*, and not the mere *absence* of all other legal remedies, and the danger of the failure of justice without it, that must usually determine the propriety of the writ—for where none but specific relief will do justice, such relief should be granted if practicable. (790). The writ will issue from a superior to an inferior court commanding it to proceed to judgment of *some kind*, but not to command *what* judgment it shall render. The discretion of a judge as to what judgment he shall render cannot be controlled by a mandamus; but if he declines to exercise his discretion or to act at all, when it is his duty to do so, the writ will issue to compel him to act. (792). The usual course in mandamus proceedings is to first pass upon the *right* involved and, if it

of the same kind. The equity of the plaintiff in such cases arose from the protracted litigation which the action of ejectment permitted. In that action, a change in the date of the alleged demise being sufficient to support a new action, the party in possession, though successful in every instance, might be harassed and vexed, if not ruined, by a litigation constantly renewed by some land-grabbing Antaeus. Bills of peace of this second class are commonly called bills to "Remove a Cloud on Title," or to "Quiet Title," or to "Quiet the Possession," to real property. "A bill *Quia Timet* is generally brought to prevent future litigation by removing existing causes of controversy." (821). Any court of record has the power, whenever several actions are pending by the same plaintiff against the same defendant for causes of action which may be joined, to order the several actions to be consolidated into one. The prosecution of a multitude of actions at law, all of which depend, for their determination, upon the same facts and legal principles, is onerous and oppressive, and will be enjoined in equity. (824). The relief against vexatious litigation afforded by the courts of equity, may be obtained, under the Code practice, by a motion in the cause for an injunction, as for a consolidation of pending actions. (826).

SEC. 7. BILLS OF INTERPLEADER.—A bill of interpleader is for the protection of a person from whom several claim, legally or equitably, the same debt, thing, or duty; but who has incurred *no independent liability* to any of them, and who *does not himself claim any interest* in the matter. That the party seeking relief has incurred no independent liability to either claimant, is a *sine qua non*; and so is the further proposition, that the claims with which the plaintiff is threatened must be such as antagonize and negative each other. But if several *antagonistic* claims be asserted to the same fund the remedy lies. (828). The material allegations of the bill are: (1) That two or more persons have each preferred a claim against the complainant; (2) that they claim the same thing; (3) that the complainant has no beneficial interest in the thing claimed; and (4) that he cannot determine, without hazard to himself, to which of the defendants the thing belongs. There should be annexed to the bill an affidavit that there is no collusion between the complainant and any of the parties. The thing claimed should be brought into court that the complainant may reap no benefit from the delay incident to filing the bill. This remedy is given in order to protect a person against a double liability, or, to speak more accurately, against a double vexation on account of one liability. While the early authorities were very exacting upon the subject of privity in such cases, many of the later cases have been less rigid and some have ignored it altogether. The doctrine of privity seems to have been abrogated as to such cases, partly by statute and partly by judicial decisions; and the Code practice does not seem to recognize it. (828).

SEC. 8. CERTIORARI.—In the old English law, the writ of certiorari was used to bring up an indictment from an inferior court into the King's Bench for trial; or to have the judgment of an inferior magistrate, not proceeding according to the course of the common law, reviewed. In neither instance did a second trial of the facts take place. In this country the writ may be used as a writ of false judgment, merely to have the matter of law reviewed; but it is also used to afford a means of retrying the facts—a use unknown to the English law. In proper cases, the writ is used as a substitute for an appeal when a party has been improperly deprived of his appeal, or has lost his appeal by accident or excusable neglect. (832). The writ is *in the nature of* a writ of error and is resorted to in those cases in which a writ of error does not lie. When courts act in a summary way, or in a new course different from that of the common law, a certiorari, and not a writ of error, is the proper remedy. The only legitimate use of a certiorari is to bring up, for review, the *final* decision of an inferior court. If parties were permitted to procure the writ at any time during the progress of a cause, it would lead to intolerable interruptions and delays. (833). The writs of recordari and certiorari are used most commonly as sub-

stitutes for an appeal, where the appellant has lost or been improperly deprived of his appeal without default or negligence on his part. The recordari may be also used as a writ of false judgment; and the certiorari as a writ of error. When thus used, only the form and sufficiency of the proceedings of the lower court, as such proceedings appear upon the face of the record, can be passed upon by the appellate court which issues the writ. The writ of recordari is issued only to an inferior tribunal whose proceedings are not recorded—to a court not of record. The writ of certiorari issues to a court of record. (835). Certiorari will issue to a lower court, from an appellate court of general supervisory jurisdiction, in cases in which no appeal is provided for by law. (836). A certiorari always issues, as a matter of course, from an appellate court upon a "suggestion of a diminution of the record;" and the court will *ex mero motu* order the writ where there is an apparent diminution of the record in a criminal case. (838). The writ will not issue to a judge to command him to correct, change, or certify a "case on appeal," unless it appear by a written statement from the judge that he will make the correction, etc., which the applicant for the writ desires to have made. (838).

SEC. 9. RECORDARI.—At common law the writ of recordari served a double purpose, (1) as a substitute for an appeal lost without default of the petitioner; (2) as a writ of false judgment where the inferior tribunal had acted beyond its jurisdiction, or the judgment was taken without service of process. The practice is now generally regulated by statute.

SEC. 10. SCIRE FACIAS—SCI. FA.—This is a judicial writ founded on some matter of record, as a recognizance, etc.: nevertheless it is so far treated as an original action to which the defendant may plead, that it must contain upon its face a legal cause of action. (841). There were two forms and purposes of the writ at common law: (1) One used to remedy defects in, or as a continuation of, some former or pending action; (2) another, in the nature of an original writ, used to commence some proceeding. Formerly a *sci. fa.* of the first class was used to obtain an execution on a dormant judgment; to prevent the abatement of an action; and to remedy defects arising from a change of parties, etc. Writs of the second class were used to repeal letters patent; to subject bail; to enforce an amercement against a sheriff, etc. These matters are now generally regulated by statute. (843).

CHAPTER XI.

ANCILLARY REMEDIES.—INTRODUCTORY. All ancillary remedies are based upon an affidavit filed in the cause; and while the contents of the affidavit will vary according to the particular remedy sought, still there is one rule common to all such affidavits, to wit, that when the grounds upon which the remedy is sought consist of matters suspected or anticipated, as distinguished from facts which actually exist, the affidavit must set forth all the facts and circumstances which constitute the basis of the plaintiff's conjecture or inference that the defendant is about to do certain things. This is required in order that the court may draw its own conclusions from the facts and circumstances disclosed, and be guided by its own deductions, and not by those of an interested plaintiff. (845).

SEC. 1. ARREST AND BAIL. A constitutional provision prohibiting imprisonment for debt except in cases of fraud, has no application to actions for pure torts. (846). In an application for an order of arrest, the plaintiff should state, in an affidavit, such facts as clearly disclose a cause of action for which the defendant may be lawfully arrested. These facts should be set forth with such fullness and legal precision as to enable the court to clearly see the particular cause of action intended. The court should find the facts from the plaintiff's affidavit. A party should not be arrested upon conjecture, nor upon facts which

leave the mind of the court in doubt and uncertainty. The affidavit should state the facts positively, when this can be done; but if it is founded upon the information and belief of the affiant, the grounds of such belief must be set forth, so that the court can see and judge of their character and sufficiency. The defendant may at any time before judgment move to vacate the order of arrest, upon the ground that it was irregularly granted, or that the evidence and the facts found were insufficient to justify it. In such case the plaintiff cannot be allowed to offer additional evidence to support his motion theretofore improperly granted. But the defendant may support his motion by producing counter-affidavits and other appropriate evidence to prove that the plaintiff's motion for the order of arrest was not well or sufficiently founded. In this case, the plaintiff may produce additional affidavits and other pertinent evidence to cure defects and strengthen his case. The court will direct that the order remain undisturbed, that it be modified in some particular, or vacated, accordingly as it may be of opinion one way or the other. The order, regularly and properly granted, should not be vacated but upon convincing proof that it should be. (846). Whether or not the defendant can be arrested and imprisoned under an execution issued upon a judgment founded on a tort—where no ancillary order of arrest has been sued out—is a matter of local statutes and practice. (848).

SEC. 2. CLAIM AND DELIVERY. This is an ancillary remedy incident to the action under the Code practice to recover the possession of chattels—which action practically corresponds to the old actions of detinue and replevin. If the plaintiff be content to let the chattel continue in defendant's possession pending the action, there is no need for his suing out this ancillary remedy of claim and delivery. This action is then, in effect, the old action of detinue. It is only when the plaintiff seeks to have the property delivered to him instantler and to have the possession pending the action, as in the old action of replevin, that he need sue out this ancillary remedy. (850).

SEC. 3. INJUNCTION. It is a mistaken notion that seems to prevail extensively, that relief by injunction may be had in almost any case, and as a matter of convenience, under the Code method of procedure. On the contrary, it is only to be granted when and where adequate relief cannot be had without it. It is extraordinary and provisional in its nature and purpose.

SEC. 4. ATTACHMENT. The process of attachment, as it existed under the common law, differed in its nature and object from the provisional remedy now known by that name. Its original purpose was to acquire jurisdiction of the defendant by compelling him to appear in court through the seizure of his property, which he forfeited if he did not appear or furnish sureties for his appearance. The practice of attaching the effects of a defendant and holding them to satisfy a judgment, which the plaintiff may recover, when, perhaps, judgment may be for the defendant, is unknown to the common law, and is founded on statute law. Its present purpose is not to compel appearance by the debtor, but to secure the debt or claim of the creditor. It is a proceeding *in rem*, and the process may issue, in certain cases, whether the defendant has been served with a summons or not, although inability to serve through the fault of the defendant, is a ground upon which the warrant may be granted. It exists, as a provisional remedy, only when authorized by statute, and, as such, is comparatively recent in its origin. Under the Code practice the remedy is not only created by statute but has substantially none of the features peculiar to the common-law remedy. This remedy is looked upon with jealousy by some courts and hence we find such expressions as the following: It amounts to the involuntary dispossession of the owner prior to any adjudication to determine the rights of the parties. It violates every principle of proprietary right held sacred by the common law. It is, to some extent, equivalent to execution in advance of trial and judgment. Owing to its statutory origin and harsh nature, laws conferring this remedy should be con-

strued, in accordance with the general rule applicable to statutes in derogation of the common law, strictly in favor of those against whom it may be employed.

"Foreign attachment" is a peculiar proceeding to compel the appearance of a debtor by seizing his property, and, in default of appearance, appropriating it to the payment of the debt. It is strictly a proceeding in rem. With respect to the property attached, whether it be real or personal, or a debt due the defendant, the judgment and proceedings are conclusive. If the court had jurisdiction, the judgment is conclusive, and cannot be called in question for mere irregularities. But except with respect to the property attached, the proceeding has no effect. No action can be brought on the judgment recovered, and in an action on the original demand a judgment in attachment is not competent as prima facie evidence of the indebtedness. The proceeding in attachment had its origin in the custom of London, and has been adopted and modified by statutory provisions. One of the peculiarities of the proceeding by attachment is, that the defendant may appear during the pendency of the suit and contest the plaintiff's demand, or, within the time limited after judgment, may dispute the debt for which the attachment issued. Both these remedies are given in the alternative. The defendant has his election to pursue either. If he appears to the suit, he makes the judgment, if any be recovered, a judgment in personam. He is under no obligation to give the plaintiff that advantage. He may leave the plaintiff to prosecute his proceedings in rem, and avail himself of the right which the law gives him of recovering back the proceeds realized, if the debt be not due. (852-854). The practice in granting, vacating, and levying attachments, and with regard to serving notice on the defendant by publication or otherwise, is regulated by statute in the different states. By act of Congress (U. S. Comp. St. 1901, p. 3517) it is provided that no attachment shall be brought against a national bank in any state court, and this has been held to be the law, not only as to state courts, but also as to United States courts. (859).

In *Pennoyer v. Neff* it is ruled that a judgment recovered in attachment proceedings in which there is no personal service of process is exhausted by a sale of the property attached and the appropriation of the proceeds to the creditor's debt, and possesses no other legal force. The sale of other land of the debtor under such judgment was held to pass no title to the plaintiff. Other courts have held that a proceeding commenced by original attachment and prosecuted, on due notice by publication of the seizure of the debtor's property, to final judgment, was not a proceeding in rem, but the judgment is personal. The attachment was, in its nature and operated as, a distress to compel appearance; and if it did not, the judgment was as absolute and conclusive as if rendered after personal service. The attachment under the Code is of quite a different nature, and subsidiary only towards obtaining the relief which is the object of the action, and seems to be intended to be more comprehensive and more fully remedial within the state than is admitted in the opinion in *Pennoyer v. Neff*. As to the extra-territorial effect of such a judgment, it can be only recognized as effectual so far as it appropriates the debtor's property to the creditor's demand, and is wholly inoperative beyond that limit. (860).

SEC. 5. RECEIVERS AND SEQUESTRATION. *NE EXEAT.* The original and primary jurisdiction of the court of chancery was in personam merely. The writ of assistance to deliver possession, and even the sequestration of property to compel performance of a decree, are of comparatively recent origin. The jurisdiction of the court was exercised for several centuries by the simple proceeding of an attachment against the bodies of the parties to compel obedience to its orders and decrees.

A receiver is the representative of the court, and may, by its direction take into his possession every kind of property which may be taken in execution, and also that which is equitable, if of a nature to be reduced to possession. He is an indifferent person between parties, appointed by the court to receive rents, issues, or profits of land, or other thing in

question in the court, pending the suit, where it does not seem reasonable to the court that either party should do it. He is an officer of the court; his appointment is provisional. He is appointed in behalf of all parties, and not of the complainant or the defendant only. He is appointed for the benefit of all parties who may establish rights in the cause. The money in his hands is in custodia legis for whoever can make out a title to it. It is the court itself which has the care of the property in dispute. The receiver is but the creature of the court; he has no powers except such as are conferred upon him by the order of his appointment and the course and practice of the court. A receiver being an officer of the court, the court has control over the parties to a suit and can order them to deliver property in controversy to its officer, and if they fail or refuse to obey such order, they may be proceeded against by process of contempt. In the absence of a statute or local ruling, a receiver appointed in one jurisdiction can bring no action in any other jurisdiction. In fact, he cannot commence an action for the recovery of outstanding property without an order of the court; and when such order is made, the action must be brought in the name of the legal owner, who will be compelled to allow the use of his name upon being properly indemnified out of the estate and effects under the control of the court. The practice of the court of chancery in England on this subject is well settled by many authorities, has long been the course and practice of our courts, and has not been materially changed by the Code. In New York, in matters of this kind the common law powers of receivers have been greatly enlarged by statute, and they may bring an action in their own names for the recovery of property which they have been directed by an order of the court to reduce into possession. Foreign receivers may sue in the courts of North Carolina, by comity. (861-863). When money is alone the demand, the common law security is the person of the debtor, nor will equity go farther; but when property is in contest, chancery will, in cases where the circumstances authorize its interference, and where its aid is invoked, secure the property itself during the existence of the controversy. Thus, in cases of waste, the common law gave the writ of waste, and, to aid and secure to the plaintiff the full benefit of the process, the writ of estrepement, to stay the further injuring of the property during the contest, was awarded. The writ of waste, both in England and in this country, from its peculiar features, has become obsolete, and has been succeeded by the more convenient and less cumbrous "action on the case in the nature of waste." With the old writ fell that of the estrepement, and the power of the court of equity was called in to supply its place, in aid of the more modern action on the case, and in analogy to the writ of estrepement. Equity, when it interferes, will secure the property in contest during the litigation. Where there is reason to apprehend that the subject of a controversy in equity will be destroyed, removed, or otherwise disposed of by the defendant, pending the suit, so that the complainant may lose the fruit of his recovery, or be hindered and delayed in obtaining it, the court, in aid of the primary equity, will secure the fund by the writ of sequestration, or by the writs of sequestration and injunction, until the main equity is adjudicated at the hearing of the cause. These writs are extraordinary process, and to sustain them, on a motion to dissolve the injunction and remove the sequestration, the court must be satisfied: (1) That the complainant does not sue in a mere spirit of litigation, and seek to set up an unfounded claim, but has probable cause, and may at the hearing be able to establish his primary equity; (2) that its extraordinary process is not asked for simply to vex and embarrass the defendant, but because there is reasonable ground for apprehension in regard to the security of the fund pending the litigation. (865, 866). Property in the hands of a receiver is in custodia legis, and, hence, not subject to execution sale. Any person claiming to have an interest, while he cannot interfere under the process of another court, may apply to the court which has jurisdiction of the fund, *pro interesse suo*, and his claim will be heard. (867). A motion for

a receiver pending a suit to foreclose a mortgage, granted without due caution, might put it in the power of an irresponsible or reckless mortgagee to ruin a mortgagor's business. Whether a receiver shall be appointed in any case is left, therefore, largely to the sound judgment of the presiding judge, who will take into consideration all the circumstances, including the nature of the property: its likelihood to be destroyed or spirited away during the litigation; and the probability, on the other hand, of its value being seriously impaired by its being placed in the hands of a receiver, as would be particularly the case with such property as a newspaper. The defendant's insolvency and poverty, taken alone, is not sufficient ground for placing his property in the hands of a receiver—especially when he denies owing anything on the mortgage. (§68).

The writ of *ne exeat* was a process unknown to the ancient common law, which, in the freedom of its spirit, allowed every man to depart the realm at his pleasure. From an early period it was used as an auxiliary jurisdiction of courts of equity, and at one time it issued at the instance of the king as a prerogative writ. It is granted wherever a present equitable debt is owing, which, if due at law, would warrant an arrest, and also to enforce arrears of alimony in aid of the spiritual court, because of the inability of that court to require bail. The *ne exeat*, as now understood and used, is a proceeding in equity to obtain bail in a case where there is a debt due in equity, though not at law. The general rule is, that where you can get bail at law, equity will not grant the writ. In the exercise of this power, courts of equity will be very cautious, as it is a strong step, tending to abridge the liberty of the citizen. To induce that court to issue a *ne exeat*, it must appear: (1) That there is a precise amount of debt positively due; (2) that it is an equitable demand, upon which the plaintiff cannot sue at law, except in account and some other cases of concurrent jurisdiction; (3) that the defendant is about quitting the country to avoid payment.

The affidavit to authorize the writ must be as positive as to the equitable debt as an affidavit of a legal debt to hold to bail. The writ of *ne exeat* is in the nature of equitable bail—it is used to keep the person of the defendant within the jurisdiction of the court. Sequestration, of the kind here discussed, was for the purpose of keeping the defendant's property within the control of the court in order to coerce obedience to the decree. (§70).

CHAPTER XII.

JURISDICTION. If a court, whether of law or of equity, have no jurisdiction of the subject-matter in controversy, it can render no valid judgment or decree upon the merits of the cause. Jurisdiction is the power to hear and determine the matter in controversy between parties to a suit—to adjudicate or exercise judicial power over them; the question is, whether on the case before a court, its action is judicial or extra-judicial—with or without the authority of law to render a judgment or decree upon the rights of the litigant parties. If the law confers the power to render a judgment or decree, then the court has jurisdiction. To decide what shall be adjudged or decreed between the parties, and with which party is the right of the case, is judicial action. It is a necessary presumption that a court of general jurisdiction can act upon the given case, where nothing appears to the contrary. Hence has arisen the rule that the party claiming exemption from its process, must set out the reasons by a special plea in abatement, and show that some inferior court of law or equity has exclusive cognizance of the case; otherwise the superior court must proceed, in virtue of its general jurisdiction. This rule prevails both at law and in equity. A plaintiff in law or equity is not to be driven from court to court by such pleas; if a defendant seeks to quash a writ or dismiss a bill for want of jurisdiction in the court, he must designate the proper court, and shall never put in a second plea to the jurisdiction of that court to which he has

driven the plaintiff by his plea. An objection to jurisdiction, on the ground of exemption from the process of the court in which the suit is brought, or the manner in which the defendant is brought into it, is waived by appearance and pleading to the issue; but when the objection goes to the power of the court over the parties or the subject-matter, the defendant need not, for he cannot, give the plaintiff a better writ or bill. As a United States court is one of limited and special original jurisdiction, its action must be confined to the particular cases, controversies, and parties over which the constitution and laws have authorized it to act; any proceeding without the limits prescribed is *coram non iudice*, and a nullity. (874, 875). Letters of administration upon the estate of a person who is in fact alive have no validity or effect as against him. By the law of England and America, before the Declaration of Independence and for almost a century afterwards, the absolute nullity of such letters was treated as beyond dispute. No judgment of a court is due process of law, if rendered without jurisdiction in the court, or without notice to the party. Even a judgment in proceedings strictly in rem binds only those who could have made themselves parties to the proceedings, and who had notice, either actually or by the thing condemned being first seized into the custody of the court. A court of probate must, indeed, inquire into and be satisfied of the fact of the death of the person whose will is sought to be proved or whose estate is sought to be administered,—because, without that fact, the court has no jurisdiction over his estate; and not because its decision upon the question, whether he is living or dead, can in any wise bind or estop him, or deprive him, while alive, of the title or control of his property. The appointment by the probate court of an administrator of the estate of a living person, being without jurisdiction and wholly void as against him, all acts of the administrator, whether approved by that court or not, are equally void. The receipt of money by such administrator is no discharge of a debt, and a conveyance of property by him passes no title. The fact that a person has been absent and not heard from for seven years, may create such a presumption of his death as, if not overcome by other proof, is such *prima facie* evidence of his death that the probate court may assume him to be dead and appoint an administrator of his estate, and that such administrator may sue upon a debt due to him. But proof, under proper pleadings, even in a collateral suit, that he was alive at the time of the appointment of the administrator, controls and overthrows the *prima facie* evidence of his death, and establishes that the court had no jurisdiction and the administrator no authority. The supposed decedent is not bound either by the order appointing the administrator or by the judgment in any suit brought by the administrator against a third person—because he was not party to and had no notice of either. (877).

In many cases, where there has been an objection to the jurisdiction, because of some irregularity or defect in the service, or some merely technical defect in the process, it has been held that a general appearance by the defendant is a waiver of such objection. But this rule applies only in cases where the court has jurisdiction of the subject-matter. Consent of parties may in a certain sense give jurisdiction of the person, but it cannot create a jurisdiction over the cause and subject-matter which is not vested in the court by law. (882). Where a court has no jurisdiction of the subject-matter, the objection can be taken at any time. Indeed, as soon as this fact is discovered, the court *ex mero motu* will take notice of it and dismiss the action. But if it has jurisdiction of the subject-matter and the venue is wrong, the objection must be taken in apt time; and if the defendant pleads to the merits of the action, he will be taken to have waived the objection. He cannot have two chances. (883). Where there are courts of equal and concurrent jurisdiction, that court possesses the case in which jurisdiction first attaches. (883).

The following propositions seem to be settled: First. The requirement

of the constitution is not that some, but that full, faith and credit shall be given by states to the judicial decrees of other states.

Second. Where a personal judgment has been rendered in the courts of a state against a non-resident merely upon constructive service—and, therefore, without acquiring jurisdiction over the person of the defendant—such judgment may not be enforced in another state in virtue of the full faith and credit clause. Indeed, a personal judgment so rendered is, by operation of the due process clause of the 14th Amendment, void, as against the non-resident, even in the state where rendered; and, therefore, such non-resident, by virtue of rights granted by the constitution of the United States, may successfully resist, even in the state where rendered, the enforcement of such a judgment. Process from the tribunals of one state cannot run into another state, and summon parties there domiciled to leave its territory and respond to proceedings against them; and publication of process, or notice, within the state where the tribunal sits, cannot create any greater obligation upon the non-resident to appear. Process sent to him out of the state and process published within it are equally unavailing in proceedings to establish his personal liability.

Third. The principles, however, stated in the second proposition, are controlling only as to judgments in personam, and do not relate to proceedings in rem.

Fourth. The general rule stated in the second proposition is, moreover, limited by the inherent power which all governments must possess over the marriage relation—its formation and dissolution—as regards their own citizens. From this exception it results that where a court of one state, conformably to the laws of such state, or the state itself through its legislative department, has acted concerning the dissolution of the marriage tie, as to a citizen of that state, such action is binding in that state as to such citizen; and the validity of the judgment may not therein be questioned on the ground that the action of the state in dealing with its own citizen concerning the marriage relation, was repugnant to the due process clause of the constitution. And as a corollary of the recognized power of a government thus to deal with its own citizen by a decree which would be operative within its own borders, irrespective of any extra-territorial efficacy, it follows that the right of another sovereignty exists, under principles of comity, to give to a decree so rendered such efficacy as to that government may seem to be justified by its conceptions of duty and public policy.

Fifth. Where husband and wife are domiciled in a state, there exists jurisdiction in such state, for good cause, to enter a decree of divorce which will be entitled to enforcement in another state by virtue of the full faith and credit clause. It has, moreover, been decided that where a bona fide domicil has been acquired in a state by either of the parties to a marriage, and a suit for divorce is brought by the domiciled party in such state, the courts of that state, if they acquire personal jurisdiction of the other party, have authority to enter a decree of divorce, entitled to be enforced in every state by the full faith and credit clause.

Sixth. Where the domicil of matrimony was in a particular state, and the husband abandons his wife and goes into another state in order to avoid his marital obligations, such other state to which the husband has wrongfully fled does not, in the nature of things, become a new domicil of matrimony, and, therefore, is not to be treated as the actual or constructive domicil of the wife; hence, the place where the wife was domiciled when so abandoned constitutes her legal domicil until a new actual domicil be by her elsewhere acquired.

Seventh. So also it is settled that where the domicil of a husband is in a particular state, and that state is also the domicil of matrimony, the courts of such state having jurisdiction over the husband may, in virtue of the duty of the wife to be at the matrimonial domicil, disregard an unjustifiable absence therefrom, and treat the wife as having her domicil in the state of the matrimonial domicil for the purpose of

the dissolution of the marriage, and, as a result have power to render a judgment dissolving the marriage which judgment will be binding upon both parties, and will be entitled to recognition in all other states by virtue of the full faith and credit clause.

These propositions settle three things beyond dispute: (1) In view of the authority which government possesses over the marriage relation, no question can arise concerning the right of a state within its own borders to give effect to a decree of divorce rendered in favor of the husband within such state—he being domiciled in such state when the decree is rendered; (2) where the husband abandons his wife and flees from the state of her domicile and of the matrimonial domicile, it clearly follows from the sixth proposition, ante, that the wife's domicile remains unchanged; (3) where the wife is neither constructively within a state nor individually domiciled therein, and does not appear in the divorce cause and is only constructively served with process issued in such cause, the courts of the divorcing state cannot acquire jurisdiction over the wife within the fifth and seventh propositions, ante.

A proceeding for divorce is not of such an exceptional character as to be excepted from the rule which limits the authority of a state to persons within its jurisdiction. While a state may enforce within its own borders a divorce rendered without personal service of process—whether such divorce be rendered in one of its own courts or in that of another state—yet such divorce is not within the full faith and credit clause, unless it be rendered in a cause in which personal service is dispensed with by the letter or spirit of the doctrines announced in the foregoing seven propositions. (885).

When a judgment rendered by a court of one state becomes the cause of action in the courts of another state, and the transcript, as made in such state, duly certified as prescribed by the act of congress, is produced, it imports verity and can be attacked for only one purpose. The defendant may deny that the court had jurisdiction of his person or of the subject-matter, and for this purpose may attack the recitals in the record. Jurisdiction will be presumed until the contrary is shown. If not denied, or if established after denial, defendant cannot interpose the plea of *nil debet*. In some of the states where the formal distinction between law and equity is abrogated, the law allows equitable defenses to be set up in an action at law. Hence, in those states, when the suit is brought upon a domestic judgment, the defendant is allowed to plead any circumstances of fraud which would have justified a court of equity in interfering in his behalf. Now, when the same judgment is made the basis of an action of another state, he ought to be allowed the same latitude of defense; for if it were otherwise, the foreign court would be required to give greater faith and credit to the judgment than it is entitled to at home. This the constitution does not require. Under the Code practice, the fraud may be set up in the answer. (891).

A plaintiff having a number of items of charge against the same defendant may unite them in one action, and where the aggregate of such claims is sufficient to bring the cause within the jurisdiction of a superior court, such court may assume jurisdiction although the amount of each item be too small by itself to come within such jurisdiction. (895). In Indiana it is held that when a statute gives jurisdiction to a justice of the peace of causes in which the sum demanded does not exceed one hundred dollars, the intention is to regulate such jurisdiction, not by the penalty of a bond, but by the amount of damages actually claimed or demanded by the plaintiff. That is, if the penalty of the trial be five hundred dollars, but the plaintiff claims only fifty dollars as damages for the breach of the bond, the justice has jurisdiction. The contrary is held in North Carolina. (895). When the jurisdiction of a justice of the peace in matters of contract depends upon the amount in controversy, exclusive of interest, the amount claimed by the plaintiff is the sum in controversy, and determines the jurisdiction. If the amount sued for be within the jurisdiction of a justice of the

peace, the defendant cannot defeat the jurisdiction by showing that he owes the plaintiff more than he has sued for. Whether a creditor whose demand is created by express contract, such as a promissory note, can voluntarily abandon a part of his claim, or enter a credit upon it for the express purpose of reducing it within the jurisdiction of a given court, is a question upon which the authorities differ. It is probable that the weight of decision is with the affirmative. This matter is regulated by statute in some states. (896). The entry of a credit without having received a corresponding payment, but merely for the purpose of reducing the claim so as to bring it within a magistrate's jurisdiction, has been held to be a fraud upon the jurisdiction. Such matters are usually regulated by statute. (898). Statutes fixing jurisdiction are based upon the assumption that plaintiffs will act fairly and only demand such an amount as they may reasonably expect to recover. When the contrary appears, it is the duty of the courts *ex mero motu* to interfere and prevent an evasion of the law. In olden times, when it was found that, by reason of the vast increase in commercial dealings, the court of Common Pleas in England—to which was assigned, by statute, all actions founded on contracts—was oppressed with business, the fiction of *quo minus* in the court of Exchequer and the contrivance of the *ac etiam* clause in the King's Bench were winked at and favored by the courts, in order to divide the jurisdiction in regard to contracts, and to relieve the court of Common Pleas of a part of a burden which was too heavy for it. But the condition of things here is entirely different, and the courts are not at liberty to wink at, or favor, an attempt to evade the laws prescribing the jurisdiction of the several courts. (898). Sometimes a superior court has both appellate and concurrent jurisdiction of matters cognizable by an inferior court. Where it is concurrent, and a case is carried by appeal to the superior court, and the appellant goes to trial without objection, that court will have cognizance of the matter by virtue of its original jurisdiction of the subject-matter of the action and of the consent of the parties thus manifested, however irregular the proceedings may have been in the inferior court. But when the inferior court takes cognizance of an action of which it has no jurisdiction, and the case is carried by appeal to the superior court, the superior court acquires no jurisdiction, because in such cases its jurisdiction is altogether derivative, and depends upon that of the inferior court. (899).

In the early days of chancery jurisdiction in England, the chancellors were accustomed to deliver their judgments without regard to principles or precedents and in that way the process of building up a system of equity went on—the chancellor disregarding absolutely many established principles of the common law. In their work the chancellors were guided not only by what they regard as the eternal principles of absolute right, but also by their individual consciences. After a time this theory of personal conscience was abandoned; and the conscience, which is an element of the equitable jurisdiction, came to be regarded, and has so continued to the present day, as a metaphorical term, designating the common standard of civil right and expediency combined—a judicial and not a personal conscience. Whenever the principles of the law by which the ordinary courts are guided, tolerate a right, but afford no remedy; or where the law is silent, and interference is necessary to prevent a wrong; or where the ordinary courts are incompetent to a complete remedy, a court of equity will afford relief. So also in cases where it is essential to a fair trial in the courts of law, a court of equity will lend assistant aid, by compelling discovery of matters necessary for that end. In this respect she acts as a handmaid of the law. But in no instance will a court of equity interpose where the party applying has a fair and complete remedy at law. Whenever a court of law is competent to take cognizance of a right, and has power to proceed to a judgment which affords a plain, adequate, and complete remedy, without the aid of a court of equity, the plaintiff must proceed at law, because the defendant has a constitutional right to a trial by

jury. Relief will not be granted in chancery when, at law, a complete remedy is afforded. Equity will not entertain a bill when personal property is the subject-matter, unless in some peculiar cases; nor will it interpose and enjoin a sale of personal property, taken in execution, either on the ground that it is not the property of the defendant in the execution, but belongs to a third person, or that it belongs to the complainant, unless it be shown that if the property were sold the complainant would be without remedy at law. The remedy at law must not only be incomplete, but the damages not an adequate compensation, to authorize a court of equity to interpose. Equity interferes in no case where the plaintiff claims as encumbrancer merely; and, where he claims as owner, only in those cases where, from the peculiar nature of the property and circumstances of the case, the remedy at law is incomplete. Where, pending a litigation, the property in dispute is in danger of being lost, and the powers of the court in which the controversy depends are insufficient for the purpose, equity will interpose to preserve it. Equity exercises a jurisdiction to put an end to the oppression of repeated litigations, after satisfactory determinations of the question, upon the principle *interest reipublicae ut sit finis litium*. In cases of personal property, the interposition of a court of equity is rare, and only occurs when the legal remedy is incomplete, and damages are not an adequate compensation. The cases of the ancient silver altar piece, of the horn by which an estate was held, of the silver tobacco box belonging to a club, and some others, and of slaves, are examples of such interference afforded by the books, and show that in those cases the remedy at law was incomplete. Those cases rest upon their own peculiar grounds, and do not affect the rule. Bills of peace are allowed in equity where a person has a right which may be controverted by various persons, at different times and by different actions. The court will thereupon prevent a multiplicity of suits by directing an issue to determine the right, and will ultimately grant an injunction. Another occasion where a bill of this kind is resorted to, is where there have been repeated attempts to litigate the same question by ejectment and repeated and satisfactory trials. In such cases the court, upon a bill preferred by all the parties interested or by some of them in the names of themselves and the rest, will grant a perpetual injunction to restrain further litigation. In such suits the plaintiff ought to establish his right by a determination of a court of law in his favor, before filing his bill in equity. (900, 901).

Under the Code practice legal and equitable relief must be administered in the same court, and may be in the same action, and in some cases in the same cause of action. The principles, doctrines and rules of law are distinct from those of equity, but they may be administered together by the same court, when it is appropriate and necessary to do so. Under that system issues of fact as distinguished from questions of fact, arising in equitable actions, as well as like issues arising in actions at law, are to be tried by a jury. The law contemplates that a jury shall find such issues, as nearly as may be, as a chancellor would do in passing upon like issues. The court should be careful to instruct the jury in such cases, as to the nature of the issue, and the application of the evidence produced before them. The peculiar nature of such issues renders it necessary that this should be done. In the trial by jury of issues arising in equitable matters, the principles, doctrines and rules of equity should be observed and applied, as nearly as may be, in the ascertainment of the facts. Otherwise, it would be difficult to administer equity at all in many cases. In the judicial system of the United States government the courts of common law and of equity are still as distinct as they were in the time of Coke and Bacon, though the same judge has jurisdiction in each. The Act of Congress requiring the Federal courts to conform to the practice of the state in which they are held, does not apply to the courts of equity of the United States. (905).

A court that is required to keep a record of its proceedings and which may fine and imprison, is a court of record. Whether or not the court

of a justice of the peace is a court of record, is a question on which there is a difference of opinion. It is practically a local question depending upon the constitution and statutes of each state. (908).

There are well known and well settled rules of distinction between local and transitory actions. Local actions are such as require the venue to be laid in the jurisdiction in which the cause of action arose. These embrace all actions in which the subject or thing sought to be recovered is in its nature local; such as actions of waste, brought to recover the place wasted, and actions of ejectment. Some other actions which do not seek the direct recovery of lands or tenements, are also local, because they arise out of a local subject or the violation of some local right or interest. Of this class are waste for damages only; trespass *quare clausum fregit*; trespass on the case for injuries to things real, as nuisances to houses or lands, disturbance of right of way; and the obstruction, or diversion of ancient watercourses. The action of *replevin* is local, although it is for damages only and does not rise out of any local subject, because of the necessity of giving a local description to the thing taken.

Transitory actions are such personal actions as seek only the recovery of money or personal chattels, whether they sound in tort or contract. They are universally founded on the supposed violation of rights, which, in contemplation of law, have no locality. In such actions the venue may be laid in the jurisdiction wherein the cause of action arose, or where the plaintiff or defendant resides at the time of instituting the action. The amount of the recovery is governed by the *lex loci*, and not by the *lex fori*. (909).

CHAPTER XIII.

PROCESS.—SEC. 1. INTRODUCTORY. From the opinions of two eminent judges the following summary of the English law is taken. The opinions were written in 1833 and 1835. "In England, when a person is about to commence a suit, the usual course of proceeding is, in the first place, to execute a warrant to an attorney of the court to have the writ issued, and the pleadings in the cause made up. The attorney then gives instructions for the original; these instructions are contained in a paper called the *præcipe*, in which he sets forth the cause of action. Formerly, the practice was to take the warrant and the *præcipe* to the chancery, where the original writ was caused to be made out by the Master of the Rolls; which original recited the action as stated in the *præcipe*. The original is a mandatory letter in parchment from the king, tested in his name, and sealed with the great seal. It is directed to the sheriff or other returning officer of the county where the plaintiff intends to lay the venue, and is made returnable to the court either of the King's Bench or the Common Pleas, at Westminster. If the sheriff return on the original *non est inventus*, the original is then left on file in the court, and a judicial writ or process issues, called a special *capias ad respondendum*, which is grounded upon the original. If the sheriff return on the *capias*, *non est inventus*, the plaintiff may then issue an *alias*, and a *pluries*, and so on to outlawry, to compel an appearance by the defendant. When the defendant appears in court in consequence of the service of the original or of an arrest on any process which issues upon it, the plaintiff then files his declaration, and serves a copy on the defendant, who defends either by demurrer or plea. If he pleads to the action, then the whole of the pleadings to the making up of the issue are completed in the superior court of Westminster. A *nisi prius* record is then made out and transmitted to the court of *nisi prius*, or the justices of the county where the venue is laid, that the issues may be there tried by a jury. When a trial takes place, and a verdict is rendered, it is entered on the *nisi prius* roll, or some paper attached to it which is called the *postea*, and delivered to the party in whose favor the verdict is rendered, who returns it into the superior court, at West-

minster, where the record belongs; and on notice being given to the adverse party, a motion is then made for judgment; which, if no cause is shown to the contrary, is rendered by the court, upon which issues the execution.

In modern times the practice of commencing suit by original purchase out of chancery has been tacitly waived by the profession. The practice is now, for the attorney to leave the *praeceipe* and a memorandum of his warrant at the *Filazer's office*, and the *Filazer* thereupon issues a *capias ad respondendum* in the first instance, keeping the *praeceipe* as instructions for the original, if such original should afterwards become necessary by a writ of error being brought after a judgment by default, on demurrer, or on plea of *nul tiel record*: for the want of an original is aided after verdict, by stat. 18 Eliz. c. 14. If a writ of error should be brought for the want of an original, in any of those cases where the defect is not cured by the statute of Elizabeth, the plaintiff may, by a petition to the Master of the Rolls, obtain an original and move the court, where the record is, to amend by adding the original, which is always granted; so that the record is complete, when, in obedience to the writ of *certiorari*, it is transmitted into the court of errors. The plaintiff in error will then have nothing in the record upon which he can assign errors, and will fail in his efforts to reverse the judgment. By the rules of the common law great nicety and exactness were required in the proceedings and pleadings in a suit; small errors and inaccuracies were always sure to be fatal to the party making them; as for instance, in bailable actions, the declaration should always correspond with the writ in the names of the parties, and in the cause of action and if there was a variance in these, or in the sum demanded, between the writ and the declaration, it would be fatal. The legislature has from time to time endeavored to remedy what it considered an evil, and has passed several statutes of *jeofails* and for the amendment of the law, to prevent justice being strangled in a net of forms and technicalities. The legislature, further to aid the administration of justice, passed the statute 5 Geo. I, c. 13 (718) which was a very liberal statute of *jeofails*." "The common-law doctrine respecting process is, that mere errors in writs are cured by the appearance of the defendant. But there is a distinction between errors that only render the process voidable, and defects that render it void. Simple appearance does not cure the latter. Process in England and writs answering to those called process in England, form no part of the record: errors in them cannot be assigned for error; hence the only remedy is to move to set aside the proceedings; and that should be done before appearance, unless the writ is wholly void. In the latter case, a mere appearance will not cure the defect. The appearance, however, here spoken of, does not simply mean the coming of the defendant into the court-house; it means an appearance to the action, such as perfecting bail, or taking some step in the action towards the defense. At common law, the writ had to be tested in the name of the president judge, and then be sealed with the seal of the court, and officially signed by the clerk. The clerk was the keeper of the seal of the court at common law; and when he sealed process, he signed it officially to show that it was sealed at the proper mint of justice." (911, 915).

SEC. 2. SUBPOENA IN EQUITY. Naming persons as defendants in the title of a bill in equity does not make them parties, for the title is no part of the bill, whether it precede the statement of the bill, or be written on the back of it. The stating part of the bill ought to contain the case of the plaintiff, showing his rights, and the injury done to him and by whom it was done; and, even then, the persons thus mentioned in the bill, as the authors of the wrong complained of, are not thereby made defendants, but only those persons who are named in the prayer for process and against whom process of subpoena is prayed, as the means of compelling their appearance. Prayer for process against "the defendants," without naming them, will not do.

SEC. 3. MESNE PROCESS. By the term *mesne process*, is generally un-

derstood any writ issued between the original writ and the execution. By original process, the first writ at the common law, is not meant the first process, under modern statutes. Such original writ is not used here. All our writs preceding the execution are *mesne* process. By *mesne* process is meant the writ or proceeding in an action to summon or bring the defendant into court. (920).

SEC. 4. ARREST. "By the common law, no man could be arrested in actions upon contract. By a variety of statutes, the law in England was entirely changed, and in process of time every man in such actions became liable to imprisonment without redress. Perhaps the common law was too lenient for a commercial people; but the statute law certainly became shamefully oppressive. These evils, however, have been long since remedied. By the statutes of Henry VI, of Eliz., and more especially of Geo. I. the personal liberty of the debtor and the right of the creditor have been carefully attended to." Imprisonment for debt having been abolished both in England and in this country, arrest is allowed only in criminal prosecutions and in civil actions founded upon pure torts. See ch. 11, § 1, *ante*. (920).

SEC. 5. WHEN IS A WRIT ISSUED? It has been said that, "as the teste of the writ on the one hand is not the commencement of the suit, for the benefit of the plaintiff; so on the other, the service of it, or its delivery to the sheriff, or any such thing, is no requisite to the commencement of the suit, for the benefit of the defendant: but only getting the writ—*impetratio brevis*. There are many cases to that effect. The form of pleading establishes this. The constant form is, 'that the defendant did not assume within, etc., *ante impetrationem brevis*.' Why? Because obtaining the writ, sealed and complete in form, is in fact and law the commencing suit." But is also said that "a delivery of the writ to the sheriff for service, or something equivalent to such delivery, is necessary, in order that the action be deemed to have been commenced." (922, 923). And again it has been said that a summons is issued when it goes out of the hands of the clerk to be delivered to the sheriff for service. If the clerk delivers it to the sheriff to be served, it is then issued; or if the clerk delivers it to the plaintiff, or some one else, to be delivered by him to the sheriff, this is an issue of the summons; or, as is often the case, the summons is filled out by the plaintiff's attorney and put into the hands of the sheriff. This is done by the implied consent of the clerk, and constitutes an issuance from the time it is placed in the hands of the sheriff for service. But a summons simply filled up and lying in the office of an attorney would not constitute an issuing. Nor would the fact that a summons had been filled up by the clerk, but held by him for a prosecution bond. (925).

SEC. 6. SUMMONS UNDER THE CODE PRACTICE. By the Code practice has been adopted, substantially, the practice of the courts of equity and not that of the courts of common law. In equity the bill precedes the subpoena which issues to bring the defendants into court. It is used to designate and bring the parties into court, and for that purpose only. It neither specifies, as the old common law writ frequently did, in what right the plaintiff claims relief, nor the right in which the defendant is sought to be charged. These matters are set forth in the bill only, and the subpoena points to the bill as containing the causes of suit which are to be answered. As it is clearly not the office of the subpoena to specify the plaintiff's claim or the defendant's liability, there can be no such thing as a variance on that account. The only difference between the practice under the Code and that of a court of equity is, that by the Code the summons does not follow, but precedes the complaint. In both courts its only operation and office is to give notice of an action begun, the parties to it, and where the complaint will be filed. The parties, plaintiff and defendant, must be named in the summons—a summons for "the heirs of A" will not do. (926). Service is the judicial delivery or communication of papers—execution of process; the operation of bringing the contents or effect of a document to the knowledge of the persons concerned. The manner of service is regulated by statute. (936).

When an attorney enters an appearance for a party without qualification, the only reasonable inference is, that the appearance is a general appearance—that is, for all purposes. Such an appearance cures all antecedent irregularity in the process, and places the defendant upon the same ground as if he had been personally served with process. (932). The test for determining the character of an appearance is the relief asked—the law looking to its substance, rather than to its form. If the appearance is in effect general, the fact that the party styles it a special appearance will not change its real character. The question always is what a party has done, and not what he intended to do. If the relief prayed affects the merits, or the motion involves the merits—and a motion to vacate a judgment is such a motion—then the appearance is, in law, a general one. The court will not hear a party upon a special appearance except for the purpose of moving to dismiss an action or to vacate a judgment for want of jurisdiction, and the authorities seem to hold that such a motion cannot be coupled with another based upon grounds which relate to the merits. An appearance for any other purpose than to question the jurisdiction of the court is, general. A special appearance may be entered for the purpose of taking advantage of any defect in the notice or summons, or to question the jurisdiction of the court over the person in any other manner; but filing a demurrer or motion which pertains to the merits of the complaint or petition, constitutes a full appearance, and is hence a submission to the jurisdiction of the court. If one duly appears to the merits, no statement that he does not, will avail him; and, if he makes a defense which can only be sustained by an exercise of jurisdiction, the appearance is general, whether it is in terms limited to a special purpose or not. (933). If the defendant enter a special appearance and move to dismiss and his motion be overruled, he should except and proceed with his defense. He does not thereby waive his rights under his motion; for, if his motion be improperly overruled in the lower court, it will be allowed on appeal and the whole case will be dismissed notwithstanding the fact that it has been tried on the merits; but if the defendant fail to except to a ruling refusing his motion to dismiss, and proceed with his defense, his appearance becomes a general appearance for all purposes. No appeal lies from the refusal to dismiss, until final judgment in the action; for the judgment overruling the motion to dismiss is merely interlocutory and is not such a judgment as can be appealed from at once. If the summons be void, the defendant may wholly ignore it, or he may enter a special appearance and move to dismiss, just as he prefers. When there is a dispute about the fact as to whether a defendant entered a general or a special appearance, the findings of the lower court are final and not reviewable. There is no appearance unless of record, for whether he appeared or not ought to be tried by the record. (935). Where a defendant has never been served with process, nor appeared in person or by attorney, a judgment against him is not simply voidable, but void; and it may be so treated whenever and wherever offered, without any direct proceedings to vacate it. It would be otherwise if the record showed service of process or appearance, when in fact there had been none. In such case the judgment would be apparently regular, and would be conclusive until vacated by a direct proceeding for that purpose. If the record shows one to be plaintiff, when in fact he was not, then it stands as where the record shows one to be defendant, when he was not. In both cases the record is conclusive until corrected by a direct proceeding for that purpose. (936). Substituted service by publication, or in any other authorized form, may be sufficient to inform parties of the object of proceedings taken, where property is once brought under the control of the court by seizure, or some equivalent act. Such service may also be sufficient in cases where the object of the action is to reach and dispose of property in the state, or of some interest therein, by enforcing a contract or lien respecting the same, or to partition it among different owners; or, when the public is a party, to condemn and appropriate it for a public purpose. In other words, such service may answer in all actions which are substantially proceedings in rem. An

act allowing personal service of process, issued from one state, upon a person in another state does not and cannot extend the jurisdiction. It is a convenient, and probably a more sure, way of bringing home to the non-resident the notice which is usually made by publication. But the service of process in another state is valid only in those cases in which publication of the process would be valid. Not only has the process issuing from one state no extra-territorial effect when served in another state (except as notice of a proceeding in rem, or quasi in rem, which could be served by publication of the notice), but even in the federal courts, whose jurisdiction extends throughout the Union, a personal judgment can be had against a defendant only when sued in the district wherein he resides. A personal judgment against a non-resident can only be obtained in a state court when he can be found and served with process while in the state, or, if a corporation, by service on its agent there. (936).

Jurisdiction is acquired in one of two modes—first, as against the person of the defendant, by personal service of process; or, secondly, by a proceeding against the property of the defendant within the jurisdiction of the court. In the latter case, the defendant is not bound by the judgment beyond the property in question. It is immaterial whether the proceeding against the property be by an attachment or by bill in chancery, but it must be substantially a proceeding in rem. A bill for the specific performance of a contract to convey real estate is not strictly a proceeding in rem in ordinary cases; but where such a procedure is authorized by statute on publication, without personal service, of process, it is substantially of that character. Mortgage liens, mechanics' liens, materialmen's liens, and other liens are foreclosed against non-resident defendants upon service by publication. Lands of non-resident defendants are attached and sold to pay their debts; and, indeed, almost any kind of action may be instituted and maintained against non-residents to the extent of any interest in property they may have in a state. Jurisdiction to hear and determine such cases may be obtained wholly and entirely by publication. All the states, by proper statutes, authorize actions against non-residents and service of summons on them by publication or in some other form no better. In the nature of things, such must be done in every jurisdiction in order that full and complete justice may be done where some of the parties are non-residents. There are three modes for the due service of process—(a) by actual service, or, in lieu thereof, acceptance or waiver by appearance; (b) by publication, in cases where it is authorized by law, in proceedings in rem. In which case the court already has jurisdiction of the res—as to enforce some lien on, or a partition of, property in its control; (c) by publication of the summons, in cases authorized by law, in proceedings quasi in rem, in which cases the court acquires jurisdiction by attaching property of a non-resident, an absconding debtor, etc. A judgment obtained under process served by the two last-named methods has no personal efficiency, but acts only on the property. (939). The prerequisites to the valid service of process—whether by publication or other method—are regulated by statute. (942).

CHAPTER XIV.

PARTIES. When a firm is a party, the name of each of the members must be set out in the summons and complaint, for there is no principle more certainly and satisfactorily settled than that, in all actions, the writ and declaration must both set forth, accurately, the Christian and surname of each plaintiff and each defendant, unless the party is a corporation and is authorized to sue and be sued in such corporate name; but the addition of the firm name to the individual names composing the firm is not necessary. If added, it can do no harm and will not subject the plaintiffs to any additional proof. (945-946). A statute authorizing a proceeding against non-resident heirs, does not authorize it against them *eo nomine*, but leaves to the rules of the common law the mode of enforcing their liability, subject to the particular provisions of

the statute. There is no proceeding at common law against unknown heirs. At common law or in equity, if heirs are required to be made defendants to a suit, it is the duty of the plaintiff to render them such by their proper names. (946). If only the surname of a defendant be set forth in the writ and pleadings, and the defendant appear, he cannot object to such defect after verdict and judgment. (947). Some of the doctrines of the common law in relation to the joinder of parties seem to be somewhat arbitrary. In actions founded on contract, if any of those living, to whom the promise or obligation was made, be omitted as plaintiffs; or if any to whom it was not made be joined, and that fact appear in the declaration, it is fatal on demurrer, in arrest of judgment, or upon a writ of error. If the defect is not shown by the pleadings, it is ground of nonsuit under the general issue. In actions *ex contractu*, if a part only of several joint contractors be sued, and the defendant wish to avail himself of the omission of the others, he must do it by a plea in abatement. If he omit to do so, he cannot afterwards urge the objection in any form, though the declaration set out a joint contract. The plea in abatement for the nonjoinder of a joint contractor, must show not only that the omission has been made, but that the omitted contractor is living. (947). In a court of equity, a defect of parties is not fatal. The cause will be continued in order that all proper parties may be made. (949). At common law, in actions *ex delicto*, for pure torts, and not for the breach of a contract, if a party who ought to join be omitted, the objection must be taken by a plea in abatement, or by way of apportionment of damages on the trial. The defendant cannot, as in actions *ex contractu*, give in evidence the nonjoinder as a ground of nonsuit on the plea of the general issue. Under the Code practice, a defect of parties—a failure to join those who should be joined—must be taken advantage of by demurrer if it appear on the face of the complaint, and by answer if it does not so appear; but the misjoinder of unnecessary parties is a mere matter of surplusage. (949). All actions by and against a corporation should be in its corporate name. (950). At common law, an infant could neither sue nor defend, except by guardian. By the statutes of Westm. 1, 13 Edw. 1, and Westm. 2, 13 Edw. 1, he is authorized to sue by *prochein amy*. In all cases, however, it is error if an infant, though sued with others, does not defend by guardian. In either character, as plaintiff or defendant, prior to the statutes of Westminster, and subsequent thereto when defending, the guardian is by special appointment of the court. A *prochein amy* sues by the permission of the court, and the fact of such permission being given, should appear in the declaration, or it is error. It is the duty of a court, if informed that a suit by *prochein amy* is not for the interest of the infant, to arrest the proceeding. This power, possessed by the court, is connected with its general superintending control over infants. The right to sue by *prochein amy* being dependent upon minority and the admission of the *prochein amy* by the court, these facts should appear in the declaration, or it is error. (951). Process should be served upon infant defendants in the same manner as upon adults; and to enable them to plead, answer, or demur, a guardian is necessary. It was regular, according to the English practice, to appoint a guardian *ad litem* before service of process upon the infant; but, according to the practice in some jurisdictions, the process must be first served. In all jurisdictions the record must show both service upon the infant and the appointment of a guardian *ad litem*. Some courts hold that no decree or judgment should be made against infants upon mere admissions in the pleadings. There must be proof in the same manner as if the bill had been denied. (952). It is a serious mistake to suppose that a next friend or a guardian *ad litem* should be appointed upon simple suggestion. It should never be done except upon proper application in writing, and due consideration by the court. The court should know who is appointed, and that such person is capable and trustworthy. The method of appointing guardians *ad litem*, and their duties, are usually prescribed by statute or by rule of court. Persons having any interest, real or nominal, antagonistic to that of the infant, must not be selected

to prosecute or defend on behalf of such infant. A plaintiff, though he be but a mere nominal party with no real interest in the controversy, must not act as guardian ad litem for an infant defendant. The plaintiff's attorney must not advise or draw pleadings for the guardian ad litem of an infant defendant. The court in which the action or proceeding is pending appoints a next friend or guardian ad litem. A justice of the peace may appoint a next friend to prosecute an action on behalf of the infant in such justice's court. (953). It is said that a judgment against an infant appearing by attorney, though erroneous, is of full force and effect until it be reversed; and that objection thereto can be taken advantage of only by a writ of error. Where writs of error are abolished and appeals substituted, the objection can be taken advantage of only by appeal. (957).

The manner of serving process on infants is regulated by statute or rule of court. An infant cannot lawfully accept service of process; but if he does accept service and a guardian ad litem is thereafter appointed who properly represents him, such defect in the service of the process is cured. (959). It has been held that an infant in ventre sa mere cannot be made a party to an action or proceeding, and, hence, cannot be estopped by a judgment in partition proceedings. So august a tribunal as the Supreme Court of the United States has held to the contrary. On this subject it has been said: "The old writ of *de ventre inspiciendo* was devised by the courts for the purpose of examining the widow, and was granted in a case where a widow, whose husband had lands in fee, marries again soon after his death and declares herself pregnant by her first husband, and under that pretext withholds the land from the next heir. Such writ commanded the sheriff or sergeant to summon a jury of twelve men and as many women, by whom the female is to be examined '*tractari per ubera et ventrem*.' Of course, no such unseemly proceeding would be tolerated in this age, but the general assembly could easily protect the unborn child as well as the innocent purchaser by prohibiting the sale of land for partition until twelve months after the intestate's death." (960).

The general rule of law is very clear, that the wife cannot sue alone, but must join with her husband. The rule was relaxed, however, in cases in which the reasons upon which it was formed ceased to exist. Thus, where the husband was exiled, his wife was permitted to sue in her own name. And the same reason applying where the husband had abjured the realm, the wife, in that case, was allowed to sue, as a widow, for her dower. The wife of an alien enemy has also been held liable to suits, as the husband was not amenable to the process of the court. The banishment of the husband, even for a limited time, operates as a removal of the disabilities of the coverture, so far as to enable the wife to sue and be sued as a *feme sole*, although the time of banishment be expired when the action is brought. The following rhetorical flourish may not be amiss in this connection: "Miserable, indeed, would be the situation of those unfortunate women whose husbands have renounced their society and country, if the disabilities of coverture should be applied to them during the continuance of such desertion. If that were the case, they could obtain no credit on account of their husbands, for no process could reach him; and they could not recover for a trespass upon their persons or their property, or for the labor of their hands. They would be left the wretched dependents upon charity, or driven to the commission of crimes, to obtain a precarious support." (962). The marriage of a *feme sole* defendant *pendente lite*, does not prevent the progress of the action against her alone. (963). A *feme covert* having a separate estate may, in a court of equity, be sued as a *feme sole*, and be proceeded against without her husband; for in respect of her separate estate she is looked upon as a *feme sole*. In that court *baron and feme* are considered as two distinct persons and, therefore, a wife, by her next friend, may sue her own husband. When the husband is thus sued by his wife, the invariable practice is, in the absence of a statute, to require her to sue by a next friend. The object of this rule is to

secure the costs of the action and to have a responsible person who will be liable if the process of the court should be abused, and also that a proper and fit adviser may interpose to prevent domestic feuds, and at the same time protect the feme from the frauds and power of the husband. (965). Under the Code practice, it now seems to be generally settled, after great confusion in the decisions growing out of the conflicting statutes of the several states, that a married woman is invested with the legal title to her property, and may maintain in her own name any appropriate action to preserve and secure it to her own use. (966, 967). It is said that idiots and lunatics may sue at law by next friend, to be appointed by the court; but in equity, must sue by the committee or guardian of their estates duly appointed. When the idiocy or lunacy is not merely partial, and in all cases when it has been found on an inquisition, a court of equity will not allow a suit to be brought by an idiot or lunatic in his own name, or that of a next friend—whether nominated by himself or appointed by the court. His guardian or committee must join in the suit. When a person is only partially incapable, as one merely deaf and dumb, the court will appoint a next friend to be joined with him in the suit, and to conduct it for him.

The authorities all agree that idiots and lunatics must sue in equity by their committees or guardians. In some states the persons to whom the estates of idiots and lunatics are committed upon inquisition found, are styled their guardians; in other states, and in England, they are called their committees. It is further said that no case or authority can be found in which it is held that they may sue by a next friend—either a volunteer or one appointed by the court. But it is also said that, where there has been no inquisition, the lunatic may sue by next friend. The jurisdiction is expressly recognized and upheld by English chancery courts. When a person is in fact, insane, but has not been so adjudged by a competent tribunal, or placed in charge of a committee or guardian, the courts, whether of law or equity, have jurisdiction to entertain suits brought by one as the next friend of the insane person. Actions at law, in behalf of lunatics, can be brought in no other name than theirs; they must not be brought in the name of the committee. They appear by guardian or attorney, according as they are within age or not. But, in equity, this incapacity to sue or defend is more considerable. In that court, after an inquisition has taken place and a committee has been appointed, the joinder of the name of the lunatic, though usual, is merely a formality. In England, the practice is to bring the bill in the name of the committee. Either way will be good. This matter of the appearance of parties *non compos mentis*—whether as plaintiffs or defendants—as well as all other matters pertaining to actions and proceedings by and against such persons, is now generally regulated by statute. (969, 971).

The general rule as to parties in chancery is, that all ought to be made parties who are interested in the controversy, in order that there may be an end of litigation. But there are qualifications of this rule arising out of public policy and the necessities of particular cases. The true distinction appears to be as follows: (1) Where a person will be directly affected by a decree, he is an indispensable party, unless the parties are too numerous to be brought before the court—in which event the case is subject to a special rule; (2) where a person is interested in the controversy but will not be directly affected by a decree made in his absence, he is not an indispensable party; but he should be made a party if possible, and the court will not proceed to a decree without him if he can be reached; (3) where he is not interested in the controversy between the immediate parties litigant but has an interest in the subject-matter which may be conveniently settled in the suit—and thereby prevent further litigation—he may be made a party or not, at the option of the complainant. When the parties interested are so very numerous that it would be difficult and expensive to bring them all before the court and have all the different interests fairly tried, the court will not require a strict adherence to the rule. (974, 976).

While a suit is pending, the plaintiff is considered in court, and

ready to support his right; but when the judgment is obtained, judicial proceedings are at an end, and the plaintiff is considered to be in court no longer. A cause is pending for purposes of motions until the judgment is fully performed—satisfied: but after final judgment the opposite party must be given due notice of an intended motion. (978).

Where a contract is joint and several, though the plaintiff may go against one or all of the contractors, yet he ought not to sue an intermediate number. When he sues more than one, he depends upon the joint contract, and then all the joint contractors living should be parties; if they be not made parties it is good ground for a plea in abatement. The plaintiff will not be permitted to enter a *nolle prosequi* as to any of the defendants in an action on contract, except where they sever in pleading and one pleads something which goes to his personal discharge. But the law is very different in actions founded on tort. In such actions, the persons guilty are separately liable to the party injured, and he has a right to sue one or all, or any number of them. If the plaintiff commence suit against several, he may, at any time before judgment, enter a *nolle prosequi* as to any of them. Even after a joint plea in an action of trespass, and after a verdict that the defendants are jointly guilty, the plaintiff may enter a *nolle prosequi* as to some and take judgment against the others. (978).

The annotations to the Century Digest, Decennial Digest and American Digest, Key Number Series, were prepared by the Editorial Staff of the West Publishing Company. These annotations will be found throughout the volume in connection with the cases cited. They give references to the title and section number under which the several legal propositions are placed in the Century Digest, Decennial Digest and its continuations, the Key Number Series. As a uniform system of classification and section numbering is now followed throughout the National Reporter System, these Key Number references make it practicable for the reader to find other decisions on the same point, not only in the Century and Decennial Digest, but in the current issues of the American Digest and in the bound volumes and advance sheet indexes of the various Reporters issued by the West Publishing Company.

REMEDIES.

CHAPTER I.

REMEDIES WITHOUT JUDICIAL PROCEEDINGS.

SEC. 1.—REMEDIES BY OPERATION OF LAW.

(a) Remitter.

“Remitter is where he who hath the true property or *jus proprietatis* in lands, but is out of possession thereof, and hath no right to enter without recovering possession in an action, hath afterwards the freehold cast upon him by some subsequent, and of course defective title: in this case he is remitted, or sent back by operation of law, to his ancient and more certain title. The right of entry, which he hath gained by a bad title, shall be *ipso facto* annexed to his own inherent good title: and his defeasible estate shall be utterly defeated and annulled by the instantaneous act of law, without his participation or consent. As if A disseizes B, that is, turns him out of possession, and dies, leaving a son C: hereby the estate descends to C the son of A, and B is barred from entering thereon till he proves his right in an action: now if afterwards C, the heir of the disseizor, makes a lease for life to D, with remainder to B, the disseizee, for life, and D dies: hereby the remainder accrues to B, the disseizee: who thus gaining a new freehold by virtue of the remainder, which is a bad title, is by act of law remitted [to, and is] in of, his former and surer estate. For he hath thereby gained a new right of possession, to which the law immediately annexes his ancient right of property.” 3 Blk. 19.

“The principle of remitter . . . applies where one, having a wrongful possession, has the title thrown on him by act of law—as by descent; he is then remitted to his ‘more ancient and better title,’ but not where he acquires the title by his own act. Coke Lit. Here the lessors of the plaintiff ac-

acquired both the possession and the 'more ancient title' by their own acts. It follows that they cannot sustain it in this court." *Williams v. Council*, 49 N. C. at p. 216.

PATE v. HAZELL, 107 N. C. 189, 11 S. E. 1089. 1890.
Restoration of Suspended Title to a Chattel.

[This was a civil action to recover possession of a sewing-machine.]

SHEPHERD, J. The defendant, the legal owner of the sewing machine, leased it to Annie Smith (now Mrs. Atkinson), who, with her husband, pledged it to the plaintiff. The plaintiff held it in his possession about four years, when it was discovered, and taken by the defendant. The plaintiff claims title by reason of his four years' possession. It is argued that the possession of a chattel confers title when the possession has been of sufficient duration to bar an action for its recovery, and, for this position, the case of *Campbell v. Holt*, 115 U. S. 620, 6 Sup. Ct. 209, is cited. Whatever may have been held by that court, we are of the opinion that no such principle has ever been recognized as a rule of the common law in North Carolina. Such was the statute law before the adoption of the present Code (see chapter 65 § 20, Rev. Code), but this was repealed, leaving no fixed period when such possession should raise a conclusive presumption of title. There is no doubt that the possession of a chattel is prima facie evidence of ownership, and this possession, if adverse and long continued, may ripen into a good title; but we cannot hold, in the absence of legislation, that four years' possession, especially under the circumstances of this case, can have the effect of defeating the true owner, who is in the actual possession of his property. Affirmed

See "Adverse Possession," Century Dig. §§ 610-623; Decennial and Am. Dig. Key No. Series, § 106.

(b) *Retainer, Lien, etc.*

EVANS v. NORRIS'S ADMR., 2 N. C. 411, 413. 1796.
Retainer.

[Case. General issue, payment and plene administravit pleaded. The defendant proved that his intestate was indebted to him; that the debt was due at the intestate's death and before this action was begun; and that he had retained the amount so due to him out of the assets which came to his hands as administrator. Plaintiff's action was to recover on a *note* made by the intestate. The defendant's claim, which he had retained, was based upon an *oral* contract.]

PER CURIAM. . . . An executor or administrator can only retain to satisfy his own demand, when it is of equal dignity with that of the creditors to whose disadvantage it is retained

... as the executor cannot sue himself, he is allowed to pay himself by retainer. The law in his favor presumes, that had he not been executor, he would have used equal diligence with any other creditor to procure payment, and places him, with respect to paying himself, in the same situation as if he had used the most expeditious diligence; but he cannot retain to satisfy himself whilst there are debts of superior dignity to his. By the act of 1786, notes are put upon the same footing with bonds, and are made superior to any simple contract debt, where the debt is not liquidated, and settled and signed by the party to be charged; of course, the debt due in the present case to the administrator cannot be satisfied by retainer in preference to the debt of the plaintiff, which is by note of hand.

See "Executors and Administrators," Century Dig. §§ 1012, 1013; Decennial and Am. Dig. Key No. Series, § 265.

FARRELL v. RAILROAD, 102 N. C. 390, 399-405, 9 S. E. 302. 1889.
Stoppage in Transitu.

[Action to recover damages for refusal to surrender a safe which plaintiffs claimed by right of stoppage in transitu. Plaintiffs alleged a sale of the safe on credit to Robertson & Rankin, and that they shipped it to them from Philadelphia to Durham, N. C., by the defendant company; that after shipment and *before delivery to the consignees*, the plaintiffs learned that the consignees were *insolvent* and notified the defendant not to deliver the safe to them; that plaintiffs tendered the freight charges due for transporting the safe, but that defendant refused to surrender the safe to them. The defendant claimed title to the safe under a sale by attachment proceedings instituted by it against the consignees, and set up other defenses which appear in the opinion. Verdict and judgment for the plaintiffs, and defendant appealed. Affirmed.]

SHEPHERD, J. . . . The plaintiffs' action is based upon their alleged right to stop the property in transitu. This right arises solely upon the insolvency of the buyer, and is based on the plain reason of justice and equity, that one man's goods shall not be applied to the payment of another man's debts. If, therefore, after the vendor has delivered the goods out of his own possession, and put them in the hands of a carrier for delivery to the buyer (which, as we have seen, is such a constructive delivery as divests the vendor's lien), he discovers that the buyer is insolvent, he may retake the goods if he can, before they reach the buyer's possession, and thus avoid having his property applied to paying debts due by the buyer to other people. It is "highly favored on account of its intrinsic justice." 2 Benj. Sales, §§ 1229-1231. It is but an equitable extension or enlargement of the vendor's common-law lien for the

price, and not an independent and distinct right." Note to section 1229, *supra*. "It is quite immaterial that the insolvency existed at the time of the sale, provided the vendor be ignorant of the fact at that time." *Loeb v. Peters*, 63 Ala. 243, and a number of cases cited in note to section 1224, *Benj. Sales, supra*. These last authorities fully sustain his honor in refusing the third instruction asked by the defendant. The mere fact that Robertson & Rankin, the consignees, were insolvent at the time of the sale, could not defeat the lien of the plaintiffs, unless they knew of such insolvency. The charge as given was correct in this particular, and the jury having found substantially that the plaintiffs were, nothing further appearing, entitled to avail themselves of the right of stoppage in transitu, and that they exercised that right through their agent, Mr. Fuller, we will now consider the several defenses made by the defendant. No agreement or usage having been shown to the contrary, the right of stoppage in transitu continued until the safe was actually or constructively delivered to the consignee. *Id.* § 1269; *Hause v. Judson*, 29 Amer. Dec. 377, and notes. The first defense, though not seriously pressed upon the argument, is that the defendant acquired title by reason of the sale under the attachment proceedings instituted by it against the consignee for arrearages of freight due on lumber. "The vendor's right of stoppage in transitu is paramount to all liens against the purchasers (*Hill, Sales*, 289; *Blackman v. Pierce*, 23 Cal. 508); even to a lien in favor of the carrier, existing by usage, for a general balance due him from the consignee (*Oppenheim v. Russell*, 3 Bos. & P. 42). An attachment or execution against the vendee does not preclude the stoppage in transitu, for this is not a taking possession by the vendee's authority; the proceeding being in invitum." Note to *Hause v. Judson, supra*, where a large number of authorities sustaining the text are collected. These authorities conclusively settle that the defense under the attachment proceedings cannot be maintained.

The second defense rests upon the following clause of the bill of lading: "The several carriers shall have a lien upon the goods [shipped] for all arrearages of freight and charges due by the said owners or consignees on other goods." The counsel for the defendant could give us no authority in support of this defense, and none, we think, can be found, to the effect that such a stipulation should be construed to take away this "highly-favored" and most important right of the vendor to preserve his lien, in order "that his goods may not be applied to the payment of another man's debts," much less to those of his agent to whom he delivers them for carriage. Shippers would hardly contemplate that, in accepting such a bill of lading, the well-established and cherished right of stoppage in transitu was to be made dependent upon whether a distant con-

signee was indebted to the carrier, and the commercial world would doubtless be surprised if it were understood that, whenever such a stipulation was imposed upon consignors, they were in effect yielding up their lien for the purchase money, and substantially pledging their goods for the payment of an existing indebtedness due their agent, the carrier, by a possible insolvent vendee. If such is the proper construction, we can well appreciate the language of Lord ALVANLEY, in *Oppenheim v. Russell*, 3 Bos. & P. 42, when he said that he hoped it would "never be established that common carriers, who are bound to take all goods to be carried for a reasonable price tendered to them, may impose such a condition upon persons sending goods by them." He doubts whether an express agreement between the carrier and the consignor would be binding, and BEST, J., in *Wright v. Snell*, 5 Barn. & Ald. 350, in speaking generally of such contracts, said he "doubted whether a carrier could make so unjust a stipulation." Chancellor Kent, in the second volume of his *Commentaries*, remarks that "it was again stated as a questionable point in *Wright v. Snell* whether such a general lien could exist as between the owner of the goods and the carrier, and the claim was intimated to be unjust. It must, therefore, be considered a point still remaining to be settled by judicial decision." Page 638. It is unnecessary, however, for us to say whether such a condition or agreement would be reasonable and binding, as it seems very clear to us that the stipulation in the present case is not susceptible of the construction contended for, and that it is entirely subordinate to the right of stoppage in transitu. The exercise of this right revested the right of possession in the plaintiffs, and, they having tendered all they owed the defendant, no interest was ever acquired by the vendee to which the claim of the defendant could attach.

The third and most plausible defense is that, according to the testimony of the agent, Holt, there was a constructive delivery to the consignee, and that this defeated the rights of the plaintiffs. The doctrine is well settled that "where goods are placed in the possession of a carrier, to be carried for the vendor, to be delivered to the purchaser, the transitus is not at an end . . . until the carrier, by agreement between himself and the consignee, undertakes to hold the goods for the consignee, not as carrier, but as his agent; and the same principle will apply to a warehouseman or wharfinger." 2 Benj. Sales, *supra*, § 1269. Was there any such agreement in this case? The most that can be said is that the consignee offered to pledge the safe to the defendant for the freight already due on lumber. There was no actual change of possession. The safe was in the defendant's warehouse, and Holt, the agent, and the consignee were both leaning upon it. The consignee, placing his hand on it, said: "I place this safe in your hands as secur-

ity for what I owe." There was no response whatever by Holt. He simply states that he "held the safe till some little time afterwards," when he heard that the consignee had run away, and that he sued out the attachment proceedings mentioned in the answer. The majority of us are of the opinion that there was no reasonably sufficient evidence to be submitted to the jury upon the acceptance of the offer and of delivery. There being no actual delivery, a constructive one can only be effected by a valid agreement on the part of the common carrier to hold for the consignee. Mr. Benjamin, from whom we have so largely quoted, says "that the existence of the carrier's lien for unpaid freight raises a strong presumption that the carrier continues to hold the goods as carrier and not as warehouseman; and, in order to *rebut this presumption* [the italics are ours] there must be proof of some arrangement or agreement between the buyer and the carrier, whereby the latter, while retaining his lien, becomes the agent of the buyer to keep the goods for him." But, conceding that the acquiescence of Holt was some evidence of the acceptance of the offer, would this in law amount to such a delivery as will defeat the plaintiffs' right? Passing by the question as to whether the defendant bailee was not estopped to set up such a transaction in favor of itself and against its principal (2 Wait, Act. & Def. 57), and also the fact that the alleged agreement was not to hold as agent of the vendee, but for itself, we are of the opinion that what transpired between the defendant's agent and the vendee did not alter in the slightest degree the relation in which they stood to each other. It will be borne in mind that there was no actual delivery; that the defendant had a lien for the freight due on the property, and under the stipulation in the bill of lading it had, as against the consignee, also a lien for the arrearages of freight due by him. There was no new consideration, and the proposition of the consignee, and its alleged acceptance by the defendant, left them in precisely the same position as before. It amounted virtually to the defendant's saying: "If you will pay the freight and arrearages, I will deliver you the safe." This was, as we have seen, the effect of the bill of lading. In the leading case upon this subject (*Whitehead v. Anderson*, 9 Mees. & W. 517, cited with approval by Benjamin, *supra*), the agent of the consignee went on board of the ship when she arrived in port, and told the captain that he had come to take possession of the cargo. He went into the cabin, into which the ends of the timber projected, and saw and touched the timber. When the agent first stated that he came to take possession, the captain made no reply, but subsequently, at the same interview, told him that he would deliver him the cargo when he was satisfied about his freight. They went ashore together, and shortly after an agent of the consignor served a

notice of stoppage in transitu upon the mate, who had charge of the cargo: "Held that, under these circumstances, there was no actual possession taken of the goods by the consignees, and that, as there was no contract by the captain to hold the goods as their agent, the circumstances did not amount to a constructive possession of the goods by them. There is no proof of any such contract. A promise by the captain to the agent of the consignees is stated, but it is no more than a promise, without a new consideration, to fulfill the original contract, and deliver in due course to the consignee on payment of freight, which leaves the captain in the same situation as before. After the agreement he remained a mere agent for expediting the cargo to its original destination." This, it seems to us, is conclusive of our case. Here there was no new consideration whatever moving from the vendee, nor was there any definite understanding that the defendant was to forbear pressing the vague proceedings suggested by him. 1 Add. Cont. 11, note. There was therefore no new contract, and the defendant held the safe in the same character as he did before, when, as we have shown, it was subject to the paramount claim of the plaintiffs. We have been able to find no case where a pledge of this kind has been asserted, but we have observed that all the cases we have examined lay down the rule that constructive delivery is only made by the carrier, either agreeing, expressly or by implication, to hold as the agent of the consignee.

While the amount involved in this suit is small, we have thought it our duty, in view of the importance of the questions of law presented, to carefully examine many of the multitude of cases upon the subject, and our conclusion is that his honor was correct in telling the jury that what transpired between Holt and Robertson (one of the consignees) did not amount to a delivery, and was not sufficient to deprive the plaintiffs of any rights they might acquire in respect to the safe. There is no error.

See *Jordan v. James*, 5 Ohio, 88; see "Carriers," Century Dig. §§ 247, 896, 900; Decennial and Am. Dig. Key No. Series, §§ 74, 197; "Sales," Century Dig. §§ 829, 834; Decennial and Am. Dig. Key No. Series, §§ 291, 294.

WINSLOW v. WALKER, 2 N. C. 192. 1795.

Liens.

Trover for a boat, and a general verdict for the plaintiff, subject to the opinion of the court upon this special case, viz: The boat sued for was the property of the plaintiff and was drifted away from the landing at Campbellton and floated down the river 114 miles, to a part of the river about a mile wide.

and was there taken up by a stranger; it again got adrift and went to the New Inlet, where the river empties into the sea, ten miles wide: there it was again taken up by a stranger who knew not the owner, nor from whence the boat had come. The boat was greatly wrecked and damaged, and in that condition was sold to the defendant, who repaired it: upon which the plaintiff demanded it, and the defendant refused to deliver it. If on the above facts the law is for the plaintiff, the judgment to be given for him on the verdict; if for the defendant, then a nonsuit to be entered.

And now upon argument it was insisted for the defendant, that the taker-up of the boat who sold it to him, had a lien on it for his salvage, to which he was entitled. 1 Ld. Raym. 393; the case of Harford & Jones, and 2 W. Blk. 1117, were cited. The court took time to advise, and the next day gave judgment for the plaintiff; being of the opinion that the right he had to detain the boat until paid for salvage, was in the nature of a demand upon the plaintiff, or a chose in action, to be enforced by keeping possession of the boat till the plaintiff should satisfy him, which could not be transferred with the boat to another; and being founded on the possession, when he parted with that, he lost his lien, and could then only recover his salvage in his own name against the plaintiff. 1 Atk. 234, 235; 1 Burr. 494; 5 Bac. Abr. 270; Doug. 105; 4 Burr. 2214. And there was judgment for the plaintiff.

In a number of instances the common law and the statutes of the several states confer upon a creditor the right to retain possession of the chattels of his debtor until the debt is satisfied. In such cases the creditor has a lien on such chattels. "A lien is a right in one man to retain that which is in his possession belonging to another till certain demands of him, the person in possession, are satisfied." *Hammonds v. Barclay*, 2 East, at p. 235. The best elucidation of the law of Common Law Liens is in 1 Gray's Cases, 241 et seq. See also *Jordan v. James*, 5 Ohio, 88; 25 Cyc. 661. In the principal case the lien claimed is for salvage which is only one of many instances in which a lien is given by the common law. Many liens are given in North Carolina by the Revisal, chap. 48. See "Salvage," Century Dig. §§ 31, 106; Decennial and Am. Dig. Key No. Series, §§ 18, 41; "Liens," Century Dig. § 11; Decennial and Am. Dig. Key No. Series, § 16.

(c) *Removal of Trade Fixtures.*

BROOKS v. STINSON, 44 N. C. 72. 1852.

Removal of Fixtures by Tenant or Licensee.

[Trespass *quare clausum fregit* for entering a school-house on plaintiff's land and removing a table, benches, and some loose plank. Defense, that plaintiff had authorized defendants, as public school committee-men, to conduct a school in the house; that the articles removed

were placed in the house and removed by defendants *during the period covered by their permit to conduct the school*. Verdict and judgment for defendants. Appeal by plaintiff. Affirmed.]

NASH, C. J. (After disposing of the question as to whether plaintiff had such a possession of the locus in quo at the time of the acts complained of, as would sustain the action.) But again: The articles taken were carried by the committee to the house and placed in it for the use of the school or school-master, and none of them had been annexed to the realty. They therefore, during the continuance of the lease, had a legal right to remove them. It is fully established, that a tenant for years may take down erections which are useful and necessary to carry on his trade or manufacture, and which enable him to carry it on with more advantage. *Bac. Abr. tit. "Ex'rs."* letter H; 2 East, 38. So he may carry away ornamental marble chimney pieces, and wainscot fixed only by screws, *Elwes v. Maw*, 3 East, 38; but he cannot, after he has left the premises, upon the expiration of his lease, return and take them away—if he does, he is a trespasser. We see no error, and the judgment is affirmed.

For the right of tenants to remove trade fixtures, manure, etc., see *Conron v. Glass*, 84 N. E. 1105, 18 L. R. A. (N. S.) 423, and note; *Munier v. Zachary*, 114 N. W. 525, 18 L. R. A. (N. S.) 572, and note; electrical contrivances and devices, *Raymond v. Strickland*, 52 S. E. 619, 3 L. R. A. (N. S.) 69, and note; effect of renewing lease during the term upon right of removal, *Wadman v. Burke*, 1 L. R. A. (N. S.) 1192, and note; gas stoves and fixtures, window and door screens and shades, steam heating apparatus, *Hook v. Bolton*, 85 N. E. 175, 17 L. R. A. (N. S.) 699, and note. See "Fixtures," *Century Dig.* §§ 22-31; *Decennial and Am. Dig. Key No. Series*, §§ 14-17.

SEC. 2. REMEDIES BY THE ACT OF THE PARTY INJURED.

(a) *Self-defense.*

POND v. THE PEOPLE, 8 Mich. 150, 175-179. 1860.

Life and Limb of Self, Family, and Servants.

[Pond was convicted of manslaughter, in the district court of Mackinac county, being tried upon an information for the murder of Isaac Blanchard. He took the case to the supreme court by writ of error. Judgment reversed.]

It appeared in evidence that Pond together with his wife, three children under 13, and two hired men, Whitney and Cull, lived on his own premises, and that he carried on the business of fishing. On the premises was a small dwelling, occupied by Pond and his family, and, 33 feet therefrom, another house used as a net house in which Cull and the other hired man slept. Within a week before the homicide, one Plant said, in the presence of Pond's daughter, that he would whip Pond, which threat was communicated to him. The deceased was pres-

ent when the threat was made. Later in the day Plant and a number of persons including deceased, surrounded Pond, and Plant struck him in the face with his fist and kicked him. Pond did not resent this but drank whiskey with Plant. Pond then escaped to the woods. That night the same "gang," with about 15 or 20 associates, tore down the door of the net-house where Pond's servants were asleep; demanded to be let into Pond's dwelling; and made a search for him, but refused to tell what they wanted with him. Later in the week Plant and deceased met Pond and Plant again threatened to whip him. That night they went to Pond's house and demanded him. He concealed himself under the bed. After committing other acts of violence, Plant and deceased departed. Thereafter Pond borrowed a shot-gun, loaded with pigeon shot, from his brother-in-law, who lived a short distance from him, and returned to his home. Later on the "gang" returned to Pond's and asked his wife to admit them to his dwelling that they might search for him. Upon her refusal, they went to the net-house, in which Cull was asleep, and tore down part of it and beat Cull. Pond went to the door and asked who was tearing down his net-house. He received no reply, but heard cries of distress from a woman and child and from Cull. He then cried out loudly, "Leave, or I'll shoot." The noise continuing, he gave the same warning again and in a few seconds fired. The deceased was found dead next morning. Pond immediately surrendered himself.

There were several exceptions to the judge's refusal to give certain special instructions and to the charge as given. The gist of all which was, so far as relates to self-defense, that the jury were instructed, contrary to the prisoner's prayers, that the prisoner was not excused or justified in shooting upon an *apparent and reasonably founded cause or apprehending injury of a serious or felonious character* to himself, his property, family and servants; but that he must show the *actual existence of such danger*.]

CAMPBELL, J. . . . In order to determine the materiality of the questions of law raised, it becomes necessary to determine under what circumstances homicide is excusable or justifiable. In doing this, it will be proper to advert merely to those instances which may be regarded as coming nearest to the circumstances of the case before us. The other cases we are not called upon to define or consider; and what we say is to be interpreted by the case before us.

The only variety of excusable homicide (as contradistinguished from justifiable homicide at common law) which we need advert to, is that which is technically called homicide *se aut sua defendendo*, and which embraces the defense of one's own life, or that of his family, relatives, or dependents, within those relations where the law permits the defense of others as of one's self. Practically, so far as punishment is concerned, there is no distinction with us between excusable and justifiable homicide; but a resort to common-law distinctions will nevertheless be convenient, in order to illustrate the difference between the various instances of homicide in repelling assaults, according as they are, or are not, felonious. Homicide *se defendendo* was excusable at common law when it occurred in a sudden affray, or in repelling an attack not made with a felo-

nious design. According to Mr. Hawkins, it was excusable and not justifiable, because, occurring in a quarrel, it generally assumed some fault on both sides. Hawk. P. C., B. 1, ch. 28, sec. 24. In these cases, the original assault not being with a felonious intent, and the danger arising in the heat of blood on one or both sides, the homicide is not excused unless the slayer does all which is reasonably in his power to avoid the necessity of extreme resistance, by retreating where retreat is safe, or by any other expedient which is attainable. He is bound, if possible, to get out of his adversary's way, and has no right to stand up and resist if he can safely retreat or escape. See 2 Bish. Cr. L. secs. 543 to 552, 560 to 562, 564 to 568; People v. Sullivan, 3 Seld. 396; 1 Russ. Cr. 660, et seq. Mr. Russell lays down the rule very concisely as follows (p. 661): "The party assaulted must therefore flee, as far as he conveniently can, either by reason of some wall, ditch, or other impediment or as far as the fierceness of the assault will permit him; for it may be so fierce as not to allow him to yield a step without manifest danger of his life or great bodily harm; and then, in his defense, he may kill his assailant instantly. Before a person can avail himself of the defense that he used a weapon in defense of his life, he must satisfy the jury that that defense was necessary; that he did all that he could to avoid it; and that it was necessary to protect his own life, or to protect himself from such serious bodily harm as would give him a reasonable apprehension that his life was in immediate danger. If he used the weapon, having no other means of resistance, and no means of escape, in such case, if he retreated as far as he could, he would be justified." A man may defend his family, his servants, or his master, whenever he may defend himself. [Compare *Leward v. Basely*, inserted post.] How much farther this mutual right exists, it is unnecessary in this case to consider. See Bish. Cr. L. sec. 581, and cases cited; 1 Russ. Cr. 62; 4 Blk. Com. 184.

There are many curious and nice questions concerning the extent of the right of self-defense, where the assailed party is at fault. But as neither Pond nor Cull were in any way to blame in bringing about the events of Friday night, which led to the shooting of Blanchard, it is not important to examine them. The danger to be resisted must be to life, or of serious bodily harm of a permanent character; and it must be unavoidable by other means. Of course, we refer to means within the power of the slayer, so far as he is able to judge from the circumstances as they appear to him at the time. A man is not, however, obliged to retreat if assaulted in his dwelling, but may use such means as are absolutely necessary to repel the assailant from his house, or to prevent his forcible entry, even to the taking of life. But here as in the other cases, he must not take life if

he can otherwise arrest or repel the assailant: 2 Bish. Cr. L. sec. 569; 3 Greenl. Ev. sec. 117; Hawk. P. C., B. 1, ch. 28, sec. 23. Where the assault or breaking is felonious, the homicide becomes justifiable, and not merely excusable.

The essential difference between excusable and justifiable homicide rests not merely in the fact that at common law the one was felonious, although pardoned of course, while the other was innocent. Those only were justifiable homicides where the slayer was regarded as promoting justice, and performing a public duty; and the question of personal danger did not necessarily arise, although it does generally.

It is held to be the duty of every man who sees a felony attempted by violence, to prevent it if possible, and in the performance of that duty, which is an active one, there is a legal right to use all necessary means to make the resistance effectual. Where a felonious act is not of a violent or forcible character, as in picking pockets, and crimes partaking of fraud rather than force, there is no necessity, and, therefore, no justification, for homicide, unless possibly in some exceptional cases. The rule extends only to cases of felony, and in those it is lawful to resist force by force. If any forcible attempt is made, with a felonious intent against person or property, the person resisting is not obliged to retreat, but may pursue his adversary, if necessary, till he finds himself out of danger. Life may not properly be taken under this rule where the evil may be prevented by other means within the power of the person who interferes against the felon. Reasonable apprehension, however, is sufficient here, precisely as in all other cases.

It has also been laid down by the authorities, that private persons may forcibly interfere to suppress a riot or resist rioters, although a riot is not necessarily a felony in itself. This is owing to the nature of the offense, which requires the combination of three or more persons, assembling together and actually accomplishing some object calculated to terrify others. Private persons who cannot otherwise suppress them, or defend themselves from them, may justify homicide in killing them, as it is their right and duty to aid in preserving the peace. And perhaps no case can arise where a felonious attempt by a single individual will be as likely to inspire terror as the turbulent acts of rioters. And a very limited knowledge of human nature is sufficient to inform us, that when men combine to do an injury to the person or the property of others, of such a nature as to involve excitement and provoke resistance, they are not likely to stop at halfway measures, or to scan closely the dividing line between felonies and misdemeanors. But when the act they meditate is in itself felonious, and of a violent character, it is manifest that strong measures will generally be required for their effectual suppression, and a man who defends himself, his

family or his property, under such circumstances, is justified in making as complete a defense as is necessary.

When we look at the facts of this case, we find very strong circumstances to bring the act of Pond within each of the defenses we have referred to. . . . It was for the jury to consider the whole chain of proof, but if they believed the evidence as spread out upon the case, we feel constrained to say that there are very few of the precedents which have shown stronger grounds of justification than those which are found here. Instead of reckless ferocity, the facts display a very commendable moderation. . . . We think there was error in requiring the actual instead of apparent and reasonably founded causes of apprehension of injury; in holding that the protection of the net-house could not be made by using a dangerous weapon; and that the conduct of the assailing party was not felonious; and also in using language calculated to mislead the jury upon the means and extent of resistance justifiable in resisting a felony. . . . The judgment below must be reversed, and a new trial granted.

The court further held that the net-house was within the curtilage, and, being occupied as a permanent dwelling by Pond's servants, it was a felony to break into it; and that whether such breaking was a felony at common law or under the Michigan statute was immaterial so far as this case is concerned.

"The law of self-defense justifies an act done in honest and reasonable belief of immediate danger; and, if an injury be thereby inflicted upon the person from whom the danger was apprehended, no liability, civil or criminal, follows. [That no civil liability follows, see also 23 L. R. A. (N. S.) 996.]

"If an act of an employee be lawful and one which he is justified in doing, and which casts no personal responsibility upon him, no responsibility attaches to his employer therefor." N. O. & N. E. R. R. v. Jones, 142 U. S. 18, 12 Sup. Ct. 109, headnotes 2 and 3. Compare Daniel v. R. R., 117 N. C. 592, 23 S. E. 327.

"When a man puts himself in a state of resistance and openly defies the officers of the law, he is not allowed to take advantage of his own wrong, if his life is thereby endangered, and set up the excuse of self-defense." State v. Horner, 139 N. C. 603, headnote 7, 52 S. E. 136. "When the prisoner knew that the deceased was a deputy sheriff, and that he had a warrant for his arrest for a misdemeanor, it was his duty to submit to arrest. In resisting it, with a gun in his hand, it is not open to him to say that he acted in self-defense; and this is not affected by the fact that the officer was not justified in shooting him to make the arrest." Ibid. headnote 6.

See "Homicide," Century Dig. §§ 131-183; Decennial and Am. Dig. Key No. Series, §§ 101-123; "Criminal Law," Century Dig. § 3336; Decennial and Am. Dig. Key No. Series, § 1225.

STATE v. HOUGH, 138 N. C. 662, 666-668, 50 S. E. 709, 1905.

Life and Lamb. Retreating to the Wall.

[Indictment for the murder of George Hartsell. Conviction of manslaughter. Appeal by prisoner. In the course of the opinion it is said:]

BROWN, J. . . . It is undoubtedly true that if two engage in a fight upon a sudden quarrel, one being unarmed and the other armed, and one kills the other with a deadly weapon, it is at least manslaughter. *State v. Curry*, 46 N. C. 280. But if the defendant's evidence is to be believed, this was not a fight upon a sudden quarrel. He had a right to suppose that the deceased was advancing on him for the purpose of carrying into execution his previous threats; and if, under such circumstances, the jury should find that the defendant had reasonable ground to believe that the deceased intended to do him great bodily harm, then he had a right to defend himself, and if the jury should find that the use of a deadly weapon under such circumstances, considering the enormous difference in the size and strength of the two men, was necessary in order to make his defense effectual, then the defendant would not be guilty. If the assault was committed under such circumstances as would naturally induce the defendant to believe that the deceased was capable of doing him great bodily harm, and intended to do it, then the law would excuse the killing, because any man who is not himself legally in fault has the right to save his own life, or to prevent enormous bodily harm to himself. *State v. Lipscomb*, 134 N. C. 692, 47 S. E. 44. The general rule is that "one may oppose another attempting the perpetration of a felony, if need be, to the taking of the felon's life, as, in the case of a person attacked by another intending to kill him, who thereupon kills his assailant, he is justified." 2 Bishop's Criminal Law, § 332. There is a distinction made by the text-writers on criminal law, which seems to be reasonable and supported by authority, between assaults with felonious intent and assaults without felonious intent. "In the latter the person assaulted may not stand his ground and kill his adversary if there is any way of escape open to him, though he is allowed to repel force with force and give blow for blow. In the former class, where the attack is made with murderous intent, the person attacked is under no obligation to fly, but may stand his ground and kill his adversary, if need be." 2 Bishop's Criminal Law, § 6333, and cases cited. It is said in 1 East, Pleas of the Crown, 271: "A man may repel force by force in defense of his person, habitation, or property against one who manifestly intends or endeavors by violence to commit a felony, such as murder, rape, burglary, robbery, and the like, upon either. In these cases he is not obliged to retreat, but may pursue his adversary until he has secured himself from all danger, and, if he kill him in so doing, it is called justifiable self-defense." The American doctrine is to the same effect. See *State v. Dixon*, 75 N. C. 275.

It is true, there is no evidence that the deceased was armed with a deadly weapon. At least, none was exhibited. But the evidence does show that the deceased had sent word to the defendant that he intended to kill him, and the defendant had a right to suppose that the deceased was endeavoring to carry out his

threat, and was prepared to do it. Then, again, the evidence shows there was an enormous disparity in the relative strength and power of the defendant and deceased; the one being a weakly, delicate man, of very small stature; the other, in comparison, being a giant of violent nature, and evidently capable of either killing the defendant or doing him great bodily harm without the aid of a weapon. The defendant was on his own premises, engaged in his peaceful pursuits, at the time the deceased advanced on him in a manner giving unmistakable evidence of his purpose to do the defendant bodily harm. How was the defendant expected to receive him? In the oft-quoted language of Judge Pearson in *State v. Floyd*, 51 N. C. 392, "One cannot be expected to encounter a lion as he would a lamb," and the measure of force which the defendant was permitted to use under such circumstances ought not to be weighed in "golden scales." New trial.

"On the question of the applicability of the rule of reasonable doubt to self-defense in homicide, or the requisite proof of self-defense, the authorities, as shown by a note in 19 L. R. A. (N. S.) 483, are not harmonious, some cases going to the extent of holding that the defendant must show self-defense beyond a reasonable doubt, and some to the other extreme of holding that the burden is upon the prosecution affirmatively to prove the absence of self-defense. Between these two extreme views the cases apparently take every possible position. In the case to which the note is appended—*Com. v. Palmer* (Pa.) 71 Atl. 100, it is held that, where an intentional killing by the use of a deadly weapon has been established, accused has the burden of showing that it was in self-defense by a fair preponderance of the facts." Case and Comment.

It is ruled in *Miller v. State*, 139 Wis. 57 (1909), that the common law rule as to "retreating to the wall"—the "flight rule"—is no longer the law.

For an elaborate note on "retreat to the wall," see 2 L. R. A. (N. S.) 49; for plea of self-defense when homicide is committed in resisting an officer, see *State v. Durham*, 141 N. C. 741, 53 S. E. 720, 5 L. R. A. (N. S.) 1016, and note. See "Homicide," Century Dig. §§ 138-176; Decennial and Am. Dig. Key No. Series, §§ 108-121.

LEWARD ET UX. v. BASELY, 1 Lord Raymond, 62, 1696.
Defence of Wife, Husband, Master. Extent of Force Allowed.

Trespass, assault and battery, for a battery committed upon the wife. The defendant pleads *de son assault d'emesme* of the wife. The plaintiff's reply, that the defendant went out to fight the husband, and that she being desirous to assist her husband, and to keep him from being wounded, insultum fecit upon the defendant. The defendant demurs. And Mr. Carthew argued that this insultum fecit was ill. And for that he cited a case between Jones and Tresillian, *intr. Trin. 21 Car. 2 B. R. Rot. 841*; 1 Mod. 36; 1 Sid. 441; 1 Lev. 282; 2 Keb. 597. Trespass, assault and battery, the defendant pleaded *de son assault de*

mesne; the plaintiff replied, that he was possessed of a close called Cupner's close, and that the defendant broke the gate and chased his horses in the close, and the plaintiff for defending his possession molliter insultum fecit upon the defendant; and upon demurrer adjudged a bad replication, for he should have said molliter manus imposuit; but he could not justify an assault in defense of his possession. And this case the court agreed to be good law, but different from the present case; for this is a justifiable assault, for the wife may lawfully make an assault to keep her husband from harm, and she has pleaded it so. In the same manner a servant may justify an assault in defense of his master, but not e contra, because the master might have an action per quod servitium amisit. So in this case, if the defendant lifted his hand to strike the husband, the wife might well justify an assault to prevent the blow. And if the fact had been otherwise, the defendant ought to have rejoined, de son tort demesne, and then it had been against the plaintiff. But a man cannot justify an assault in defense of his horse, or his possession, for there he ought to say, molliter manus imposuit. Judgment for the plaintiff, nisi, etc.

See *State v. Cook*, 59 S. E. 862, 15 L. R. A. (N. S.) 1013, and note; *Pond v. The People*, inserted in ch. 1, sec. 2 (a); also *State v. Bullock*, 91 N. C. 614; *State v. Johnson*, 75 N. C. 174; 2 Kent, *261; 3 Cyc. 1075; 14 L. R. A. 317, and note; *Johnson v. Perry*, 56 Vt. 703, inserted in ch. 1, sec. 2, (b). See "Assault and Battery," Century Dig. § 12; Decennial and Am. Dig. Key No. Series, § 14.

PERRY v. PHIPPS, 32 N. C. 259. 1849.
Defense of Person. Unnecessary Violence.

[Action of trespass for killing plaintiff's dog on the premises of plaintiff. Verdict and judgment for plaintiff. Appeal by defendant. Affirmed.]

Defendant entered the yard of plaintiff on a visit. The dog attacked him and was only prevented from biting him by being driven off by plaintiff's daughter. After the dog had been driven off and while it was going under the house, it was shot and killed by the defendant, against the protest of the plaintiff's daughter. Defendant offered to show that "the dog had attacked persons off the plaintiff's land" on three occasions; but the evidence was rejected. The jury were instructed that "defendant was not justifiable in killing the dog unless in defense of himself; and if the dog had retreated and was still retreating, the jury might infer therefrom that the defendant did not shoot the dog to protect himself."]

RUFFIN, C. J. . . . The instructions appear to the court to be unexceptionable. A person is not bound to stand quietly and be bitten by a dog, nor to give him what might be called a fair fight among men. But if a fierce and vicious dog be allowed to go at large, and he runs at a person, as he lawfully gets to a house, or in passing along the road, apparently to set on the per-

son, or, for example, on the horse he is riding, it seems but reasonable the person should protect himself from the injury of a bite to himself or his horse, by killing the dog: for, although a man has a right to keep a dog for the protection of his house and yard, yet he ought to keep him secured, and not let him loose and uncontrolled at such hours and in such places as will endanger peaceable and honest people engaged in their lawful business. If, therefore, this dog were one of the kind supposed and the defendant had shot him, as he came at him, and when he had reasonable grounds to think, that the dog could not be restrained by the owner or his family, and would bite him, we should hold, that he did no more than he had a right to do. But when the plaintiff's family were at home, and, by their immediate interference and commands and punishment, governed and drove away the dog, so as not only to prevent him from biting the defendant at that time, but also to save the defendant from all danger then, by driving the dog away, the killing of the dog after that, and against the urgent entreaties of the family, could have been only on the pretense, and not on the reality of protecting the defendant from an attack at that time, and the circumstances were properly left to the jury, as evidence on which they might find, that the defendant did not act on the defensive. Judgment affirmed.

See "Animals," Century Dig. § 252; Decennial and Am. Dig. Key No. Series, § 73.

STATE v. CRATON, 28 N. C. 164, 174-176. 1845.

A Husband May "Preserve His Honor."

[Craton was indicted for the murder of Harrison. Verdict and judgment against defendant. Appeal by defendant. Affirmed.]

The material facts, as to the point presented by that part of the opinion here inserted, may be thus summarized: Harrison had reason to believe that improper relations existed, or were likely to exist, between his wife and Craton. On the day of the homicide Harrison's wife insisted upon riding behind Craton on a horse, against her husband's protest. Craton and the woman being on one horse and Harrison on another, they all proceeded along the same road for some distance. Then Harrison demanded that Craton surrender his wife to him, threatening to kill him if he refused. After several demands of this kind and sundry threats as above, Harrison turned his horse across the road so as to intercept Craton, and, with an open knife in his hand, again demanded the surrender of his wife by Craton, threatening to kill Craton, should he refuse. Craton turned out of the road; but Harrison got before him again. Craton dismounted and told Harrison that he would beat him if he did not leave. Craton then killed Harrison by striking him with a stick.]

RUFEN, C. J. . . . The question, then, in this case, turns upon the right of the deceased to coerce the prisoner to surrender to him his wife, and that depends much on the authority of a husband over his wife. There is no suspicion, that

the prisoner detained the wife against her will. If that had been the case, the husband could have justified a battery in her defense and for her rescue. But, though she was detained by the prisoner with her consent, the court is of opinion, that under the circumstances the deceased had a right, after demanding his wife, to stop the prisoner, as he did, until he should give her up. In general, a man has a right to the exclusive custody of his wife. It may be true, that any person has a right to protect her from the violence of her husband, and to take her from cruel usage under his hand. And it may also be true, that the husband would not have a right to take her by force from the house of a parent or any proper protection during a difference between them, nor, indeed, to confine her, where there is not plainly a sufficient reason for imposing the restraint upon her. But in *Lister's Case*, 8 Mod. 22, 1 Str. 478, it was agreed by all the court, that where a wife makes an undue use of her liberty, as by going into lewd company, it is lawful for the husband, in order to preserve his honor, to lay his wife under a restraint; though when nothing of that appears, he cannot justify depriving her of her liberty. Now, that is a full authority, and founded, as we think, upon the very best reason, that Harrison might have restrained his wife by force, from criminal conversation with the prisoner; and, by consequence, that he might compel her to leave the society of the prisoner, if he had any reasonable grounds to suspect, that those persons had perpetrated, or that they were forming the guilty purpose of perpetrating, a violation of his rights and honor, or were contracting those regards towards each other, which would probably result in that stigma. That such was the state of the case between these parties, there is very strong ground to affirm. The avowal by the prisoner of an affection for this woman—the inference that she returned it, to be deduced from numerous circumstances, as that he said he could elope and leave the country with her; and the familiarity with which she lay on the same bed with the prisoner, with her arm around his neck, and they both refused to change their situation, though the husband remonstrated; her pertinaciously insisting to ride home behind the prisoner, and refusing to go in any other manner; her being found by the husband on the road with the prisoner alone, and not also in the company of Mrs. Garman, her sister-in-law; and the oft-repeated refusals of both the wife and the prisoner to let the husband take her, after he overtook them, and after he had explicitly stated, as proved by the prisoner's witness, Murphy, that the reason why he insisted on having her was, that the prisoner kept her; these circumstances leave no room to doubt, that the husband entertained the belief, and that upon strong grounds of presumption, that it was essential to his wife's purity and his honor, that he should separate her from the company of the prisoner. Such a cause would justify the husband in effecting that end by compulsion on his wife, for it was obvious that nothing short of it would

be effectual. And it would seem necessarily to follow, that he might use actual force towards the paramour also, in order to regain his wife from him. But we need not consider that, as we have already seen, there was no actual assault by the deceased. There was merely a stopping of the prisoner by the deceased—drawing up his horse in front of the prisoner several times, accompanied by a demand for his wife, and a declaration that the prisoner should not go on, unless he gave up the wife. Those acts, we think, were not an injurious restraint on the prisoner's liberty, but only a lawful impediment to his carrying away the deceased's wife, to her ruin and the husband's dishonor. There was, consequently, no provocation to extenuate the killing of Harrison.

See *Drysdale v. State*, 83 Ga. 744, 10 S. E. 358, 6 L. R. A. 424, and note; *State v. Weathers*, 98 N. C. 685, 4 S. E. 512; *State v. Young*, 96 Pac. —, 18 L. R. A. (N. S.) 688, and note. See "Homicide," Century Dig. § 33; Decennial and Am. Dig. Key No. Series, § 20.

STATE v. HARMAN, 78 N. C. 515. 1878.

A Husband May "Preserve His Honor."

[Harman was indicted for the murder of Trivett. Verdict and judgment against defendant, and he appealed. Reversed. The facts appear in the opinion. Only so much of the opinion as bears upon the point under consideration is inserted.]

READE, J. 1. "Should he deal with our sister as with an harlot?" is the voice of unrestrained human nature, since Shechem defiled the daughter of Jacob and was slain by her brothers. Gen. ch. 34.

We have restrained human nature in so far as we say, you shall not slay in redress of a past wrong, but if you slay the wrongdoer in the very act, it will not be murder, but manslaughter. The redress for past offenses must be sought through the process of the courts.

In the case before us, the prisoner looked through a crack of his house, and saw the deceased, whom he had before suspected, with his arms around his wife's neck and saw enough to satisfy him, and ran around to the door and into his house, when the deceased came at him with a knife, and he killed him. The situation was not the very act, but it was severely proximate, and fine distinctions need not be made. This is clearly not murder, but manslaughter. *State v. Samuel*, 48 N. C. 74; *State v. John*, 30 N. C. 330. . . . Venire de novo.

In *State v. Neville*, 51 N. C. at pp. 423, 424, it is said by Ruffin, J. "A husband finding a man violating or attempting to violate his wife, and killing him on the spot, might plead that furor brevis which so atrocious a wrong, both to the wife and to the husband, would naturally

inspire; nay, if needful to prevent the accomplishment of the purpose, we think that he would be justified in slaying him; as the woman would be. . . . With respect to the case of adultery the law is found in the most ancient archives of the common law, . . . and a court at this day has no more authority to interpolate new qualifications or exceptions into it, than power to make a statute. . . . Homicide is extenuated to manslaughter, not by the fact that it was perpetrated in a fury of high passion, but by such fury's being excited by a present provocation which the law deems sufficient for the time to deprive men in general of that power of reasoning and reflection which ought to lead them to appeal for redress to the law, and instead thereof prompts them to take it into their own hands. The wrong is thus infallibly known, and the wrong-doer is thus made instantly to expiate it with his blood. But where a husband only *hears* of the adultery of his wife, no matter how well authenticated the information may be, or how much credence he may give to the informer, and kills either the wife or her paramour, he does it not upon present provocation, but for a past wrong—a grievous one indeed! but it is evident he kills for revenge. . . . It is obvious that these observations apply with equal force to an alleged rape or an attempt to commit a rape on the wife at a past time."

"The human cur who has invaded the domestic fold, and who is likely to invade it further, may be killed though the injured person does not catch him in the very act." Powell, J., in *Miller v. State*, 63 S. E. at mid. p. 573, inserted post in this section.

"See "Homicide," Century Dig. § 71; Decennial and Am. Dig. Key No. Series, § 47.

STATE v. RAMSEY, 50 N. C. 195. 1857.

Defense of Liberty. Excessive Force.

[Indictment for the murder of Benjamin Walker. Verdict and judgment against defendant, and he appealed. Reversed. The facts are set out in the opinion.]

BATTLE, J. There are some cases of homicide which are so near the dividing line between manslaughter and murder upon implied malice, that it is difficult to ascertain on which side they are to be found. The present case is one of that number, and it is only after a full examination of various instances of killing upon provocation more or less slight, and reflection upon the principles on which they have been decided, that we have been enabled to determine in which grade of guilt it is to be classed. In the case of the *State v. Curry*, 46 N. C. 280, we attempted the difficult task of stating, with some precision, the general rule, with the exceptions to it, which the judges and the sages of the law have established upon this subject. The general rule is, that a killing upon provocation is not murder, but manslaughter. But there are three well-defined exceptions:

"1. Where there is a provocation, no matter how strong, if the killing is done in an unusual manner, evincing thereby deliberate wickedness of heart, it is murder.

"2. Where there is but slight provocation, if the killing is done with an excess of violence out of all proportion to the provocation, it is murder.

“3. Where the right to chastise is abused, if the measure of chastisement, or the weapons used, be likely to kill, it is murder.”

His Honor in the court below thought this case came within the second exception to the general rule, and the question is whether the circumstances, under which the homicide was committed, justify his opinion.

In the consideration of this question, the first inquiry which is to be made is, whether the provocation which the prisoner received before he struck the fatal blow, is to be deemed a slight or trivial one, as it was held to be by his Honor. The injurious and unlawful restraint of a person's liberty, is undoubtedly considered a provocation of a grade sufficient to extenuate a killing: as where a creditor placed a man at a chamber-door of his debtor with a sword undrawn, to prevent him from escaping, while a bailiff was sent for to arrest him; and the debtor stabbed the creditor, who was discoursing with him in the chamber, it was held to be manslaughter only. *Rex v. Buckner*, Style's Rep. 467. So, where a sergeant in the army laid hold of a fifer, and insisted upon carrying him to prison: the fifer resisted; and whilst the sergeant had hold of him to force him, he drew the sergeant's sword, plunged it into his body, and killed him. The sergeant had no right to make the arrest, except under the articles of war and they were not proved. “*Buller, J.*, considered it in two lights: first, if the sergeant had authority; and secondly, if he had not, on account of the coolness, deliberation and reflection, with which the stab was given.” The jury found the prisoner guilty of murder; but the judges were unanimous that, as the articles of war were not proved, to show the authority of the sergeant to arrest, the conviction was wrong. *Rex v. Withers*, reported in *East's P. C.* p. 233. See also 1 *Russ. on Cr.* and M. 488. The same doctrine was recognized as law in this state in the case of *State v. Craton*, 28 N. C. 173, where the two cases, above mentioned, were cited with approbation. It is not stated in either case, whether the illegal restraint of the prisoner's liberty was deemed a slight or a great provocation; but we must suppose that it could not have been either slight or trivial in the case of *Withers*, else the judges would hardly have been unanimous in holding that an act of stabbing with a very deadly weapon, done apparently “with coolness, deliberation and reflection,” was only manslaughter. The circumstances under which the homicide was committed in the present case, made out a case of provocation, certainly not less aggravated than in that of *Withers*.

[FACTS.] The parties were neighbors, friends, and distant relatives, and had been drinking together in a friendly manner only a short time before the fatal transaction. The prisoner got his horse, mounted him and took his bag, having in it a jug containing a gallon of molasses, and started home. He had

proceeded about twenty or thirty steps, when the deceased, who was drunk, called to him to stop and come back and take another drink. He did stop, and the deceased came up and took hold of the reins of his bridle and would not let him go. The prisoner tried to get loose, but the deceased held on until the bridle rein broke. He then became angry and got off his horse and struck the deceased with his jug in the bag. This was from ten minutes to three quarters of an hour after the deceased stopped the prisoner, the witnesses differing as to the length of time the parties were together before the blow was struck. When that was done, both the prisoner and the deceased fell to the ground, and, upon rising, the former knocked the latter down again with the jug, and then struck him, while down, two more blows with the jug which was still in the bag. The prisoner, then saying to the deceased, "damn you, lie there," mounted his horse and rode off.

It cannot be denied that the act of the deceased was an illegal restraint of the prisoner's liberty, nor that his holding on to the bridle rein, against his remonstrances, until the rein broke, was well calculated to excite his passions, and they naturally prompted him to strike the deceased with what was most convenient, which was the jug in the bag then in his hands. The fall was well calculated to excite his passions still higher; and then, to strike again and again with what he still had in his hands, was the impulse of blind fury. There was no appearance of "coolness, deliberation and reflection," in his conduct, and the exclamation which follows, "damn you, lie there," was the dictate, and the evidence, of the *furor brevis*, which had so fatally expended itself. That the act of the prisoner was highly culpable, no one can deny, yet no one can say that it did not proceed from the transport of passion naturally excited by the unlawful conduct of the deceased. It was the act of an infirm human being, during the brief period when the sway of his reason was disturbed, and before it could be calmed by reflection. He did not seek an instrument of death; and though he used a deadly weapon, it was one which the deceased, by making it necessary for him to dismount, compelled him to have in his hands at the moment.

We do not think that the provocation was slight, nor was it great. It was sufficient to arouse passion even in an ordinarily well-balanced mind, and the killing, though done with an excess of violence, was not out of all proportion to the provocation. Our opinion, therefore, is, that the conviction for murder was wrong, and as it was produced by an improper charge from the court to the jury, the judgment must be reversed, and a *venire de novo* awarded.

PLOOF v. PUTNAM, 81 Vt. 471, 71 Atl. Rep. 188. 1908.
Self-Preservation.

[Ploof sued Putnam for damages resulting from the act of Putnam's servant in unmooring Ploof's boat from Putnam's dock during a storm. Defendant demurred to the declaration. Demurrer overruled. Judgment for plaintiff. Defendant appealed. Affirmed.]

MUNSON, J. It is alleged as the ground of recovery that on the 13th day of November, 1904, the defendant was the owner of a certain island in Lake Champlain, and of a certain dock attached thereto, which island and dock were then in charge of the defendant's servant; that the plaintiff was then possessed of and sailing upon said lake a certain loaded sloop, on which were the plaintiff and his wife and two minor children; that there then arose a sudden and violent tempest, whereby the sloop and the property and persons therein were placed in great danger of destruction; that, to save these from destruction or injury, the plaintiff was compelled to, and did, moor the sloop to defendant's dock; that the defendant, by his servant, unmoored the sloop, whereupon it was driven upon the shore by the tempest, without the plaintiff's fault; and that the sloop and its contents were thereby destroyed, and the plaintiff and his wife and children cast into the lake and upon the shore, receiving injuries. This claim is set forth in two counts—one in trespass, charging that the defendant by his servant with force and arms willfully and designedly unmoored the sloop; the other in case, alleging that it was the duty of the defendant by his servant to permit the plaintiff to moor his sloop to the dock, and to permit it to remain so moored during the continuance of the tempest, but that the defendant by his servant, in disregard of this duty, negligently, carelessly, and wrongfully unmoored the sloop. Both counts are demurred to generally. There are many cases in the books which hold that necessity, and an inability to control movements inaugurated in the proper exercise of a strict right, will justify entries upon land and interferences with personal property that would otherwise have been trespasses. A reference to a few of these will be sufficient to illustrate the doctrine.

In *Miller v. Fandrye*, Paph. 161, trespass was brought for chasing sheep, and the defendant pleaded that the sheep were trespassing upon his land, and that he with a little dog chased them out, and that, as soon as the sheep were off his land, he called in the dog. It was argued that, although the defendant might lawfully drive the sheep from his own ground with a dog, he had no right to pursue them into the next ground; but the court considered that the defendant might drive the sheep from his land with a dog, and that the nature of a dog is such that he cannot be withdrawn in an instant, and that, as the defendant had done his best to recall the dog, trespass would not lie. In

trespass of cattle taken in A., defendant pleaded that he was seised of C. and found the cattle there damage feasant, and chased them towards the pond, and they escaped from him and went into A., and he presently retook them; and this was held a good plea. 21 Edw. IV. 64; Vin. Ab. Trespass, H. a. 4, pl. 19. If one have a way over the land of another for his beasts to pass, and the beasts, being properly driven, feed the grass by morsels in passing, or run out of the way and are promptly pursued and brought back, trespass will not lie. See Vin. Ab. Trespass, K. a, pl. 1. A traveler on a highway who finds it obstructed from a sudden and temporary cause may pass upon the adjoining land without becoming a trespasser because of the necessity. *Henn's Case*, W. Jones, 296; *Campbell v. Race*, 7 Cush. (Mass.) 408, 54 Am. Dec. 728; *Hyde v. Jamaica*, 27 Vt. 443 (459); *Morey v. Fitzgerald*, 56 Vt. 487, 48 Am. Rep. 811. An entry upon land to save goods which are in danger of being lost or destroyed by water or fire is not a trespass. 21 Hen. VII, 27; Vin. Ab. Trespass, H. a, 4, pl. 24, K. a, pl. 3. In *Proctor v. Adams*, 113 Mass. 376, 18 Am. Rep. 500, the defendant went upon the plaintiff's beach for the purpose of saving and restoring to the lawful owner a boat which had been driven ashore, and was in danger of being carried off by the sea; and it was held no trespass. See, also, *Dunwick v. Sterry*, 1 B. & Ad. 831.

This doctrine of necessity applies with special force to the preservation of human life. One assaulted and in peril of his life may run through the close of another to escape from his assailant. 37 Hen. VII, pl. 26. One may sacrifice the personal property of another to save his life or the lives of his fellows. In *Mouse's Case*, 12 Co. 63, the defendant was sued for taking and carrying away the plaintiff's casket and its contents. It appeared that the ferryman of Gravesend took 47 passengers into his barge to pass to London, among whom were the plaintiff and defendant; and the barge being upon the water a great tempest happened, and a strong wind, so that the barge and all the passengers were in danger of being lost if certain ponderous things were not cast out, and the defendant thereupon cast out the plaintiff's casket. It was resolved that in case of necessity, to save the lives of the passengers, it was lawful for the defendant, being a passenger, to cast the plaintiff's casket out of the barge; that, if the ferryman surcharge the barge, the owner shall have his remedy upon the surcharge against the ferryman, but that if there be no surcharge, and the danger accrue only by the act of God, as by tempest, without fault of the ferryman, every one ought to bear his loss to safeguard the life of a man. It is clear that an entry upon the land of another may be justified by necessity, and that the declaration before us discloses a necessity for mooring the sloop. But the defendant questions the sufficiency of the counts because they do not negative the existence of natural objects to which the plaintiff could have moored with equal safety. The allega-

tions are, in substance, that the stress of a sudden and violent tempest compelled the plaintiff to moor to defendant's dock to save his sloop and the people in it. The averment of necessity is complete, for it covers not only the necessity of mooring, but the necessity of mooring to the dock; and the details of the situation which created this necessity, whatever the legal requirements regarding them, are matters of proof, and need not be alleged. It is certain that the rule suggested cannot be held applicable, irrespective of circumstance, and the question must be left for adjudication upon proceedings had with reference to the evidence or the charge.

The defendant insists that the counts are defective, in that they fail to show that the servant in casting off the rope was acting within the scope of his employment. It is said that the allegation that the island and dock were in charge of the servant does not imply authority to do an unlawful act, and that the allegations as a whole fairly indicate that the servant unmoored the sloop for a wrongful purpose of his own, and not by virtue of any general authority or special instruction received from the defendant. But we think the counts are sufficient in this respect. The allegation is that the defendant did this by his servant. The words "willfully and designedly" in one count, and "negligently, carelessly, and wrongfully" in the other, are not applied to the servant, but to the defendant acting through the servant. The necessary implication is that the servant was acting within the scope of his employment. 13 Enc. Pl. & Pr. 922; Voegel v. Pickel Marble Co. 49 Mo. App. 643; Wabash Ry. Co. v. Savage, 110 Ind. 156, 9 N. E. 85. See, also, Palmer v. St. Albans, 60 Vt. 427, 13 Atl. 569, 6 Am. St. Rep. 125. Judgment affirmed and cause remanded.

See the note to the principal case in 20 L. R. A. (N. S.) 152. See *Laidlaw v. Russell Sage*, 158 N. Y. 73, at pp. 89 et seq., 52 N. E. 679, for an interesting discussion, from the standpoint of the law, of the maxim, "self-preservation is the first law of nature," and of the principle, that, when it is a question which of two men shall suffer, each is justified in doing the best he can for himself.—"Every man for himself, God for use all, and the devil take the hindmost," so to speak. See "Torts," Century Dig. §§ 3, 33; Decennial and Am. Dig. Key No. Series, §§ 3, 26.

SIMPSON v. STATE, 59 Ala. 1, 31 Am. Rep. 1. 1877.

Defense of Property. Spring Guns, et.

[Indictment, under Rev. Code of Alabama, § 3679, for assault with intent to murder Michael Ford. Ford was injured by a spring gun upon Simpson's land. Verdict and judgment against Simpson, who carried the case to the Supreme Court by writ of error. Reversed.]

Only so much of the opinion is inserted as discusses the right of the owner of premises to protect his property from trespassers by such means as spring guns, and the liabilities incurred by the use of such instruments.]

BRICKELL, C. J. . . . The particular facts of the case in one phase in which the evidence presents it, are so interwoven with the remaining instructions, that a determination of the primary question they involve is necessary to a correct understanding of them. This question is the right of a landowner to plant spring guns on his premises, by which trespassers may be wounded, and what is his liability, if thereby a trespasser receives grievous bodily harm. Whether he was civilly liable at common law, was agitated in *Deane v. Clayton*, 7 Taunt. 518, but not decided, the judges being equally divided in opinion. In *Hott v. Wilkes*, 3 B. & Ald. 304, the Court of King's Bench unanimously decided that a "trespasser having knowledge that there are spring guns in a wood, although he may be ignorant of the particular spots where they are placed, cannot maintain an action for an injury received in consequence of his accidentally treading on the latent wire communicating with the gun, and thereby letting it off." Statutes followed soon after this decision, rendering the setting or placing spring guns, and other like agencies calculated to destroy human life, or to inflict grievous bodily harm on trespassers, or others coming in contact with them, a misdemeanor. 1 Russ. Cr. 783. It is not our province to deny that the decision in *Hott v. Wilkes* is a correct exposition of the common law of England as it then existed. The common law of England is not in all respects the common law of this country. *Vanness v. Packard*, 2 Pet. 144. This court has frequently said that, in this state, only its general principles, which are adapted to our situation, and not inconsistent with our policy, legislation and institutions, are of force, and prevail. *State v. Cawood*, 2 Stew. 360; *N. & C. R. R. Co. v. Peacock*, 25 Ala. 229; *Barlow v. Lambert*, 28 id. 704. We concur in the conclusions reached by the Supreme Court of Connecticut in *Johnson v. Patterson*, 14 Conn. 1; *State v. Moore*, 31 id. 479, after a careful examination, that the principle announced in *Hott v. Wilkes* is not in harmony with our conditions or our institutions, and that it had its origin in a state of society not existing here, and the necessity for the protection to a species of property not here recognized, or if recognized, of less importance and value than the legislation of Great Britain, and the common law there prevailing attached to it.

It is a settled principle of our law, that every one has the right to defend his person and property against unlawful violence, and may employ as much force as is necessary to prevent its invasion. Property would be of little value, if the owner was bound to stand with folded arms and suffer it to be taken by him who is bold and unscrupulous enough to seize it. But when it is said a man may rightfully use as much force as is necessary for the protection of his person and property, it must be recollected the principle is subject to this most important qualification, that he shall not, except in extreme cases, inflict

great bodily harm, or endanger human life. *State v. Morgan*, 3 Ired. 186. The preservation of human life, and of limb and member from grievous harm, is of more importance to society than the protection of property. Compensation may be made for injuries to, or the destruction of, property; but for the deprivation of life there is no recompense; and for grievous bodily harm, at most but a poor equivalent. It is an inflexible principle of the criminal law of this state, and we believe of all the states, as it is of the common law, that for the prevention of a bare trespass upon property, not the dwelling house, human life cannot be taken, nor grievous bodily harm inflicted. If in the defense of property, not the dwelling house, life is taken with a deadly weapon, it is murder, though the killing may be actually necessary to prevent the trespass. The character of the weapon fixes the degree of the offense. But if the killing is not with a deadly weapon—if it is with an instrument suited rather for the purpose of alarm, or of chastisement, and there is no intent to kill, it is manslaughter. *Carroll v. State*, 23 Ala. 28; *Harrison v. State*, 24 id. 21; *State v. Morgan*, 3 Ired. 86; *Commonwealth v. Drew*, 4 Mass. 301; *McDaniel v. State*, 8 Sm. & Mar. 401; *State v. Vance*, 17 Iowa, 138; *Whart. Hom. ss.* 414-417. However true this may be of violence the owner directly in person inflicts, for a trespass, or in defense, or prevention of a trespass, committed in his presence, the argument now made by the counsel for appellant is that of the court in *Hott v. Wilkes*, that for the prevention of secret trespasses, committed in the absence of the owner, he may employ means of defense and protection to which he could not resort if present, offering personal resistance. The instructions requested place the proposition in its most imposing form, of protection against repeated acts of aggression committed in the nighttime by unknown trespassers. For the prevention of such trespasses, he may, it is said, employ any agency or instrumentality adequate to the end, even though it involves of necessity, grievous bodily harm, or death to the trespasser. The proposition itself subordinates human life, and the preservation of the body in its organized state, to the protection of property. It subjects the man to loss of limb or member, or to the deprivation of life, for a mere trespass, capable of compensation in money. How else can the owner protect himself? it is asked. The answer may well be, he is not entitled to protection at the expense of the life, or limb or member of the trespasser. All that the latter forfeits by the wrong is the penalty the law pronounces. At common law, he would be compelled to (make) compensation, for particular trespasses, and of the nature, in one respect, the defendant intended to guard against—the severance from the freehold of its products—not only is he compelled to compensation, but under our statutes, indictable for a misdemeanor. It may well be asked, in return, if the owner has the right to visit on the

trespasser a higher penalty than the law would visit? Has he a right to punish a mere trespass as the law will punish the most aggravated felonies, which not only shock the moral sense, evince an abandoned, malignant, depraved spirit, but offend the whole social organization? There are but few offenses the law suffers to be punished with death. Whether this extreme penalty shall be visited the law submits to the discretion and to the mercy of the jury—they may consign the offender to imprisonment for life in the penitentiary. There is no offense which is punished by the laceration of the body, or by loss of limb or member. Shall the owner, for the prevention of a trespass, inflict absolutely the penalty of death, a jury could not inflict, nor a court sanction? Inflict it without the opportunity the jury has, when they may lawfully inflict it, of lessening it in their mercy and discretion to imprisonment? Shall he, in protection of his property, lacerate the body, a punishment so revolting that it has long been excluded from our criminal code? If the owner is vexed by secret trespasses, and their repetition, his own vigilance must, within the limits of the law, find means of protection. Stronger enclosures, and a more constant watch must be resorted to, and a stricter enforcement of the remedies the law provides will furnish adequate protection. If these fail, it is within legislative competency to adopt remedies to the exigencies and necessities of the owner.

It is said the spring gun, or like engine, is harmless, if of his own wrong the trespasser does not come in contact with it. Admit it, and the controlling, underlying consideration is not met. If it was conceded thereby he lost his right to recover compensation for the injury sustained, the state does not lose the right, nor is its duty lessened, to demand retribution for its broken laws, and the unlawful death or wounding of one of its citizens. With certainty the measure of protection to property is declared, and the force which may be employed in its defense is defined. The secrecy of the trespass, or the frequency of its repetition, does not enlarge the one or the other. Life must not be taken, nor grievous bodily harm inflicted. The trespasser is always in fault—it is his own wrong, which justifies force, to the extent it may be lawfully used, or to the extent it may be provoked and exerted. The secrecy and frequency of the trespass would not justify the owner in concealing himself, and with a deadly weapon, taking the life, or grievously wounding the trespasser, as he crept stealthily to do the wrong intended. What difference is there in his concealing his person, and weapon, and inflicting unlawful violence, and contriving and setting a mute, concealed agency or instrumentality which will inflict the same, or it may be greater violence? In each case, the intention is the same, and it is to exceed the degree of force the law allows to be exerted. In the one case, if the trespasser came not with an unlawful in-

tent—if his trespass was merely technical—if it was a child, a madman, an idiot, carelessly, thoughtlessly, entering and wandering on the premises, the owner would withhold all violence. Or he could exercise a discretion, and graduate his violence to the character of the trespass. The mechanical agency is sensitive only to the touch—it is without mercy, or discretion, its violence falls on whatever comes in contact with it. Whatever may not be done directly cannot be done by circuitry or indirection. If an owner, by means of spring guns or other mischievous engines planted on his premises, capable of causing death or of inflicting great bodily harm on ordinary trespassers, does cause death, he is guilty of criminal homicide. Whart. Cr. L. ss. 418, 553.

The degree of the homicide depends on the facts already stated. If the engine is of the character of a deadly weapon, the killing is murder. It could not be employed without the intent to injure, and without indifference whether the injury would be death, or great bodily harm. But if not deadly in its character, if it is intended only for alarm, and for inflicting slight chastisement, or mere detention of the trespasser until he shall be freed from it, there may be no offense, or at most but manslaughter. The character of the instrument, and its probable capacity for injury, may repel all presumption to do more than merely alarm, or without inflicting any corporal harm, merely to detain the trespasser, and stay him in his efforts to wrong, and if death should ensue, it would be beyond the intention of the owner, and an unforeseen, and not a natural or probable, consequence of an act in itself not unlawful. For it is lawful to frighten away the trespasser, or by detaining him and staying the wrong he contemplates, to involve him in disgrace; to detect him, and to deter him from future trespasses. If the instrument is adapted only to the purposes of punishment, and it should inflict a punishment from which death ensued, the offense is manslaughter, as it would have been if the owner in person had inflicted the violence. The instructions requested by the appellant were inconsistent with these views, and were properly refused.

The instructions given by the city court are some of them based on the theory, that if death had ensued from the wounding of the prosecutor, by the spring gun, it would have been murder, it is a legal sequence, that the defendant is guilty of an assault with intent to murder. Others proceed on the theory that he is guilty of an assault with intent to murder, if the spring gun was set with the specific intent to kill the prosecutor, whom he suspected as the trespasser, and against whom he bore malice, although there was also a general intent to kill whoever was the trespasser, coming in contact with it. We regard each class of instructions as erroneous.

An error pervading the first is, that a general felonious intent is made the equivalent of the specific felonious intent, which we

have said is the indispensable element of the offense, with which the prisoner stands charged. A general felonious intention, by implication of law, will convert the killing of a human being into murder, though his death or injury was not within the intention of the slayer. So, also, if there is the felonious intention to kill one, and the fatal blow falls on another, causing death, it is murder. The act is referred to the felonious intent existing in the mind of the actor, and by implication of law supplies the place of malice to the person slain. Whart. Hom. s. 183; 4 Black. 261; *Bratton v. State*, 10 Humph. 103. The doctrine of an intent implied by law, different from the intent in fact, can have no application to the offenses the statute punishes. It is excluded by the terms of the statute which include only direct assaults on the person of the party it is averred there was the intent to murder. If in fact there was not the intent to murder him, whether there was a general felonious intent, or an intent to do harm to some other individual, is not important—there can be no conviction of the aggravated offense. *Morgan v. State*, 13 Sm. & Mar. 242; *Jones v. State*, 11 id. 315; *Norman v. State*, 24 Miss. 54.

An assault is defined as an intentional attempt, by violence, to do a corporal injury to another. In *Johnson v. State*, 35 Ala. 363, it is defined as “an attempt or offer, to do another personal violence, without actually accomplishing it. A menace is not an assault, neither is a conditional offer of violence. There must be a present intention to strike.” In *Lawson v. State*, 30 Ala. 14, it is said: “To constitute an assault there must be the commencement of an act, which if not prevented, would produce a battery;” the drawing of a pistol, without cocking or presenting it, is not an assault. In *State v. Davis*, 1 Ired. 125, it is said by Gaston, J.: “It is difficult in practice to draw the precise line which separates violence menaced, from violence begun to be executed, for until the execution of it is begun, there can be no assault. We think, however, that where an unequivocal purpose of violence is accompanied by an act, which if not stopped or diverted, will be followed by personal injury, the execution of the purpose is then begun, and the battery is attempted.” Constructive assaults are not within the statute. The ulterior offense: the principal felony intended, and the intent to accomplish which is the aggravating quality of the offense, consists in actual violence and wrong done to the person. The assault must, therefore, consist of an act begun, which if not stopped or diverted, will result, or may result in the ulterior offense, and the act when begun must be directed against the person who is to be injured. *Evans v. State*, 1 Humph. 394; *State v. Freels*, 3 id. 228. It must also be an act which, when begun, the person against whom it is directed has the right to resist by force. 2 Arch. Cr. Pl. 224, 2 note.

The setting a spring gun on his premises, by the owner, is culpable only because of the intent with which it is done. Un-

less the public safety is thereby endangered, it is not indictable. *State v. Moore*, 31 Conn. 479. If dangerous to the public, it is indictable as a nuisance. Resistance by force to the setting of it, by any individual (if not dangerous to the public), the law would not sanction, though he may apprehend injury to him is intended if he trespass on the premises. The injury exists only in menace—it is conditional, and his own act must intervene and put in motion the force from which injury will proceed. While, because of the unlawful intention with which the gun is set the owner is made criminally liable for the consequences he contemplates, it is not his violence, except by implication of law, which produces the injury. It is not, consequently, an assault which, connected with an intent to murder, is punishable under the statute. If the gun is set with intent to kill a particular person, who is injured by it, whether it is not an attempt to murder committed by means not amounting to an assault, indictable under another clause of the statute, is a question this record does not present.

The result is that the judgment of the city court is reversed and the cause remanded. The prisoner will remain in custody until discharged by due course of law.

The decision in *Hott v. Wilkes*, 3 B. & Ald. 304, referred to in this opinion, produced a controversy between Sidney Smith and Best, J., to be found in Smith's *Miscellanies*, vol. 1, p. 347, and vol. 2, p. 136. For further discussion as to civil and criminal liability for setting spring guns, see Bish. Non-Cont. Law, ss. 847, 943; *Loomis v. Terry*, 17 Wend. 496, and note; *State v. Barr*, 11 Wash. 481, 39 Pac. 1080, 29 L. R. A. 154, and note; Bish. Cr. Law, ss. 854-857; Clark's Cr. Law, 174; McClain's Cr. Law, ss. 142, 325, 1184; *State v. Marfaudille*, 92 Pac. 939, 14 L. R. A. (N. S.) 346, and note. See "Homicide," Century Dig. §§ 112, 187, 188; Decennial and Am. Dig. Key No. Series, §§ 86, 124.

CONWAY v. GRANT, 88 Ga. 40, 14 L. R. A. 196, 13 S. E. 803. 1891.

Defense of Property. Guard Dogs.

[Action by Conway to recover damages for injuries received from being bitten by defendant's dogs. Judgment for defendant, dismissing the action. Conway carried the case to the supreme court by writ of error. Reversed. Conway went into the back yard of defendant to seek work as a carpenter, and was bitten by defendant's dogs.]

BLECKLEY, C. J. The ferocious character of the dogs and the knowledge of the owner are sufficiently alleged. The only matter of controversy is touching the fault of the plaintiff in exposing himself to attack by entering the premises of the defendant where the dogs were kept. There was an open gate in rear of the premises, and the plaintiff, according to his declaration, was on lawful business. Being in search of employment as a carpenter, and seeing indications that such work was prob-

ably carried on in a certain house, he entered the premises for the purpose of making engagement or to work, having no notice or knowledge of the dogs. In this way he became exposed and was bitten. We think a cause of action is substantially set forth. Code, § 2964, declares: "A person who owns or keeps a vicious or dangerous animal of any kind, and, by the careless management of the same, or by allowing the same to go at liberty, another, without fault on his part, is injured thereby, such owner or keeper shall be liable in damages for such injury." The fault here referred to is not that of being a trespasser, but that of being in some way instrumental in provoking or bringing on the attack complained of. "It must, at the same time, be understood that the right of redress of the injured person will be defeated if the injury was caused by his own fault. A person who irritates an animal, and is bitten or kicked in turn, is deemed in law to have consented to the damage sustained, and cannot recover. But if the fault of the injured party had no necessary or natural and usual connection with the injury, operating to produce the injury as cause produces effect, the owner of the animal will be liable. For example, the defendant keeps upon his premises a ferocious dog, and the plaintiff, having no notice that such dog is there, trespasses in the daytime upon the premises, and the dog rushes upon him and bites him. The defendant is liable, since it is not the necessary or natural and usual consequence of a person's trespassing upon a man's premises by day that he should be attacked by a savage dog." Bigelow, *Torts*, pp. 249, 250. Though the gate was open, and the plaintiff was on lawful business, it may be that he had no strict legal right to enter the premises from the rear. But this would be no justification for leaving dangerous dogs loose on the premises to bite him or others that might so intrude. Such dangerous means of defense against mere trespassers the law will not countenance. As general authorities on the subject, see *Brook v. Copeland*, 1 Esp. 203; *Sarch v. Blackburn*, 4 Car. & P. 297; *Curtis v. Mills*, 5 Car. & P. 489; *Loomis v. Terry*, 17 Wend. 496; *Pierret v. Moller*, 3 E. D. Smith, 574; *Kelly v. Tilton*, *42 N. Y. 263; *Sherfey v. Bartley*, 4 Sneed. 58; *Woolf v. Chalker*, 31 Conn. 121; *Laverone v. Mangiante*, 41 Cal. 138; notes to *Knowles v. Mulder* (Mich.), 41 N. W. Rep. 896; *Cooley, Torts*, *345; *Bish. Non-Cont. Law*, 1235 et seq.; 1 *Thomp. Neg.* p. 220 § 34; *Muller v. McKesson*, 73 N. Y. 195; *Rider v. White*, 65 N. Y. 54. It will be observed that the most that could possibly be said against the plaintiff is that he trespassed by going upon the premises. This is a milder fault than going there to commit a trespass. If his purpose had been to commit a crime, the dogs would have been properly employed in resisting him. But he seems to have had a virtuous and worthy object, although his mode of executing it was doubtless injudicious. It was

not lawful to bite him by the instrumentality of dogs or other dangerous animals. The court erred in dismissing the action. Judgment reversed.

See the notes to this case in 14 L. R. A. 196. See "Animals," Century Dig. § 236; Decennial and Am. Dig. Key No. Series, § 70.

BROCK v. COPELAND, 1 Espinasse, 203. 1794.

Defense of Property. Guard Dogs.

[Action on the case for damages caused by defendant's dog. Judgment for defendant nonsuited plaintiff. The declaration stated that defendant knowingly kept a dog used to bite and that plaintiff was injured by the dog. Not guilty pleaded.]

It was given in evidence that the defendant was a carpenter, and that the dog was kept for the protection of his yard; that he was kept tied up all day, and was at that time very quiet and gentle, but was let loose at night. It was further proved that the plaintiff, who was foreman to the defendant, had gone into the yard after it had been shut up for the night, and the dog let out; at which time the injury happened, the dog having then bit and torn him.

On this evidence Lord Kenyon ruled, that the action would not lie. He said that every man had a right to keep a dog for the protection of his yard or house; that the injury which this action was calculated to redress, was where an animal known to be mischievous was permitted to go at large, and the injury therefore arose from the fault of the owner in not securing such animal, so as not to endanger or injure the public; that here the dog had been properly let loose; and the injury had arisen from the plaintiff's own fault, in incautiously going into defendant's yard after it had been shut up. His Lordship added, that in a former case, where in an action against a man for keeping a mischievous bull, that had hurt the plaintiff, it having appeared in evidence that the plaintiff was crossing a field of the defendant's where the bull was kept, and where he had received the injury, the defendant's counsel contended, that the plaintiff having gone there of his own head, and having received the injury of his own fault, that an action would not lie; but that it appearing also in evidence that there was a contest concerning a right of way over this field wherein the bull was kept, and that the defendant had permitted several persons to go over it as an open way, that he had ruled in that case, and the court of King's Bench had concurred in opinion with him; That the plaintiff having gone into the field, supposing that he had a right to go there, and the defendant having permitted persons to go there, as over a legal way, that he should not then be allowed to set up in his defense the

right of keeping such an animal there as in his close; but that the action was maintainable.

See "Animals," Century Dig. §§ 225, 226, 233, 236, Decennial and Am. Dig. Key No. Series, §§ 68, 70.

STATE v. STEELE, 100 N. C. 766, 782, 787, 41 S. E. 478. 1890.
*Because of Person and Property—Ejecting Persons from Hotels, etc.,
 by Force.*

[Criminal prosecution begun in a justice's court of Buncombe county and carried by appeal to the criminal court of Buncombe county, where there was a verdict and judgment against the defendant. Defendant appealed to the supreme court. Reversed.]

Joseph Weaver, the prosecutor, had been notified, in writing, by defendant, not to go upon the premises of the Battery Park Hotel; but, notwithstanding such notice, Weaver did go upon the porch of the hotel and was directed by defendant to leave. As he was leaving, defendant pushed him off the porch. Defendant was manager of the hotel. Weaver was on the porch contrary to the rules of the hotel, which required persons representing livery-men—and such was Weaver's business on this occasion—to keep off the porch, and to transact their business with the guests of the hotel through servants of the hotel stationed at a designated part of the premises for that purpose. There was evidence tending to prove that the prosecutor was discriminated against in the enforcement of the rules of the hotel. The defendant's third exception was as follows: 3. That the court erred in the following instructions given to the jury: "If you shall find from the evidence that others engaged in the same business as the prosecutor were permitted by the defendant to go to the Battery Park Hotel for the same purpose for which the prosecutor went there—that is, to secure and transact business for his employer's livery-stable—then the prosecutor had also the right to go there for that purpose at reasonable times, and to remain there a reasonable length of time for the transaction of such business; and it would not matter that the rules of the hotel forbade his entering the premises of the hotel for that purpose, or that he had been previously forbidden, in writing, to come upon the premises of the hotel."

Only so much of the opinion is here inserted as discusses the rights and liabilities of hotel proprietors, and others having property used for similar purposes, with regard to defending their property from trespassers and others.]

AVERY, J. . . . Upon a review of all the authorities accessible to us, and upon the application of well-established principles of law to the admitted facts of this particular case, we are constrained to conclude that there was error in the charge given by the court to the jury, because:

1. Guests of an hotel, and travelers or other persons entering it with the bona fide intent of becoming guests, cannot be lawfully prevented from going in or put out by force, after entrance, provided they are able to pay the charges and tender the money necessary for that purpose, if requested by the landlord, unless they be persons of bad or suspicious character, or of vulgar habits, or so objectionable to the patrons of the house, on account of

the race to which they belong, that it would injure the business to admit them to all portions of the house, or unless they attempt to take advantage of the freedom of the hotel to injure the landlord's chances of profit derived either from his inn or any other business incidental to or connected with its management, and constituting a part of the provision for the wants or pleasure of his patrons. *Jencks v. Coleman*, *supra*; *Com. v. Mitchell*, *supra*; *Com. v. Power*, *supra*; *Pinkerton v. Woodward*, 91 *Amer. Dec.* 660; *Barney v. Steamboat Co.*, *supra*; 1 *Whart. Crim. Law*, § 621; *Ang. Carr.* §§ 525, 529, 530; *Britton v. Railroad Co.*, 88 *N. C.* 536.

2. When persons unobjectionable on account of character or race enter an hotel, not as guests, but intent on pleasure or profit, to be derived from intercourse with its inmates, they are there, not of right, but under an implied license that the landlord may revoke at any time; because, barring the limitation imposed by holding out inducements to the public to seek accommodation at his inn, the proprietor occupies it as his dwelling house, from which he may expel all who have not acquired rights, growing out of the relation of guest, and must drive out all who, by their bad conduct, create a nuisance and prove an annoyance to his patrons. *Harris v. Stevens*, 31 *Vt.* 79; 1 *Whart. Crim. Law*, § 625.

3. The regulation, if made by any innkeeper, that the proprietors of livery stables, and their agents or servants, shall not be allowed to enter his hotel for the purpose of soliciting patronage for their business from his guests, is a reasonable one, and, after notice to desist, a person violating it may be lawfully expelled from his house, if excessive force be not used in ejecting him. *Com. v. Power*, *supra*; *Harris v. Stevens*, *supra*. See, also, *Griswold v. Webb*, recently reported in 19 *Atl. Rep.* 143 (a Rhode Island case); *Railroad Co. v. Tripp*, *supra*.

4. An innkeeper has unquestionably the right to establish a news-stand or a barbershop in his hotel, and to exclude persons who come for the purpose of vending newspapers or books, or of soliciting employment as barbers; and, in order to render his business more lucrative, he may establish a laundry or a livery stable in connection with his hotel, or contract with the proprietor of a livery stable in the vicinity to secure for the latter, as far as he legitimately can the patronage of his guests in that line for a per centum of the proceeds or profits derived by such owner of vehicles and horses from dealing with the patrons of the public house. After concluding such a contract, the innkeeper may make, and after personal notice to violators, enforce, a rule excluding from his hotel the agents and representatives of other livery stables who enter to solicit the patronage of his guests; and where one has persisted in visiting the hotel for that purpose, after notice to desist, the proprietor may use sufficient force to expel him if he refuse to leave when requested, and may eject him, even though on a particular occasion he may have entered

for a lawful purpose, if he does not disclose his true intent when requested to leave, or whatever may have been his purpose in entering, if he in fact has engaged in soliciting the patronage of the guests. *Barney v. Steamboat Co.*, supra; *Jencks v. Coleman*, and *Harris v. Stevens*, supra; *Ang. & A. Corp.* § 530.

5. The broad rule laid down by Wharton (1 Crim. Law, § 625) is that "the proprietor of a public inn has a right to request a person who visits it, not as a guest or on business with a guest, to depart, and if he refuse the innkeeper has a right to lay his hands gently upon him, and lead him out, and, if resistance be made, to employ sufficient force to put him out; and for so doing he can justify his conduct on a prosecution for assault and battery." It will be observed that the author adopts in part the language already quoted from the courts of Pennsylvania.

6. If it be conceded that the prosecutor went into the hotel at the request of a guest, and for the purpose of conferring with the latter on business, still, in any view of the case, if, after entering, he engaged in "drumming" for his employer when he had been previously notified to desist in obedience to a regulation of the house, the defendant had a right to expel him if he did not use more force than was necessary; and if the prosecutor, having entered to see a guest, did not then solicit business from the patrons of the hotel, but had done so previously, the defendant, seeing him there, had a right to use sufficient force to eject him, unless he explained, when requested to leave, what his real intent was. *Harris v. Stevens*, and *Com. v. Power*, supra. The guest, by sending for a hackman, could not delegate to him the right to do an act for which even the guest himself might lawfully be put out of the hotel.

7. If we go further, and admit, for the sake of argument, that the principle declared in *Markham v. Brown*, 8 N. H. 530, and relied on to sustain the view of the court below, is not inconsistent with the law on the same subject, as we find it laid down by Wharton and other recognized authorities, still our case will be found to fall under the exception to the general rule stated in express terms in that case. The court said: "If one comes to injure his [the innkeeper's] house, or if his business operates directly as an injury, that may alter the case; but that has not been alleged here; and perhaps there may be cases in which he may have a right to exclude all but travelers and those who have been sent for by them. It is not necessary to settle that at this time." There was no evidence in *Markham v. Brown* that the proprietor of the hotel had any contract with another stage line, or would suffer pecuniary loss or injury, if the agent who was expelled was successful in his solicitations; and it seems that Angell and others, who cite as authority that case, as well as *Jencks v. Coleman* and *Barney v. Steamboat Co.*, reconcile them by drawing the distinction that in the latter cases, and in the hypothetical case of an innkeeper, put by Justice Story, the person whose expulsion was justified was doing an injury to the proprietor, who had him re-

moved, by diminishing his profits derived legitimately from a business used as an adjunct to that of common carrier or innkeeper. In using the language quoted above, Justice PARKER seems to have had in his mind, without referring to it, the opinion of Justice STORY, delivered in the circuit court but two years before (*Jencks v. Coleman*, *supra*).

8. The defendant, as manager of the hotel, could make a valid contract, for a valuable consideration, with Sevier, to give him the exclusive privilege of remaining in the house and soliciting patronage from the guests in any business that grew out of providing for the comfort or pleasure of the patrons of the house. The proprietors of the public house might legitimately share in the profits of any such incidental business, as furnishing carriages, buggies, or horses to the patrons, and for that purpose had as full right to close their house against one who attempted to injure the business in which they had such interest as the owner of a private house would have had, and this view of the case is consistent with the doctrine enunciated in *Markham v. Brown*. There was no evidence tending to show that Chambers had actual permission from the proprietors to approach the inmates of the hotel on the subject of patronizing him, nor that they had actual knowledge of the fact that he had continued his solicitations after receiving a similar notice to that sent to the prosecutor. The fact that he was overlooked or passively allowed to remain in the hotel (it may be under the impression on the part of the defendant that he had desisted from his objectionable practices) cannot, in any view of the law, work a forfeiture of the right to enforce a reasonable regulation, made to protect their legitimate business from injury. If, therefore, a permit on the part of the defendant to Chambers to "drum" gratuitously in the house would at once have opened his doors to all of the competitors of the latter (a proposition that we are not prepared to admit), the defendant did not, so far as the testimony discloses the facts, speak to him on the subject; and the soundness of the doctrine that, without interfering with the legal rights of the guests, the proprietor of a hotel is prohibited by the organic law from granting such exclusive privileges to any individual, as to the use or occupancy of his premises, as any other owner of land may extend, is not drawn in question. We therefore sustain the second and third assignments of error. His honor erred, for the reasons given, in instructing the jury that the guilt of the defendant depended upon the question whether he permitted Chambers or Sevier to solicit custom in the house. He had a lawful right to discriminate, for a consideration, in favor of Sevier, while it does not appear from the evidence that he granted any exclusive privileges to Chambers. We hold that the regulation was such a one as an innkeeper had the power to make, and must not be understood as approving the idea that the sanction of the municipal authorities could impart validity to it, if it were not reasonable in itself, and within the powers which the law gives to proprietors of public houses in order that they

may guard their own rights and protect their patrons from annoyance. For the reasons given the defendant is entitled to a new trial.

See note to *Rex v. Cheshunt*, 1 B. & A. 473, inserted post in this section. See "Assault and Battery," Century Dig. § 100; Decennial and Am. Dig. Key No. Series, § 69, and "Innkeepers," Century Dig. § 9; Decennial and Am. Dig. Key No. Series, § 6.

STATE v. DAVIS, 80 N. C. 351. 1879.

Defence of Person and Property. Trespasser in Public Road.

[Indictment for an affray against Davis and Lassiter. Lassiter was acquitted. Verdict and judgment against Davis, who appealed. Affirmed. The facts appear in the beginning of the opinion.]

ASHE, J. The defendant and one Evans were quarrelling near the dwelling house of Mrs. Laws in a public road running over her land. The defendant, armed with a pistol which he had in his hand, was vamping, cursing, and using very vulgar language in the hearing of the inmates of the house. Lassiter, who was the son of Mrs. Laws and lived with her, came out with an ordinary walking stick in his hand and remonstrated with the defendant, who, still holding his pistol, cursed and denounced him, saying he was in the public road, and he would curse as much as he pleased. After the interchange of a few words, the lie was given by defendant, and Lassiter struck him with his stick, when the defendant attempted to use his pistol, but was prevented by those present.

He seems to have rested his defense upon the ground that he was in the public road and had the right to do there as he pleased. In this he was mistaken. The public have only an easement in a highway—that is, the right of passing and repassing along it. The soil remains in the owner, and where one stops in the road and conducts himself as the defendant is charged to have done, he becomes a trespasser, and the owner has the right to abate the nuisance which he is creating. The principle of *molliter manus* does not apply in a case like this, where the trespasser armed with a pistol is acting in such belligerent defiance. See *State v. Buckner*, 61 N. C. 431.

The defendant used language which was calculated and intended to bring on a fight, and a fight ensued. He is guilty. *State v. Perry*, 50 N. C. 9; *State v. Robbins*, 78 N. C. 431. No error.

See "Affray," Century Dig. §§ 1-5; Decennial and Am. Dig. Key No. Series, §§ 1, 2; "Assault and Battery," Century Dig. § 90; Decennial and Am. Dig. Key No. Series, § 64.

STATE v. GOODE, 130 N. C. 651, 41 S. E. 3. 1902.

"A Man's House is His Castle." The Force That May Be Used to Protect It. Furniture Sold on Installment Plan.

[Indictment against Lucinda Goode for an assault and battery upon the prosecutor (whose name does not appear in the report of the case). Verdict and judgment against the defendant, who appealed. Reversed. The prosecutor went to the defendant's house to collect some money due on furniture which had been sold to her husband on the installment plan. The other facts are stated in the opening of the opinion.]

CLARK, J. Whether there was excessive force used or not was a question for the jury, not for the court. The defendant's testimony was fuller than that of the prosecutor, but was not contradicted by him: and taking it to be true, as his honor assumed, and as must be done on the virtual demurrer to her evidence, these are the facts: Two strangers, one of them a white man, came to the defendant's home. She invites the latter in politely, and gives him her rocking chair. Without showing any credentials, he demands pay for her bedstead. Upon her saying she had no money, and asking him to wait till her husband came, the prosecutor jumps up violently, and, swearing he would take the bedstead, or go to hell trying, he throws her tablecloth and underskirt on the floor. She tells him to let her things alone. As she was ironing, presumably those things were freshly washed, and nicely starched and ironed, and he must have known that to throw them on the floor would arouse her ire. Then he laid his profane hands on the paraphernalia of her bed, and began to throw back the bedclothes and to lift the mattress, all of which would speedily have gone, of course, upon the floor. The defendant would not have been a woman if she had stood that. She seized her little boy's baseball bat, and told him to let her things alone and leave the house, when he squared off at her, drawing back his fist, and called her a "damned fool," whereupon, very naturally, she batted the back of his head. It was probably a "left fielder," for the prosecutor soon after left that field. The counsel for the prosecutor tells us he left because he did not wish to provoke a difficulty. It is doubtful if he could do more to provoke a woman, which is sometimes worse, and it would seem that he left rather than to collect another installment on the batting. The woman was in her own house. If her evidence is true,—and it must be so taken on this appeal,—she treated the prosecutor politely, and he returned her politeness by swearing, throwing her things on the floor, throwing back the bedclothes and mattress and avowing his intention to carry off her bedstead, at the direst hazard to his soul, and drawing back his fist at her and cursing her when again told to desist. It cannot be said, as a matter of law, with two men against her, and in her own house, she used excessive force in protecting her person, her home and her property. In view of his violent conduct and language, and refusal to behave or to leave, could she have secured her rights in her own home or his

departure by the use of less force? Could she, with safety to her person, have laid hands on him more gently? If, on another trial, the evidence being the same, it shall be held that this was excessive force, a jury must so declare it. This court cannot. Sir Edward Coke (3 Inst. 162) says: "A man's house is his castle, et domus sua cuique tutissimum refugium," which last is a little quotation by him from the famous *Corpus Juris Civilis* of Justinian, and is to be found in the Pandects (lib. 2. tit. 4. "De in Jus Vocando"). And another great lawyer and statesman, whose name is borne with honor by two of our counties,—William Pitt, earl of Chatham,—used this ever-memorable expression: "The poorest man, may, in his cottage, bid defiance to all the forces of the crown. It may be frail, its roof may shake, the wind may blow through it, the storms may enter, the rain may enter, but the king of England cannot enter. All his forces dare not pass the threshold of the ruined tenement." This home was a humble one. The bedstead on which defendant slept may not have been fully paid for. But the prosecutor had no right to enter that home and misbehave, or refuse to leave when ordered out,—still less, to carry off any property therefrom unless he had been an officer with a legal precept so to do; and the occupant of that home had the right to use sufficient force to make him leave, and to abandon his attempt to carry off the bedstead, and to stop his handling of the other property; in short, to make him "leave her things alone," as the defendant repeatedly told him to do. Whether the force used by the defendant was excessive is matter for a jury, but, if this evidence is to be believed, the prosecutor was a lawbreaker, and is himself in jeopardy of the judgment for his violence and his defiant disregard of the rights of the defendant. Suppose this defendant had been white, and the prosecutor a negro man. The law is impartial, and extends the same protection to all alike. **Error.**

While it is to be hoped that the judges, lawmakers, and orators will ever bear in mind the eloquence of the Earl of Chatham, it is well—in order to be on the safe side—that the private individual bear in mind the sententious utterance of the immortal and practical Mr. Grummer: "No room's private to his majesty when the street door is once passed. That's law. Some people maintains that an Englishman's house is his castle. That's gammon." The truth lies between the eloquent Earl and the practical constable. A man's house may be broken into—whether the outer door be closed or not—for the purpose of serving *criminal* process. Cooley's Const. Lim. p. 429; Bish. New Crim. Proc. (a most admirably prepared book), secs. 194–209; and even in civil cases, in North Carolina, if the civil process be a fiat in claim and delivery proceedings. But, ordinarily, his dwelling house cannot be broken into for the purpose of serving *civil* process; though, if the outer door be open, *inner doors* may be broken to serve such process. Hence, a man's house is a city of refuge against creditors, but not for criminals against criminal process. Neither is it a "fence" for ill-gotten chattels in North Carolina. That is, if "building," in the statute, shall be held to include "dwelling house." See Revisal, sec. 798. See McLeod v. Jones, 105 Mass. 403, inserted at sec. 2, post, and note.

It has been held by some courts that the vendor of chattels under a

conditional sale, by the terms of which such a right is stipulated for, may enter and forcibly seize the subject-matter of the contract, without thereby subjecting himself to an action of trespass; provided he use no unnecessary force. There is a conflict of authority on this point. See 19 L. R. A. (N. S.) 607, and note.

See "Assault and Battery," Century Dig. §§ 99-101, 141; Decennial and Am. Dig. Key No. Series, §§ 69, 95.

GREEN v. GODDARD, 2 Salkeld, 641. 1706.

Defense of Person and Property. Molliter Manus.

Trespass, assault and battery laid on the first of October, 3 Reg. The defendant as to the *vi et armis* pleaded *Non cul.* And as to the residue says, that long before, viz. on the 13th of September, a stranger's bull had broke into his close, that he was driving him out to put him in the pound, and the plaintiff came into the said close, et manu forti impedit ipsum ac taurum praed. rescussisse voluit, et quod ad praeveniend. &c. ipse idem defend. parvum flagellum super quentem molliter imposuit, quod est idem residuum, &c. absque hoc quod *cul.* fuit ad aliquod tempus ante eundem 13 diem. The plaintiff demurred. Mr. Eyre for the plaintiff argued, that they should have requested him to go out of the close. 19 H. 6, 31. 11 H. 6, 23. 2 Ro. Tresp. 547, 548, 549, and that flagellum molliter imponere is repugnant. 1 Sid. 4. Lastly, the traverse is short, and no answer to the time after. 1 Leon. 307. 3 Cro. 87. 1 Ro. Rep. 406. Et Per Curiam, there is force in law, as in every trespass quare clausum fregit: As if one enters into my ground, in that case the owner must request him to depart before he can lay hands on him to turn him out: for every impositio manuum is an assault and battery which cannot be justified upon the account of breaking the close in law, without a request. The other is an actual force, as in burglary, as breaking open a door or gate: and in that case it is lawful to oppose force to force; and if one breaks down the gate, or comes into my close *vi et armis*, I need not request him to be gone, but may lay hands on him immediately, for it is but returning violence with violence: So if one comes forcibly and takes away my goods, I may oppose him without more ado, for there is no time to make a request.

2dly, POWELL, J., held, that the attempt to take and rescue the bull was an assault on his person and a taking from his person: for if H. is driving cattle on the highway, and one comes and takes them from him, it is robbery, which cannot be without a taking from his person: quod non fuit negatum. Vide 29 H. 66. 2 Ro. 549. Placito 11. 1 Ro. Rep. 19.

See "Assault and Battery," Century Dig. § 15; Decennial and Am. Dig. Key No. Series, § 15.

STATE v. TAYLOR, 82 N. C. 554, 1880.

Defence of Drawing Molliter Manus.

[Indictment of Taylor and Lassiter for an affray. Verdict and judgment against both. Taylor alone appealed. Reversed. The facts appear in the opinion.]

ASTH. J. The alleged affray occurred in the house of the defendant, and only three witnesses were examined, two for the state and one for defendant.

The court charged the jury that if they believed the testimony of any of the witnesses on behalf of the state or defendant, both defendants were guilty; that according to the testimony of any witness examined both defendants were guilty. And after the case was submitted to the jury with this charge, they came into court and asked his honor to instruct them as to the amount of force that might be lawfully used by the defendant Taylor, in order to expel the other defendant from his house. The court told the jury that the question did not arise from the testimony, and that it was not made necessary or proper by the testimony of any witness who had been examined for the court to instruct them upon this point. To this ruling of his honor the defendant excepted.

If then there was any one witness examined who testified to a state of facts, taken by itself, from which it might reasonably be inferred that the purpose of Taylor in advancing on Williams, the other defendant, with the whip-staff, was *to remove him from his house*, that question should have been left to the jury, and then the further question would necessarily arise as to the amount of force the defendant might use to accomplish his purpose. How then stands the case?

[FACTS.] One witness, Bryan Smith, testified that the first he saw was Williams at the door of Taylor's house "cutting or reaching into the door, and Taylor came out striking at Williams with a whip-staff, while Williams was cutting at Taylor with a razor; that Williams walked backwards cutting with his razor some ten or fifteen feet from Taylor's door, and Taylor continued to advance upon him, with his whip-staff."

When a trespasser or unwelcome visitor invades the premises of another, the latter has the right to remove him, and the law requires that he should first request him to leave, and if he does not do so, that he should lay his hands gently upon him, and if he resists he may use sufficient force to remove him, taking care however to use no more force than is necessary to accomplish that object. But if the intruder *defiantly stands his ground armed with a deadly weapon, the doctrine of molliter manus does not apply*, and the owner may at once resort to physical force; and it is a question for the jury whether he used more force than was necessary. *State v. Davis*, 80 N. C. 351.

As Williams was at the door of defendant's house, reaching in

the door and cutting with a razor and the defendant was striking at him with a staff, we think the jury might have been warranted in coming to the conclusion that it was the purpose of defendant to expel him from his house as he had the right to do; and then it would have been a material inquiry for the jury whether the defendant had used more force than was necessary. In this view of the case it was proper for the jury to ask the court for instructions as to the amount of force that might lawfully be used by the defendant. Taylor, in order to expel Williams from his house, and we are of the opinion it was the duty of the court to give the instructions, and in its failure to do so *there was error*. . . .

In such cases "the true questions are: (1) Whether the party justifying had a good reason for using force; and, if so, (2) Whether such force was appropriate in kind and suitable in degree to accomplish the purpose. . . . As the kind and degree of force proper to remove a trespasser, must depend upon the conduct of the trespasser in each particular case, the question whether it was suitable and moderate in any particular case, is a question of fact to be left to the jury." *Commonwealth v. Clark, 2 Metcalf (Mass.)*, at p. 25. See 22 L. R. A. (N. S.) 724, and note. See "Assault and Battery," *Century Dig.* § 100; *Decennial and Am. Dig. Key No. Series*, § 69.

HAMLIN v. MACK, 33 Mich. 103, 105. 1875.

Defense of Property from Trespassing Animals. Distress.

[Action, based upon a statute, for damages, and for the penalty imposed for the rescue of any beast distrained for any cause. Verdict and judgment against the plaintiff, and he appealed. Reversed.]

The declaration alleged that Hamlin seized a heifer doing damage in his field; that Mack rescued her; that plaintiff was damaged by the rescue. The case being on trial before a jury, the judge intimated that the plaintiff could not recover unless he showed a regular impounding under the statute and strict adherence to the requirements of the statute. Thereupon plaintiff's counsel proposed to shorten the trial by stating, in the form of an offer of proof, the precise facts he proposed to prove. This course being assented to by defendant's counsel, the plaintiff's counsel made offer to prove (in substance) that in November, 1873, plaintiff took up the heifer while damage feasant on his land, and, because there was no public pound, confined it in his barn and cared for it properly until February thereafter, when "the defendant took the heifer from plaintiff's possession without his consent." He further offered to show various acts of notification to certain persons supposed to be owners of the heifer, and that plaintiff had filed a notice with the town clerk to the effect that he had taken up the heifer; and that he had published a notice in a newspaper to like effect.

On objection by defendant's counsel, the court rejected this offer of proof and directed the jury to find for the defendant, which they did. There was no proof or offer to prove that defendant used any threats or violence when he took the heifer from the plaintiff. The plaintiff's offer of proof showed that he had not fully complied with the requirements of the statute regulating the distraining of animals. Nevertheless his counsel intimated that the defendant was liable for rescue, notwithstanding such irregularities on the part of the plaintiff. He also insisted that the facts he offered to prove established a lawful distress and impounding by plaintiff and an unlawful rescue by defendant.

GRAVES, Ch. J. . . . The learned counsel for the defendant contends that the remedy sought by the plaintiff is purely statutory and derogatory to the common law rights of property owners and should be construed strictly, and that a compliance with all material provisions of the statute ought to be insisted on; that under ch. 214, C. L., the party trespassed upon by cattle has an election of remedies, and may sue in trespass, or distrain and impound, and that in case he distrains and impounds, the distress can only be rendered lawful by strict compliance with the statutory requirements. And that a rescue involves a *forcible* taking back of the beast when lawfully impounded, and requires something more than a mere taking without leave; that there must be violent acts or menacing or threatening words.

The right of distress damage feasant existed at common law and was not introduced by statute. 1 Inst. 142a, 161a.

It sprang from a felt necessity for a summary and direct remedy against the beasts committing damage, and also for some guard against possible incentives to do hurt to them or put them out of the way. The owner might not be discoverable, or be in a situation to be reached by process, or, if discovered and within reach of process, there might be impediments to any redress by an ordinary action. And if the beasts could not be held, the injured party might be moved to misuse them or put them in a way to be lost to the owner. The right itself, with several incidents, being established at common law, acts were passed in England to regulate its exercise, and the same course has been taken here.

It is scarcely correct, therefore, to speak of the remedy by distress damage feasant as something merely statutory and in derogation of the common law rights of property.

The right being admitted, it was needful to frame guards, not only against wrongs likely to be done under color of it, but also against violations likely to be committed against the right itself, under color of the very guards intended merely to prevent its being resorted to as a cloak for wrong.

As a safeguard in certain cases against the carrying on of proceedings in the assumed exercise or furtherance of the right of distress, the law admitted the right of rescue, but as this latter right was subject to be perverted and made an instrument to thwart the right of distress in cases when it was considered it ought not to be interfered with, and also subject to be resorted to in such manner and on such occasions as to give rise to unseemly wrangles and collisions, it was at length settled that generally, in case of an asserted distress, the regularity of the proceedings should not be left to the judgment or caprice of the party, but should be triable exclusively in a court of law, and in a specific proceeding, to be instituted by the party claiming the distrained beasts. Our law now in question is framed on this principle.

The offer of the plaintiff embraced facts to show a lawful distress damage feasant. There was no township pound, and the

plaintiff personally took the beast when trespassing on his land, and confined it in his barn there. Before this act the beast in contemplation of law was in the owner's possession, but the seizure of it damage feasant, and immediate confinement of it by the plaintiff in his barn there, took it out of the owner's possession and into the plaintiff's custody, and this was enough to constitute a distress damage feasant. 3 B. C. 6; Broom and Had. Com. B. 2, p. 74.

The offer made included sufficient matter to prove a rescue. It was not necessary that positive violence, or menacing or threatening words should be employed to characterize the act as a rescue of the beast. The taking away and setting at liberty against law the distrained animal, constitutes a rescue. 1 Inst. 160 b; Bac. Ab. "Rescue" a; 1 Wheat. Sel. 689. Such a taking is esteemed in law a violent taking.

The facts offered showed a lawful distress and impounding, and the taking away and setting at liberty by the defendant, without the consent of the plaintiff, was a taking away and setting at liberty against law. The proposed facts, then, if admitted, would have shown, in the absence of any countervailing circumstance, a rescue by the defendant. And the statute forbade any showing by the latter of irregularities alleged by the defendant in the course taken by the plaintiff.

The plaintiff was therefore warranted in his offer, and the court erred in rejecting it. No question has been made as to what were proper items of damage, and we are not to be understood as saying that those claimed for irregular proceedings, or for the keep of the animal in the course of such proceedings, would be recoverable. The judgment should be reversed, with costs, and a new trial ordered.

See "Animals," Century Dig. §§ 390, 396, 422; Decennial and Am. Dig. Key No. Series, §§ 55, 101.

MILLER v. STATE, 5 Ga. App. 463, 63 S. E. 571. 1909.
Trespassing Animals. Dogs That Kill Sheep, Suck Eggs, etc.

[Miller was indicted for cruelty to animals. Verdict and judgment against him, and he carried the case up by writ of error. Reversed.]

Miller killed a dog upon its owner's premises, in the presence of the owner's family. The dog had killed several sheep, at different times, which sheep belonged to Miller's father. Owing to its shyness, the dog could not be killed while in the act of chasing the sheep. Complaint was made to the owner of the dog; but he refused to confine it, saying, however, that if the dog killed any more sheep, it might be killed, or might be killed while in the act of killing the sheep. The judge charged that Miller had no right to kill the dog, even on Miller's own premises, *unless while the dog was in the act of killing or interfering with the defendant's sheep*. The killing of the dog was done under instructions given by Miller's father.]

POWELL, J. Judge Hamilton, who tried the case in the court below and who is usually so well versed in all matters of general jurisprudence, seems to have gone wrong when he encountered the intricacies of the dog law. He was doubtless misled by the precedents of the modern English cases when he should have looked further back to the ancient wisdom of the common-law authorities. He seems to have overlooked the provision of the canine code which makes the practices of *egg-sucking and sheep-killing capital felonies*. Such is the law, and so it has been so long that the memory of dogs and men runneth not to the contrary. Indeed, in the case of *Wadhurst v. Dammie*, Cro. Jac. 45, decided by the court of King's Bench over 300 years ago, Sir John Popham, Knt., Chief Justice, in a case where the warrener killed a dog which had been killing conies in his warren, said: "The common use of England is to kill dogs and cats in all warrens, as well as any vermin; which shows that the law hath been always taken to be that they may well kill them." And all the court joined in holding the defendant not liable, saying: "It is good cause for the killing him in salvation of his conies, for, having used to hunt the warren, he cannot otherwise be restrained."

The cynical (the word may be taken here in its etymological as well as in its popular meaning) reflection of the modern philosopher that the more he sees of some dogs the less he thinks of some men, has no reference to suck-egg dogs or to sheep-killing dogs. In some states (e. g., Massachusetts, Missouri, and California) the sheep-killing dog is made an outlaw by statute. In this state his status is a part of the higher or unwritten law. We think that the court erred in holding that it was necessary to kill the dog in *flagrante delicto* to make the act justifiable. It may be true—and there is respectable authority to support the proposition—that the sucking of a single egg or the worrying of sheep one time may not establish a dog's status as an outlaw and a nuisance so as to justify his summary execution whenever and wherever he may thereafter be met (see *Brent v. Kimball*, 60 Ill. 211, 14 Am. Rep. 35; *Wells v. Head*, 4 Car. & P. 568; *Dodson v. Mock*, 20 N. C. 282, 32 Am. Dec. 677; *Bowers v. Horan*, 93 Mich. 420, 53 N. W. 535, 17 L. R. A. 773, 32 Am. St. Rep. 513), but, when a dog acquires the egg-sucking or sheep-killing habit, *he becomes a nuisance and may be destroyed as such* (*Throne v. Mead*, 122 Mich. 273, 80 N. W. 1080, 80 Am. St. Rep. 568; *Dodson v. Mock*, *supra*; *Hinckley v. Emerson*, 4 Cow. (N. Y.) 351, 15 Am. Dec. 383; *Brown v. Carpenter*, 26 Vt. 638, 62 Am. Dec. 603; *Hubbard v. Preston*, 90 Mich. 221, 51 N. W. 209, 15 L. R. A. 249, 30 Am. St. R. 426, and notes; *Simmonds v. Holmes*, 61 Conn. 1, 23 Atl. 702, 15 L. R. A. 253; *Nesbett v. Wilbur*, 177 Mass. 200, 58 N. E. 586; *Wood on Nuisances* (3d ed.), s. 771). In *Boulton v. Banks*, Cro. Car. 254 (B. R.), a dog alleged to have been "affectus ad mordendum porcos" was held not to be a dog which one might lawfully keep. We cannot agree with those courts which hold that a dog is not a domestic animal within the purview of statutes punishing cruelty to domestic animals (see *Wileox v. State*, 101 Ga. 563, 28 S. E. 981,

39 L. R. A. 709; May v. State, 120 Ga. 497, 48 S. E. 153; but, as much as we love some dogs (for the writer admits that he loves some dogs), we must concede the correctness of the doctrine, almost universally recognized by the courts, that the dog is not in full fellowship and standing in this circle of domestic proteges, that his rights are more limited, and his protection less complete. See Blair v. Forehand, 100 Mass. 140, 97 Am. Dec. 82, 1 Am. Rep. 94.

Whether the killing of a dog is justifiable or not, as related to a civil case, seems to depend upon whether the killing was done, *not necessarily while some act of depredation was in progress, but under such circumstances as that the killing was a fair act of prudence on the part of the person doing the killing*, reasonable regard being had as to the value of the dog, the value of the property menaced, and the probability of present or future depredations. Compare Hodges v. Causey, 77 Miss. 353, 26 South. 945, 48 L. R. A. 95, 78 Am. St. Rep. 525. In a criminal prosecution under a statute preventing wilful and unjustifiable cruelty to a domestic animal, such as the one under which the present defendant was accused and tried, the defendant should not be convicted if the dog was killed not in a spirit of cruelty, but because it had shown itself to be a menace to property more valuable than itself; the defendant's motive and the spirit actuating him being generally questions for the jury. The well known habits of sheep-killing dogs, of being so sly and wary when engaged in their nefarious practices as to elude every approach of the owner of the sheep, would render the privilege of killing only when the marauder was in flagrante delicto a very inadequate protection. Even the human cur who has invaded the domestic fold, and who is likely to invade it further, may be killed, though the injured person does not catch him in the very act. Biggs v. State, 29 Ga. 723(4), 76 Am. Dec. 630; Drysdale v. State, 83 Ga. 744, 10 S. E. 358, 6 L. R. A. 424, 20 Am. St. Rep. 340.

Young Mr. Miller it must be conceded committed a serious breach of propriety and a lack of neighborly consideration in killing the dog in Mr. Stanton's yard in the presence of the latter's family. They doubtless loved the little fice. These little animals, however worthless they may be, have a way of endearing themselves, especially to the women and children of the family. I well remember how in the days gone by my childish tears flowed as in poignant grief I stood brokenhearted and viewed the cold remains of my fine dog, Buster, who had met an untimely death. But under the record we are inclined to think that the defendant's cruelty was operative against Mr. Stanton's family rather than against the dog, which seems to have been worthless and of a vicious temperament. He did wrong to shoot when and where he did, but he is entitled to a new trial as to the penal offense with which he stands charged. Judgment reversed.

See *Reynolds v. State*, 1304; *State v. Churchill*, 98 Pac. 1, 19 L. R. A. 18, 89 S. E. 815, and notes. See "Animals," *Georgia Digest* §§ 287-287, *Domestic and Anti-Dog Key No. Section 31-31*, 84.

AMICK v. O'HARA, 6 Blackford, 258. 1842.

Defense of Property from Trespassing Animals. Negligence. Force. Distress.

BLACKFORD, J. O'Hara brought an action of trespass for an injury done to his mare by Amick who was the defendant in the lower court. Plea, not guilty. Verdict for the plaintiff [O'Hara]. Motion for a new trial overruled, and judgment on the verdict. [Affirmed.]

The evidence shows the following facts: The defendant, Amick, had a field in which corn was growing, enclosed by a good fence. The defendant, finding the plaintiff's, O'Hara's, mare in the field late at night, set his dogs on her, one a small dog, the other a large, fierce one, and thus drove her out of the field. The mare was bit in the nose by one of the dogs, and in running from them, had a snag run into her, which, in a day or two, caused her death.

The defendant, Amick, moved the court to instruct the jury, that if they believed from the evidence that the mare was trespassing on his field of corn; that he used ordinary care and diligence in driving her from the field; and that he did not intend to injure her; they should find for him. This instruction was rightly refused. There are two objections to it. First, it was not applicable to the case. There was no evidence, that the defendant used ordinary care and diligence in driving the mare from his premises. The evidence on the subject is the other way. Secondly, it was not essential to the support of the action, that the defendant intended to injure the mare. If a person unlawfully injure another's property, he is liable to an action for the damage, without regard to the intention with which the act was done. It is upon that principle, that even a lunatic is liable, civiliter, for a trespass against the person or property of another. *Weaver v. Ward*, Hobart, 134; *Haycraft v. Creasy*, 2 East, 92, per *Ld. Kenyon*.

The court gave the following instruction: If the defendant, Amick, hunted the mare from the field with a dog, and she was thereby injured, he is liable for the damages. This instruction was objected to. The law on the subject is stated in *Bacon's Abr.* as follows: "If J. S. chase the beast of J. N. with a little dog out of land in the possession of J. S., an action of trespass does not lie, inasmuch as J. S. has an election to do this, or to distrain the beast. But if J. S. chase the beast of J. N. with a mastiff dog out of land in the possession of J. S., and any hurt be thereby done to the beast, this action does lie; the chasing with such a dog being unlawful." *Bac. Abr. tit. Trespass, E.* According to that doctrine, the instruction given was not strictly correct; but still we do not consider that to be a sufficient reason for reversing the judgment in this case. We have the evidence before us, and as it fully sustains the verdict, the objection to the instruction is not material. The evidence shows that the defendant chased the mare out of his field with a large, fierce dog,

which was an unlawful act, and he must be held liable for the injury which that act occasioned.

Per Curiam. The judgment is affirmed.

See "Animals," Century Dig. § 373; Decennial and Am. Dig. Key No Series, § 94.

BOST v. MINGUES, 64 N. C. 44, 46. 1870.

Defense of Property from Trespassing Animals. Excessive Force.

[Plaintiff sued Mingues for damages caused by his killing plaintiff's boar. Verdict and judgment against defendant, and he appealed. Affirmed.]

There was evidence that the boar in question had on three occasions broken through defendant's fence and entered his field, letting in also a number of other hogs and thereby destroying about seventy-five bushels of defendant's corn. On each occasion, except the last, the boar had been turned out of the field uninjured and the fence had been properly repaired. At length the boar was shot by orders of the defendant under the following circumstances: The boar was attempting to break into the defendant's corn field. Defendant ordered his hands to drive it away, which they endeavored to do with the aid of dogs. The boar, after routing both hands and dogs on two occasions, broke through the fence where it was five feet in height, and entered the field. Immediately thereupon the defendant caused the boar to be shot. There was a conflict of evidence as to the height and strength of defendant's fence. The boar was unmarked, and the defendant, after inquiry, was unable to ascertain who was its owner. The judge refused to charge that under the proof the defendant had a right to kill the boar as a nuisance; but did instruct them that if the fence around defendant's field, in which the boar was killed, was not five feet high at all points, the killing of the boar was unlawful and plaintiff was entitled to damages if the boar was his property. Defendant excepted.]

READE, J. The defendant had no right to kill the hog for what he had already done; that were to take vengeance. Nor had he the right to kill him to prevent an anticipated mischief; for that might never happen. Nor had he the right to kill him for breaking over the fence, to get away from the dogs; for that was the instinct of self-preservation, incited by the violence of the pursuit.

It is the custom of the country that stock shall run at large; and because of the unnecessary expense, every owner of stock does not keep a bull or a boar. A few in each neighborhood are sufficient. They are regarded as public conveniences, and are indulged to considerable latitude, in "the freedom of the neighborhood."

The hog in question seems to have been improved stock, a Chester boar, worth \$50. From the fact that he was not marked, and was allowed the range, he seems to have been devoted to the service of the public by his liberal owner, and was in no sense a nuisance. To kill such a hog, was an injury to the plaintiff and a loss to the public, and would have been bad neighborship in the defendant, if it were not apparent that the killing was done un-

der considerable provocation, and under the impulse of the moment.

It was plausibly urged for the defendant that, inasmuch as the hog was not marked, and the owner was unknown, he could have no redress for the depredations upon his crop; but that is not so, for the stray-law gave an ample remedy. To this suggestion it was objected by the defendant, that he could not catch him. It seems that with dogs he could not, but milder means would doubtless have been effective, and they were not tried. His honor's instructions that the defendant had no right to kill the hog unless his fence were five feet high "all around," did the defendant no injustice, and was more favorable to him than the law allows, for he had no right to kill under the circumstances, if his fence had been five feet all around. *Morse v. Nixon*, 51 N. C. 293. There is no error.

See *Williams v. Dixon*, 65 N. C. 416, and *State v. Neal*, 120 N. C. 613, 27 S. E. 81, for other cases of killing trespassing animals and fowls while damage feasant. See "Animals," Century Dig. § 375; Decennial and Am. Dig. Key No. Series, § 96.

(b) *Recaption of Property.*

JOHNSON v. PERRY, 56 Vt. 703, 48 Am. Rep. 826. 1884.

Retaking Chattels from Tort-feasor. What Force May Be Used.

[Johnson sued Perry for assault. Judgment against plaintiff. Plaintiff appealed. Affirmed. The facts are stated in the beginning of the opinion.]

VEAZEY, J. The slabs in question belonged to the defendant, but were in the possession of the plaintiff, on his sled, on defendant's premises. The plaintiff had got the possession without permission of the defendant. Under these circumstances the defendant was proceeding to repossess himself of the slabs, by throwing them from the sled, when the plaintiff interfered, by throwing the slabs back on to the sled; and the defendant used what force was necessary to prevent the interference, and to unload the slabs.

For the assault on the defendant, under these circumstances, this suit was brought. Had the defendant the legal right to use this force upon the plaintiff, is the question to be determined.

In *Yale v. Seeley*, 15 Vt. 221, it was held that one has a legal right to enter upon the land of another to take away wood belonging to the former; and should the owner of the land attempt to hinder him in the enjoyment of the right, he would be justified in using such force as might be necessary to overcome the hindrance. He had, in that case, bought the trees of a former owner of the land, and cut them before the sale of the land. It was in-

sisted in that case, that the party, claiming the right to go upon another's land for such purpose, is entitled to the enjoyment of it only when it can be done in a "peaceable manner." The court said upon this point: "This is a qualification that is sometimes affixed to the right of recapture and reprisal, and applies to the regaining of personal property that has been wrongfully taken or withheld; and the law recognizes the right only within that qualification. But it is not so with regard to the right to enter upon another's land. If it is my right, the law will protect me in the enjoyment of it, and the person who attempts to hinder or obstruct me is the aggressor, and the first in the wrong."

In *Hodgeden v. Hubbard*, 18 Vt. 504, it was held that if a person purchase personal property, such as a stove, by means of false and fraudulent representations as to his solvency and means of payment for it, he acquires no right either of property or possession, and the vendor will be justified in pursuing him and retaking the property, and to effect this object, even against the resistance of the purchaser, he may use as much force as may be necessary. In delivering the judgment of the court, Chief Justice Williams said: "In the present case the defendant had clearly a right to retake the property thus fraudulently obtained from him, if it could be done without unnecessary violence to the person, or without breach of the peace. It is admitted by the counsel for the plaintiff, that a right to recapture existed in the defendant, if it could be done without violence, or breach of the peace, and how far this qualification of the right to retake property, thus taken, was intended for the security or benefit of the fraudulent possessor, may admit of some doubt. Whoever is guilty of a breach of the peace, or of doing unnecessary violence to the person of another, although it may be in the assertion of an unquestioned and undoubted right, is liable to be prosecuted therefor. But the fraudulent possessor is not the protector of the public interest. To obtain possession of the property in question, no violence to the person of the plaintiff was necessary or required, unless from his resistance. It was not like property carried about the person, as a watch or money, nor did it require a number of people to effect the object. The plaintiff had no lawful possession, nor any right to resist the attempt of the defendant to regain the property."

These cases were criticised in *Dustin v. Cowdry*, 23 Vt. 631, but not overruled. When the case at bar was before this court at the February term, 1882, reported in 54 Vt. 459, Judge Ross said: "On the doctrine of these cases, the plaintiff was entitled to have his request complied with." The charge to the jury conformed to the doctrine of these cases, and must be held correct, or these cases practically overruled.

Indeed this case is scarcely as strong for the plaintiff as was that of *Hodgeden v. Hubbard*. There the defendant had put the plaintiff in possession of the stove, and the latter had departed, and was on his way home. In this case the plaintiff had gone on

to the defendant's premises and loaded the slabs without any right or license, and before he had departed, the owner interfered. The property was of a kind that could be retaken without violating the person of the plaintiff, unless he became the aggressor by wrongfully hindering the defendant in his lawful act.

We should not be disposed to extend the law of the *Hodgeden v. Hubbard* case. But we are not disposed to overrule it, especially in this case; or to adopt a rule that when one man goes on to another's premises, without right or license, and undertakes to carry away his property, the latter cannot interfere to stop it, and to use sufficient force for the purpose, even against the resistance of the wrongdoer, when in order for the owner to assert his right, he can do it without violating the person of the wrongdoer, unless he interferes and persists in his wrongdoing. Judgment affirmed.

See *Leward v. Basely*, 2 Ld. Raym. 62, supra, sec. 2 (a). See also for a valuable discussion of the right to recapture chattels and the amount of force that may be used, 22 Atl. 1111, 14 L. R. A. 317, and note; Mikell's Cases on Crim. Law (Orig. Ed.) 406. See "Assault and Battery," Century Dig. § 14; Decennial and Am. Dig. Key No. Series, § 15.

BARNES v. MARTIN, 15 Wis. 263. 1862.

Resisting Unlawful Attempt to Retake Chattels. Force That May Be Used.

[Martin and his wife were the plaintiffs below. They sued Barnes for an assault and battery upon Mrs. Martin. There was a verdict and judgment in their favor, and Barnes carried the case to the supreme court by writ of error. Reversed.]

The defendant below, Barnes, pleaded that, at the time the alleged assault took place, he was possessed of a certain close and of a cow therein, and that Mrs. Martin broke into the close by force and endeavored to take away the cow forcibly; whereupon he, Barnes, resisted her, and if she suffered any injury, it happened of her own wrong, etc. The gist of the case was, that Barnes had distrained Martin's cow while it was on Barnes' premises damage feasant; and Mrs. Martin was injured by Barnes, while she was attempting to rescue the cow. The fourth and sixth instructions referred to in the opinion are as follows:

4. That if the jury should find that the plaintiff Barbara intended by her acts, in order to obtain the cow, to commit violence upon, or menaced violence to, the defendant, with the butcher knife, then her acts on coming up to the defendant on the occasion referred to in the case, with the intention of executing her purpose, amounted to an assault first upon the defendant. . . . 6. That the jury had no right to find punitive or exemplary damages, unless they first found that the acts of the defendant in resisting the taking of the cow from him were governed by wanton or malicious motives, and were without apparent cause.

Only so much of the opinion as bears upon the subject under discussion, is inserted.]

DIXON, C. J. All the witnesses concur in saying that the plaintiff in error had taken up and was peaceably possessed of the cow at the time of the affray. The defendant in error, Barbara, came for and demanded that the cow be delivered up, which the plaintiff refused. She then went home, and soon afterward returned with a knife in her hand, avowing her purpose to take the cow by force. The plaintiff resisted, and it was in the prosecution of this unlawful enterprise that she received her injuries. For whether the plaintiff was authorized to take up the cow, and might lawfully detain her or not, the defendant Barbara had no right to retake her by force. The law affords ample redress for all injuries of that kind, and will not justify parties in resorting to violence and breaking the public peace. The defendant was, therefore, acting in her own wrong in thus endeavoring to dispossess the plaintiff, and that whether his possession was lawful or unlawful. Under these circumstances, we think it clear that the judge should have given the fourth and sixth instructions asked by the plaintiff. It cannot be disputed, if the jury had found that the defendant in error, in order to obtain the cow, threatened and intended to commit violence upon the plaintiff with the knife, that her acts in coming up to him with the intention of executing such purpose, would have amounted to an assault. Neither can it be claimed that vindictive damages should be given in such a case, unless the jury should find that the acts of the party resisting were without apparent cause, and proceeded from wanton or malicious motives. It would seem to be one of the clearest principles of justice, that a party resisting the forcible and unlawful act of another ought not to be punished by way of exemplary damages, unless he be guilty of excess and act from motives of malice. . . . Judgment reversed, and a new trial awarded.

See *Hamlin v. Mack*, 33 Mich. 103, inserted sec. 2 (a), supra, and the cases immediately following that case. See also *Andre v. Johnson*, 6 Blackford, 375. See "Assault and Battery," Century Dig. §§ 3, 14; Decennial and Am. Dig. Key No. Series, §§ 5, 15.

COMMONWEALTH v. DONAHUE, 148 Mass. 529, 20 N. E. 171. 1889

Retaking Property by Force.

[Donahue was indicted for robbery. He was convicted of an assault. Judgment against him, and he appealed. Reversed. Mitchelman claimed that Donahue owed him \$21.55. Donahue placed \$20 on a table, and placed some clothes—the price of which was the *casus belli*—upon a chair. He then told Mitchelman that he could have the money or the clothes. Mitchelman pocketed the money, but still claimed \$1.55 more. Donahue thereupon demanded the return of the \$20, which being refused, he choked Mitchelman until it was surrendered. The jury were instructed that they could render a verdict of guilty if satisfied that Donahue choked and assaulted Mitchelman, although for the sole purpose of getting possession of the money which he honestly believed to be his own. Defendant excepted.]

HOLMES, J. . . . On the evidence for the commonwealth, it appeared that the defendant offered the \$20 to Mitchelman only on condition that Mitchelman should accept that sum as full payment of his disputed bill, and that Mitchelman took the money, and at the same moment, or just afterwards, as part of the same transaction, repudiated the condition. If this was the case, since Mitchelman, of course, whatever the sum due him, had no right to that particular money except on the conditions on which it was offered (*Com. v. Stebbins*, 8 Gray, 492), he took the money wrongfully from the possession of the defendant; or the jury might have found that he did, whether the true view be that the defendant did not give up possession, or that it was obtained from him by Mitchelman's fraud (*Com. v. Devlin*, 141 Mass. 423, 6 N. E. Rep. 64; *Chiffer's Case*, T. Raym. 275, 276; *Reg. v. Thompson*, Leigh & C. 225; *Reg. v. Slowly*, 12 Cox, Crim. Cas. 269; *Reg. v. Rodway*, 9 Car. & P. 784; *Rex v. Williams*, 6 Car. & P. 390; 2 East, P. C. c. 16, §§ 110-113). See *Reg. v. Cohen*, 2 Denison, Cr. Cas. 249, and cases *infra*. The defendant made a demand, if that was necessary,—which we do not imply,—before using force. *Green v. Goddard*, 2 Salk. 641; *Polkinhorn v. Wright*, 8 Q. B. 197; *Com. v. Clark*, 2 Mete. 23, 25; and cases *infra*. It is settled by ancient and modern authority that under such circumstances a man may defend or regain his momentarily interrupted possession by the use of reasonable force, short of wounding, or the employment of a dangerous weapon. *Com. v. Lynn*, 123 Mass. 218; *Com. v. Kennard*, 8 Pick. 133; *Anderson v. State*, 6 Baxt. 608; *State v. Elliot*, 11 N. H. 540, 545; *Rex v. Milton*, Moody & M. 107, Y. B. 9 Edw. IV. 28, pl. 42, 19 Hen. VI. 31, pl. 59, 21 Hen. VI. 27, pl. 9. See *Seaman v. Cuppledick*, Owen, 150; *Taylor v. Markham*, Cro. Jac. 224, Yelv. 157, 1 Brownl. 215; *Shingleton v. Smith*, Lutw. 1481, 1483, 2 Inst. 316, Finch, Law 203, 1 Hawk. P. C. c. 60, § 23, 3 Bl. Comm. 121. To this extent the right to protect one's possession has been regarded as an extension of the right to protect one's person, with which it is generally mentioned. *Baldwin v. Hayden*, 6 Conn. 453, Y. B. 19 Hen. VI. pl. 59; *Rogers v. Spence*, 13 Mees. & W. 579, 591, 1 Hawk. P. C. c. 60, § 23, 3 Bl. Comm. 120, 131.

We need not consider whether this explanation is quite adequate. There are weighty decisions which go further than those above cited, and which hardly can stand on the right of self-defense, but involve other considerations of policy. It has been held that even where a considerable time had elapsed between the wrongful taking of the defendant's property and the assault, the defendant had a right to regain possession by reasonable force, after demand upon the third person in possession in like manner as he might have protected it without civil liability. Whatever the true rule may be, probably there is no difference in this respect between the civil and the criminal law. *Blades v. Higgs*, 10 C. B. (N. S.) 713, 12 C. B. (N. S.) 501, 13 C. B. (N. S.) 844.

11 H. L. Cas. 621; Com. v. McCue, 16 Gray, 226, 227. The principle has been extended to a case where the defendant had yielded possession to the person assaulted, through the fraud of the latter. *Hodgeden v. Hubbard*, 18 Vt. 504. See *Johnson v. Perry*, 56 Vt. 703. On the other hand, a distinction has been taken between right to maintain possession and the right to regain it from another who is peaceably established in it, although the possession of the latter is wrongful. *Bobb v. Bosworth*, Litt. Sel. Cas. 81. See *Barnes v. Martin*, 15 Wis. 240; *Andre v. Johnson*, 6 Blackf. 375; *Davis v. Whitridge*, 2 Strob. 232; 3 Bl. Comm. 4. It is unnecessary to decide whether in this case, if Mitchelman had taken the money with a fraudulent intent, but had not repudiated the condition until afterwards, the defendant would have had any other remedy than to hold him to his bargain, if he could, even if he knew that Mitchelman still had the identical money upon his person. If the force used by the defendant was excessive, the jury would have been warranted in finding him guilty. Whether it was excessive or not was a question for them; the judge could not rule that it was not, as matter of law. *Com. v. Clark*, 2 Mete. 23. Therefore the instruction given to them, taken only literally, was correct. But the preliminary statement went further, and was erroneous; and, coupling that statement with the defendant's offer of proof, and his course after the rulings, we think it fair to assume that the instruction was not understood to be limited, or indeed to be directed, to the case of excessive force, which, so far as appears, had not been mentioned, but that it was intended and understood to mean that any assault to regain his own money would warrant finding the defendant guilty. Therefore the exceptions must be sustained. . . .

See "Assault and Battery," *Century Dig.* §§ 99, 145; *Decennial and Am. Dig. Key No. Series*, §§ 69, 145 (4).

MCLEOD v. JONES, 105 Mass. 403. 1870.

Entering Upon Another's Land to Retake Chattels.

[Tort for forcibly entering the plaintiff's close and removing, and converting to the defendant's use, household furniture found therein. Verdict and judgment against defendant, and he appealed. Affirmed.]

McLeod once lived in Providence and, while living there, gave Jones a bill of sale for certain furniture. Thereafter McLeod moved to Taunton and carried Jones' furniture with him together with certain other chattels which he had previously mortgaged to Jones. All of these goods were in plaintiff's dwelling in Taunton when he and his family left Taunton for a visit—he going to New York and his wife and children to Fall River. Three or four days after their departure, Jones, believing, and having reasons for so believing, that McLeod had left with no intention to return to Taunton, entered McLeod's dwelling in Taunton, and removed the furniture embraced in the bill of sale which McLeod had made to him. The judge below ruled that under such circumstances Jones was liable in this action for a forcible entry,

although his only purpose was to get possession of his own property; that Jones had no right to enter McLeod's house for such purpose, without permission or license, express or implied, from McLeod; and that the mere fact that Jones' goods were in the house under the circumstances stated, did not amount to such license or permission. Defendant excepted.]

WELLS, J. The defendant was liable as a trespasser for entering the plaintiff's close, unless he can justify his entry by some legal right, or by some license or permission so to do. The plaintiff's absence will not excuse him. Reasonable cause to believe, and actual belief that the plaintiff and his family did not intend to return, are no defense. The only question is, whether the ruling of the court below was correct, that "the mere fact that his goods were in said premises under the circumstances stated" did not furnish a sufficient ground from which a license, permission or legal right could be inferred.

In the decision of this question, we must assume that the defendant's claim would have been sustained, that his title, as mortgagee of all the property taken away by him, was valid, and his mortgage debt unpaid. He had then a right to the possession of the property which he took.

But the possession of the plaintiff, as mortgagor, was not wrongful. The goods were rightfully upon his premises. There is nothing to show that the terms of the mortgage, or bill of sale, under which the defendant claimed them, gave him any special authority to enter for the purpose of recovering the property, in any event; nor that the removal of the goods from the shop to the house, or from Providence to Taunton, was inconsistent with the rights of the mortgagee, or against his wishes. The removal from Providence was about two years before the time of his entry.

The goods then were rightfully in the custody of the plaintiff, and within his close. The defendant was the owner of the legal title, with a present right of possession. Does that alone justify him in a breach of the plaintiff's close? A majority of the court are of the opinion that it does not.

One whose goods are stolen, or otherwise illegally taken from him, may pursue and retake them wherever they may be found. No one can deprive him of this right, by wrongfully placing them upon his own close. *Patrick v. Colerick*, 3 M. & W. 483; *Webb v. Beavan*, 6 M. & G. 1055, and note; *Com. Dig. Trespass D*, citing 2 Rol. Ab. 565, L. 54; *Bac. Ab. Trespass F*, 1. But if they are deposited upon the land of another, who is not a participant in the wrongful taking, the owner cannot enter upon his land to retake them; unless in case of theft, and fresh pursuit. 20 Vin. Ab. 506, *Trespass H*, a. 2, pl. 4, 5. So, from the necessity of the case, one whose cattle escape upon the land of another may follow and drive them back, without being a trespasser, unless the escape itself was a trespass. *Com. Dig. Trespass D*, citing 2 Rol. Ab. 565, L. 35. In these cases, the law gives the party a right to enter for that particular purpose.

In other cases a right or license to enter upon land results, or may be inferred, from the contracts of the parties in relation to personalty. Permission to keep, or the right to have one's personal property upon the land of another, involves the right to enter for its removal. *Doty v. Gorham*, 5 Pick. 487; *Bac. Ab. Trespass F. 1*; *White v. Elwell*, 48 Maine, 360.

A sale of chattels, which are at the time upon the land of the seller, will authorize an entry upon the land to remove them, if, by the express or implied terms of the sale, that is the place where the purchaser is to take them. *Wood v. Manley*, 11 Ad. & El. 34; *Nettleton v. Sikes*, 8 Met. 34; *Giles v. Simonds*, 15 Gray, 441; *Drake v. Wells*, 11 Allen, 141; *McNeal v. Emerson*, 15 Gray, 384.

A license is implied, because it is necessary in order to carry the sale into complete effect; and is therefore presumed to have been in contemplation of the parties. It forms a part of the contract of sale. The seller cannot deprive the purchaser of his property, or drive him to an action for its recovery, by withdrawing his implied permission to come and take it. This proposition does not apply, of course, to a case where a severance from the realty is necessary to convert the subject of the sale into personalty, and the revocation is made before such severance.

But there is no such inference to be drawn, when the property, at the time of sale, is not upon the seller's premises; or when, by the terms of the contract, it is to be delivered elsewhere. And when there is nothing executory or incomplete between the parties in respect to the property, and there is no relation of contract between them affecting it, except what results from the facts of ownership or legal title in one and possession in the other, no inference of a license to enter upon lands for the recovery of the property can be drawn from that relation alone. 20 Vin. Ab. 508, *Trespass H. a. 2 pl. 18*. *Anthony v. Haney*s 8 Bing. 186; *Williams v. Morris*, 8 M. & W. 488. We think the authorities cited illustrate and establish these distinctions.

It is said in *Com. Dig. Trespass D*, citing 2 Rol. Ab. 566, L 30, that I may not enter lands "for retaking goods, which he, who holds them in common with me, put there; for though a tenant in common may retake goods in common, when the other takes them, yet he cannot justify a trespass to do it."

In *Wood v. Manley*, 11 Ad. & El. 34, where the doctrine that a sale of goods, to be taken on the premises of the seller, gives a license to the purchaser to enter and take them, is laid down, it is guarded by the remark of *Patteson, J.* "I do not say that a mere purchase will give a license."

In *Bac. Ab. Trespass F. 1*, it is said: "But if J. S. have commanded A. to deliver a beast to J. N. and J. N. go into the close of J. S. to receive the beast, the action does lie; for, as the beast might have been delivered at the gate of the close, the going of J. N. thereinto is not necessary."

In the note to *Webb v. Beavan*, 6 M. & G. 1055, is a citation from the year books 9 Edw. IV. 35, in which *Littleton, J.*, after

laying down the doctrine that a man may enter the close of another to retake his own goods wrongfully put there, is reported to have said: "But it is otherwise if I bail goods to a man. I cannot enter his house and take the goods, for they did not come there by wrong, but by the act of us both."

It is by act of both, that goods, upon which the defendant had only a chattel mortgage, leaving the possession rightfully with the plaintiff, were in the plaintiff's house. In 20 Vin. Ab. 507, Trespass H. a. 2, pl. 12, it is said: "If a man takes my goods and puts them upon his land, I may enter and retake them. Contrary upon bailment of goods," citing the above authority of Littleton. A note contains the following: "When a man bails goods to another to keep, it is not lawful for him, though the doors are open, to enter into the house of the bailee and to take the goods, but ought to demand them; and if they are denied, to bring writ of detainue, and to obtain them by law," citing Bro. Ab. Trespass, pl. 208, and 21 Hen. VII. 13. A right to enter the premises of the mortgagor, without legal process, is not essential to the security of the mortgagee of personal property. Permission to do so is not implied, therefore, from the existence of that relation alone. If there was anything in the form of the mortgage or bill of sale, or in the nature and circumstances of the plaintiff's possession of the property, which gave the defendant a right to seek it within the close of the plaintiff, where it had been deposited since the date of the mortgage or bill of sale, it should have been made to appear. The burden was upon the defendant to establish the special right which he set up in justification of his entry. At the trial, *he based his right to enter, solely upon his title to the personal property*, and the supposed abandonment of the premises by the plaintiff; and asked the court to rule that that was sufficient. The court held it to be insufficient "without some license or permission from the plaintiff, express or implied." The defendant does not show that there was anything in the terms of his bill of sale or mortgage, or in the situation of the property at the time it was made, or in the circumstances of the plaintiff's possession at the time of the entry, from which such license or permission could be implied; and he asked no instructions upon the evidence upon that point, if any existed, at the trial.

In *McNeal v. Emerson*, 15 Gray, 384, the property mortgaged was furniture, which remained in the same situation as when the mortgage was made, and the circumstances left the case in the same position substantially as a sale of personal property to be removed by the purchaser.

In the case of *Heath v. Randall*, 4 Cush. 195, the jury must have found, under the instructions given them, that the contract was that the defendant had a right to take the property away any day until paid for, which was plainly understood to mean a right to take it from the premises of the bailee. It is to be observed also, that in that case the question pressed in the argument, and to which the discussion by the court was mainly directed, was that

of the right to terminate the bailment without demand of the balance due upon the conditional purchase: the right of entry upon the plaintiff's close being considered only incidentally.

A majority of the court are of the opinion that the facts reported in this case are not sufficient to sustain the justification relied on by the defendant, and that the instructions upon that point were correct. If the defendant established his title to the property taken away, he would of course be liable only for such injury as he did to the plaintiff's house. But no question appears to be raised as to the measure of damages, and we are to presume that proper instructions upon that point were given. Exceptions overruled.

See further on this subject, Finch's Cases, 789, at pp. 791, 792; State v. Goode, 130 N. C. 651, 41 S. E. 3, inserted ante, in section 1, and note to that case; Stanley v. Payne, 62 Atl. 495, 3 L. R. A. (N. S.) 251 and note. See "Trespass," Century Dig. § 63; Decennial and Am. Dig. Key No. Series, § 27.

(c) *Entry.*

RANSOM v. LEWIS, 63 N. C. 43, 45. 1868.

What Constitutes an Entry.

[Action of ejectment, in which Ransom was "lessor of plaintiff," against Lewis. Judgment of nonsuit against the plaintiff, and he appealed. Affirmed.]

The defendant and those under whom he claimed had been in possession, claiming title under a devise, from 1845 to the trial in 1868. In 1864 Ransom on various occasions cut wood on the land and carried it away. He also demised the land to a tenant, but the tenant did not enter under such demise. These acts were done by Ransom under a claim of owning the land, *but his acts were unknown to any one except himself and his lessee.* These facts being admitted, a verdict was, by consent, entered for the plaintiff, subject to the opinion of the court. The court set aside the verdict and nonsuited the plaintiff. The defendant claimed title by the adverse possession of himself and his predecessors, under color of title. Ransom claimed title under a deed made in 1862. The question was, whether or not Ransom's acts in 1864 amounted to an entry which would interrupt the adverse holding of the defendant, who was in possession.]

PEARSON, C. J. . . . In our case the lessor of the plaintiff, so far from taking exclusive possession, or even making an entry openly and aboveboard, merely slipped over upon the land occasionally and cut wood, and split and carried away some fence-rails and some pine straw, which was unknown to the defendant or any one else, so far as the evidence shows. It is true the lessor of the plaintiff leased the land, but the tenant, before entry, contracted with the defendant for the use and occupation of the land, and paid him the rent; so that amounts to nothing.

We hold that, in order to revest an estate which is divested by adverse possession under color of title, there must be an *open en-*

try under claim of right, so as to give notoriety to the matter, which is all that is necessary to decide to dispose of this case. There is no error. Affirmed.

See "Adverse Possession," Century Dig. § 235; Decennial and Am. Dig. Key No. Series, § 47.

ALSBROOK v. SHIELDS, 67 N. C. 333, 336. 1872.

Effect of Entry. Fieri Non Debet Sed Factum Valet.

[Plaintiff sued Shields for the conversion of a bale of cotton. Verdict and judgment against defendant, and he appealed. Reversed.]

Alsbrook and Shields each claimed title to a bale of cotton—Alsbrook as purchaser thereof from the tenant of Shields; and Shields under a landlord's lien for rent, etc. Shields took the cotton from a public gin at which it had been left by Alsbrook, and converted it to his own use without Alsbrook's consent. The judge instructed the jury that, as Alsbrook was in possession of the cotton when it was taken by Shields, he was entitled to recover; because, even if Shields was owner of the cotton, he could not lawfully retake possession thereof—as such recaption was calculated to produce a breach of the peace. To this Shields excepted. Only so much of the opinion is inserted as bears upon the point under consideration.]

BOYDEN, J. . . . We understand his honor as instructing the jury that if the owner of property takes it out of the possession of another under circumstances calculated to produce a breach of the peace, he may be sued for such taking by the possessor, and the value of the property recovered.

The court had supposed that it was familiar learning that the owner of property thus taken could not be sued for the property; and that if the owner of real estate had taken possession under circumstances calculated to produce a breach of the peace, and even if he committed a breach of the peace by ousting the possessor, still, he [the possessor] could not sustain a suit for the land against the real owner, who had thus violently deprived him of the possession, and that a plea of liberum tenementum, if established, would bar the plaintiff's recovery. . . . Venire de novo.

See "Trove and Conversion," Century Dig. §§ 164, 165; Decennial and Am. Dig. Key No. Series, § 23.

ROBERTS ET AL. v. PRESTON, 106 N. C. 411, 420, 10 S. E. 983. 1890.

Effect of Entry Continued.

[Plaintiffs sued Preston for damages for alleged trespasses on land. Verdict and judgment against plaintiffs, and they appealed. Affirmed.]

Both parties claimed the locus in quo under Mills Roberts. Preston claimed that his acts of alleged trespass were done under authority

from one Hettrick to whom the locus in quo had come, by mesne conveyances, from Mills Roberts. Plaintiffs claimed title by descent from Mills Roberts. Some weeks previous to the acts complained of, Hettrick had entered upon the locus in quo and taken possession thereof. The alleged trespasses by Preston were committed under a claim of right as assignee of Hettrick, or by his permission. There was evidence tending to prove that plaintiffs were in the actual possession at the time of Hettrick's entry.

"The plaintiffs requested the court to charge the jury as follows: 'Whether plaintiffs have proven title or not to the land in controversy, yet if they were in the actual possession of the land, or any part of it, and the defendant, while they were there in possession of the land, entered upon the land so in their possession, and built a tramway or cut down trees without the plaintiffs' permission, he was guilty of trespass, as charged in the complaint.' . . . This was given by the court, with the qualification: 'Unless the jury find from the evidence that at the time of Preston's entry, Hettrick was the owner of said land, had previously entered thereon, and taken possession thereof, and was at the time of Preston's entry in actual possession, and had authorized Preston to enter.' . . . Plaintiffs excepted."

There were other exceptions to the charge, but this exception is sufficient for the purpose in view.]

MERRIMON, C. J. . . . There was evidence going to prove that Hettrick, under whom the defendant claims and justifies, had title to the land in question at and before the time of the alleged trespasses, and that he then had actual possession and control thereof, and that while he was so in possession, he allowed the defendant to cut timber, and do other things complained of, on the land. There was also evidence to the contrary.

Unquestionably, the owner of land having the right of possession may peaceably enter upon it, while another person, who has no right, has previously taken, and has, possession thereof. When the lawful owner thus enters and takes possession, the possession extends to the whole tract unless a person is in the wrongful possession of some part, in which case, his wrongful possession is confined to the part of which he has actual possession. When the lawful owner thus takes possession, the law favors and helps him in the assertion of his right. Thus he has perfect title, and he may do whatever he may lawfully do with his own property. He cannot be treated as a trespasser in such case. He may put his agents and servants in possession of the land, or any part of it, under him, and may authorize other persons to cut timber, construct roads, and do other things on his land, and have the right to ingress, egress and regress. Nor can the person having such wrongful possession maintain trespass in such case against the lawful owner, or those in possession under him, or cutting timber, and doing other like things on the land by his permission or direction. This is so, because he goes into, and has, possession of right. *Ring v. King*, 20 N. C. 301; *Tredwell v. Reddick*, 23 N. C. 56; *Everett v. Smith*, 44 N. C. 303; *White v. Cooper*, 53 N. C. 48; *Gadsby v. Dyer*, 91 N. C. 311; *Logan v. Fitzgerald*, 92 N. C. 644; *Gaylord v. Respass*, *ibid.* 553; *Nixon v. Williams*, 95 N. C. 103.

The court, therefore, properly declined to give the jury in-

structions as specially demanded by the plaintiffs, without modification. . . . Affirmed.

A had possession of a tenement, consisting of a main building and a shed attached. He locked the door of the shed in which he had some tools, etc., and, leaving a tenant in possession, went away intending to return. Afterwards the tenant admitted B, who had the title and right of possession, into the peaceable possession of the main building; held, that B was not indictable for a forcible entry in breaking into the shed and assuming possession of that too. *State v. Pridgen*, 30 N. C. 84.

In 53 N. C. at p. 53, Pearson, C. J., says: "The plaintiff in this case by making an actual entry on the land by force of his title, was then in possession notwithstanding the presence of defendant; for it is settled, that when two are on the land, the law adjudges the possession to be in the party who has title." See "Trespass," *Century Dig.* §§ 54-56; *Decennial and Am. Dig. Key No. Series*, § 25.

LOW v. ELWELL ET AL., 121 Mass. 309, 23 Am. Rep. 272. 1876.

Entry. Eviction of Tenant by Sufferance.

[Tort for an assault in forcibly ejecting the plaintiff from her dwelling-house. By consent of parties, the case was carried to the supreme court upon agreed facts. If defendant was adjudged liable, the case was to stand merely for assessment of damages; if otherwise, the plaintiff should become nonsuit. The Supreme Court nonsuited the plaintiff.]

The plaintiff, Ellen B. Low, was in possession of a house under an oral lease made to her husband, John C. Low, by the owner in fee thereof. In March, 1873, while she was thus in possession, the owner of the house duly demised it to the defendant, Zeno P. Elwell, and both the owner and Elwell gave written notice to John C. Low of this lease and to quit the premises. Under the law of Massachusetts the oral lease to John C. Low gave him no greater estate than a tenancy at will, which estate was terminated by the acts stated above, and, therefore, at the time of the alleged assault, John C. Low was a mere tenant at sufferance. As plaintiff did not quit the premises, the defendants, Elwell and his wife, forcibly broke open the house at ten o'clock in the morning of April 15, 1873, and put the plaintiff and all of her effects out of the house against her protest. Elwell directed the plaintiff to leave the house, which she refused to do. Thereupon he took her by the shoulders and "ran her into the street." Elwell and his wife then kept possession of the house.]

GRAY, C. J. A tenant holding over after the expiration of his tenancy is a mere tenant at sufferance, having no right of possession against his landlord. If the landlord forcibly enters and expels him, the landlord may be indicted for the forcible entry. But he is not liable to an action of tort for damages, either for his entry upon the premises, or for an assault in expelling the tenant, provided he uses no more force than is necessary. The tenant cannot maintain an action in the nature of trespass *quare clausum fregit*, because the title and the lawful right to possession are in the landlord, and the tenant, as against him, has no right of occupation whatever. He cannot maintain an action, in the nature of trespass to his person, for a subsequent expulsion

with no more force than necessary to accomplish the purpose; because the landlord, having obtained possession by an act which, though subject to be punished by the public as a breach of the peace, is not one of which the tenant has any right to complain, has, as against the tenant, the right of possession of the premises; and the landlord, not being liable to the tenant in an action of tort for the principal act of entry upon the land, cannot be made liable to an action for the incidental act of expulsion, which the landlord, merely because of the tenant's own unlawful resistance, has been obliged to resort to in order to make his entry effectual. To hold otherwise would enable a person, occupying land utterly without right, to keep out the lawful owner until the end of a suit by the latter to recover the possession to which he is legally entitled.

This view of the law, notwithstanding some inconsistent opinions, is in accordance with the current of recent decisions in England and in this commonwealth.

In *Turner v. Meymott*, 7 Moore, 574; S. C. 1 Bing. 158; it was decided that a *tenant whose term had expired could not maintain trespass against his landlord for forcibly breaking and entering the house in his absence*. In *Hillary v. Gay*, 6 C. & P. 284, indeed, Lord Lyndhurst at nisi prius, while recognizing the authority of that decision, ruled that if the landlord, after the expiration of the tenancy, by force put the tenant's wife and furniture into the street, he was liable to an action of trespass *quare clausum fregit*. And in *Newton v. Harland*, 1 Man. & Gr. 644; S. C. 1 Scott N. R. 474, a majority of the court of Common Pleas, overruling decisions of Baron Parke and Baron Alderson at nisi prius, held that under such circumstances the landlord was liable to an action of trespass for assault and battery.

But in *Harvey v. Brydges*, 14 M. & W. 437, Baron Parke stated his opinion, upon the point raised in *Newton v. Harland*, as follows: "Where a breach of the peace is committed by a freeholder, who, in order to get into possession of his land, assaults a person wrongfully holding possession of it against his will, although the freeholder may be responsible to the public in the shape of an indictment for a forcible entry, he is not liable to the other party. I cannot see how it is possible to doubt that it is a perfectly good justification to say that the plaintiff was in possession of the land against the will of the defendant, who was owner, and that he entered upon it accordingly; even though, in so doing, a breach of the peace was committed." Baron Alderson concurred, and said that he retained the opinion that he expressed in *Newton v. Harland*, notwithstanding the decision of the majority of the court of common pleas to the contrary. The opinion thus deliberately adhered to and positively declared by those eminent judges, though not required by the adjudication in *Harvey v. Brydges*, is of much weight. In *Davis v. Burrell*, 10 C. B. 821, 825, Mr. Justice Creswell said, that the doctrine of *Newton v. Harland* had been very much questioned. And it was finally

overruled in *Blades v. Higgs*, 10 C. B. (N. S.) 713, where, in an action for an assault by forcibly taking the defendant's property from the plaintiff's hands, using no more force than was necessary, Chief Justice Erle, delivering the unanimous judgment of the court, approved the statement of Baron Parke, above quoted, and added: "In our opinion, all that is so said of the right of property in lands applies in principle to a right of property in a chattel, and supports the present justification. If the owner was compellable by law to seek redress by action for a violation of his right of property, the remedy would be often worse than the mischief, and the law would aggravate the injury, instead of redressing it." See also *Lows v. Telford*, 1 App. Cas. 414, 426.

In *Commonwealth v. Haley*, 4 Allen, 318, the case was upon an indictment for forcible entry, and no opinion was required or expressed as to the landlord's liability to a civil action.

The judgment in *Sampson v. Henry*, 11 Pick. 379, turned upon a question of pleading. The declaration, which was in trespass for an assault and battery, alleged that the defendant assaulted the plaintiff, and with a deadly weapon struck him many heavy and dangerous blows. The pleas of justification merely averred that the defendant was seized and had the right of possession of a dwelling-house, that the plaintiff was unlawfully in possession thereof, and opposed defendant's entry, and that the defendant used no more force than was necessary to enable him to enter and to overcome the plaintiff's resistance; but did not deny the use of the dangerous weapon and the degree of violence alleged in the declaration; and were therefore held bad, in accordance with *Gregory v. Hill*, 8 T. R. 299, there cited. The remarks of Mr. Justice Wide, denying the right of a party dispossessed to recover possession by force and by a breach of the peace, would, if construed by themselves, and extended beyond the case before him, allow the tenant to maintain an action of trespass against the landlord for entering the dwelling-house, in direct opposition to the judgment delivered by the same learned judge, in another case, between the same parties, argued at the same term and decided a year after. *Sampson v. Henry*, 13 Pick. 36.

In the latter case, which was an action for breaking and entering the plaintiff's close, and for an assault and battery upon him, the court held that the plea of *liberum tenementum* was a good justification of the charge of breaking and entering the house, but not of the personal assault and battery. That decision, so far as it held that the *landlord was not liable* to an action of trespass *quare clausum fregit* by a tenant at sufferance for a forcible entry, *has been repeatedly affirmed*. *Meador v. Stone*, 7 Met. 147; *Miner v. Stevens*, 1 Cush. 482, 485; *Mason v. Holt*, 1 Allen, 45; *Curtis v. Galvin*, 1 Allen, 215; *Moore v. Mason*, 1 Allen, 406. And so far as it allowed *the plaintiff to recover*, in such an action, damages for the incidental injury to him or to his personal property, *it has been overruled*. *Eames v. Prentice*, 8 Cush. 337; *Curtis v. Galvin*, *ubi supra*.

It has also been adjudged that a landlord, who, having peace-

ably entered after the termination of the tenancy, proceeds, against the tenant's opposition, to take out the windows of the house, or to forcibly eject the tenant, is not liable to an action of assault, if he uses no more force than is necessary for the purpose. *Mugford v. Richardson*, 6 Allen, 76; *Winter v. Stevens*, 9 Allen, 526. For the reason already stated, we are all of the opinion that a person who has ceased to be a tenant, or to have any lawful occupancy, has no greater right of action when the force exerted against his person is contemporaneous with the landlord's forcible entry upon the premises.

Our conclusion is supported by the American cases of the greatest weight. *Jackson v. Farmer*, 9 Wend. 201; *Overdeer v. Lewis*, 1 W. & S. 90; *Kellam v. Janson*, 17 Penn. St. 467; *Stearns v. Sampson*, 59 Maine, 568; *Sterling v. Warden*, 51 N. H. 217. The opposing decisions are so critically and satisfactorily examined in an elaborate article upon this subject in 4 Am. Law Rev. 429, that it would be superfluous to refer to them particularly.

The tenancy of the plaintiff's husband under an oral lease was but a tenancy at will, which, by the written lease from his landlord to the defendant, and reasonable notice thereof, was determined, and he became a mere tenant at sufferance. *Pratt v. Farrar*, 10 Allen, 519. It being admitted that, if the defendants had the right to remove the plaintiffs by force, no more force was used than was reasonably necessary, this action cannot be maintained. Plaintiff nonsuit.

See "Assault and Battery," Century Dig. § 14; Decennial and Am. Dig. Key No. Series, § 15, "Landlord and Tenant," Century Dig. § 1167; Decennial and Am. Dig. Key No. Series, § 275.

MOSSELLER v. DEAVER, 106 N. C. 494, 11 S. E. 529, 8 L. R. A. 537.
1890.

Entry. Eviction of Tenant by Sufferance. Forcible Entry.

[Action of trespass. Judgment against the plaintiff, and he appealed. Reversed.]

SHEPHERD, J. The plaintiff had been in possession of the strip of land in controversy from 1884 to March, 1888. Whether he entered under the defendant Wilson, the owner, and the terms under which he entered, are disputed questions. It is admitted, however, that in March, 1887, Wilson, after giving the plaintiff notice to quit, agreed that he should remain upon the land until the succeeding October. The plaintiff continued in possession until March, 1888, when, without any further notice, he was forcibly ejected by the defendant Deaver and a negro, who were acting under the direction and authority of the said Wilson. The entry was made while the plaintiff was in the actual possession

of his house, and in his presence, and was done under such circumstances as to constitute a forcible entry under the statute, if not, indeed, an indictable forcible trespass. His honor charged the jury that, if the plaintiff was not the tenant of Wilson, the latter, and those acting under him, "had the right to go there, and put him out by force, if no more force was used than was necessary for that purpose." Under the circumstances of this case (the plaintiff not being a recent trespasser or intruder) we cannot approve of the instruction given, as it is not only opposed to the public policy which requires the owner to use peaceful means, or resort to the courts in order to regain his possession, but is directly contrary to a statute which condemns the violent act as a criminal offense. In *Dustin v. Cowdry*, 23 Vt. 631, REDFIELD, J., said: "We entertain no doubt that such a principle of law . . . did exist in England from the time of the Norman conquerer until the statute of 5 Richard II. c. 8, of 'Forcible Entry and Detainer,' a period of nearly three hundred years; . . . and it is certain, we think, that such a mode of reducing rights of action to possession is more suited to the turbulence and violence of those early times, when no man, whose head was of much importance to the state, felt secure of retaining it upon his shoulders for an hour, than to quiet and order and general harmony of the nineteenth century. . . . But as men advanced towards equality, and claimed to have their rights respected and guaranteed to them, and more carefully defined this state of the law became intolerable, and was among the first to be abrogated by parliament." This was done by the statute of 5 Richard II., which is substantially enacted in North Carolina (see Code, § 1028) and in many other states of this Union. "A contrary rule," says LAWRENCE, J., in *Reeder v. Purdy*, 41 Ill. 279, "befits only that condition of society in which the principle is recognized that—

He may take who has the power,
And he may keep who can.

—If the right to use force be once admitted, it must necessarily follow as a logical sequence that so much may be used as shall be necessary to overcome resistance, even to the taking of human life."

Nearly all of the authorities agree that such forcible entries on the part of the owner are unlawful, but there is a great diversity as to whether an action of trespass *quare clausum fregit* may be maintained, and also whether the defendant can justify under the plea of *liberum tenementum*. ERSKINE, J., in *Newton v. Harland*, 39 E. C. L. 963, said that "it is remarkable that a question so likely to arise should never have been directly brought before any of the courts sitting in banc," until that case which was tried in 1840; and it is also worthy of remark that RUFFIN, C. J., in *State v. Whitfield*, 8 Ired. 317, regarded it as still an open question in North Carolina. In the conflict of authorities we must adopt that rule which in our judgment rests upon the sounder reason. This is so well expressed by the

court in *Reeder v. Purdy*, supra, that we will reproduce the language of the learned justice who delivered the opinion. He says: "The reasoning upon which we rest our conclusion lies in the briefest compass, and is hardly more than a simple syllogism. The statute of forcible entry and detainer, not in terms, but by necessary construction, forbids a forcible entry, even by the owner, upon the actual possession of another. Such entry is therefore unlawful. If unlawful, it is a trespass, and an action for the trespass must necessarily lie. . . . Although the occupant may maintain trespass against the owner for a forcible entry, yet he can only recover such damages as have directly accrued to him from injuries done to his person or property, through the wrongful invasion of his possession, and such exemplary damages as the jury may (under proper instructions) think proper to give. But a person having no title to the premises clearly cannot recover damages for any injury done to them by him who has title." He may, however, says the court, recover nominal damages in all cases of forcible entry and detainer; and this, in our opinion, is the correct view of the law. It is strongly sustained in *Newton v. Harland*, supra, though the point is not distinctly decided. In that case, BOSANQUET, J., agrees with TINDAL, C. J., in holding that, "if the act be expressly prohibited by statute, it must . . . be illegal and void." See, also, Cooley, Torts, 323, 324. Our conclusion, therefore, is that there having been a forcible entry upon the peaceable possession of the plaintiff, he is entitled to recover nominal damages for the trespass. He is also entitled to recover damages for any injury inflicted upon his person, his furniture, his tools, and even his house, if it is a fixture only. There may also be awarded exemplary damage if the unlawful act be done in a wanton and reckless manner. The complaint alleges such injuries, and it was error on the part of the court in making the case turn upon the question whether the force used was necessary to the expulsion of the plaintiff, as we have seen that the forcible entry was unlawful, without reference to the amount of force necessary to effectuate the purpose of the plaintiff. . . . New trial.

For re-entry of landlord by force for breach of conditions in the lease, when such right is reserved in the lease, cutting off heat, water, gas, etc., for breach of conditions, see *Howe v. Frith*, 95 Pac. 603, 17 L. R. A. (N. S.) 672, and note; for forcible entry of landlord and eviction of tenant by sufferance, *Whitney v. Brown*, 90 Pac. 277, 11 L. R. A. (N. S.) 468, and note. See "Forcible Entry and Detainer," Century Dig. § 61; Decennial and Am. Dig. Key No. Series, § 12. See notes to the principal case in 8 L. R. A. 537.

STATE v. ROSS ET AL., 49 N. C. 315. 1857.

Entry. What Force May Be Used. Tenant by Sufferance.

[Indictment for forcible trespass. Verdict and judgment against the defendant, who appealed. Reversed. The facts appear in the beginning of the opinion.]

PEARSON, J. We are told by the Attorney-General that this was treated as an indictment at common law, for the purpose of giving the state the benefit of the testimony of Hinson, who was not a competent witness in a proceeding under the statute. The question is, has the state made out a case indictable at common law? The indictment is strong enough, but the evidence does not sustain the allegations. The case made upon the facts is this: Hinson sold and conveyed the land to Ross, but remained on it under an alleged parol agreement, "that he was to remain there for ten years." Ross, in company with four others, went to the land, taking with him a wagon loaded with provisions and some household furniture, for the purpose of taking possession. Hinson was present and forbade them to enter; but they did enter against his will, and began to erect a house outside of the enclosure where Hinson's house was situated, and some of them continued there for several weeks. His Honor was of the opinion that these facts made out an offense indictable at common law. We do not think so.

To make a trespass indictable, it must be committed *manu forti*, in a manner which amounts to a breach of the peace; or, according to some of the cases, which would necessarily lead to a breach of the peace, if the person in possession were not overawed by a display of force, so as to be induced to surrender and give up the possession because resistance would be useless. Unless this degree of force is resorted to, the trespass is a mere civil injury, to be redressed by action.

The courts should keep a steady eye to this distinction, because individuals are under great temptation to convert civil injuries into public wrongs, for the sake of becoming witnesses in their own cases, and of saving costs.

We can see nothing in this matter, even as told by Hinson himself, that can magnify it into an indictable trespass. There was no breach of the peace—no display of arms or "multitude of people"—nothing of the "pomp and circumstance of war" calculated to frighten a man of ordinary firmness. Hinson was not expelled and put out of possession. His dwelling-house was not invaded, and his enclosure was unmolested. It was, at most, a mere civil trespass.

We do not feel at liberty to take into consideration the fact, that according to the evidence, Ross was the owner of the land, and had a *right of entry*—the alleged parol lease for ten years being void, and Hinson being in effect a mere tenant at sufferance—because we find it an unsettled question, whether one who has a right of entry may not use force, if necessary to assert his right, according to the common law. It is not necessary for us to enter upon this debatable ground in order to dispose of this case. 1 Hawk. Pl. Cr. ch. 28, p. 495. "It seems that at common law, a man disseised of any land (if he could not prevail by fair means, might lawfully regain the possession thereof by force." "But this indulgence of the common law, in suffering persons to regain the lands they were unlawfully deprived

of, having been found by experience, to be very prejudicial to the public peace, it was thought necessary, by many severe laws, to restrain all persons from the use of such violent methods of doing themselves justice."

Blackstone, whose book on criminal law is of the highest authority, following Hawkins, says: "An eighth offense against the public peace is that of forcible entry and detainer, which is committed by violently taking, or keeping possession of lands with menace, force and arms, and without the authority of law. This was formerly allowable to every person disseised, or turned out of possession, unless his entry was taken away, or barred. . . . But this being found very prejudicial to the public peace, it was thought necessary, by several statutes, to restrain all persons from the use of such violent methods, even of doing themselves justice, and much more if they had no justice in their claim." 4 Blk. 148.

In *King v. Wilson*, 8 Term. Rep. 357, the correctness of this view of the common law is questioned in the remarks which fell from the judges in delivering their opinions. But on a subsequent day of the term they felt called on to explain, and Lord Kenyon says, "perhaps some doubt may hereafter arise respecting what Mr. Sergeant Hawkins says: 'that at common law the party may enter with force into that to which he has a legal title;' but without giving any opinion concerning that dictum one way or the other, but leaving it to be proved, or disproved, whenever that question shall arise, all we wish to say is, that our opinion, in this case, leaves that question untouched; it appearing by this indictment that the defendants unlawfully entered, and, therefore, the court cannot intend that they had any title." That was upon a demurrer.

So, in *State v. Whitfield*, 30 N. C. 315, the court throws a doubt upon the view of the common law, as laid down by Hawkins and Blackstone, and reference is made to "Wilson's case." But the matter was before the court upon a motion in arrest of judgment, and as was done in Wilson's case, the point is left undecided. Perhaps it will be found that the authorities may be reconciled on this distinction: *One having a right of entry*, may, at common law, use force, provided it does not amount to an actual breach of the peace; whereas *one not having a right of entry*, is guilty of a trespass, indictable at common law, if he enters with a strong hand, under circumstances calculated to excite terror, although the force used *does not amount to a breach of the peace*. This, however, is merely a suggestion. *Venire de novo*.

Consider with care the ruling in this case and the doctrines announced therein, in comparison with the rulings and doctrines of the two cases next preceding, to wit, *Low v. Elwell*, 121 Mass. 309, and *Mosseller v. Deaver*, 106 N. C. 494, 11 S. E. 529; bearing in mind the dates of the decisions and also that this is a criminal prosecution, while the others were to redress civil injuries. See *State v. Whitfield*, 30 N. C. 315, referred to in this case and in *Mosseller v. Deaver*, *supra*. See

"Forcible Entry and Detainer," Century Dig. §§ 192, 193; Decennial and Am. Dig. Key No. Series, § 51; "Trespass," Century Dig. § 172; Decennial and Am. Dig. Key No. Series, § 82.

REX v THE INHABITANTS OF CHESHUNT, 1 Barn. & Ald. 473, 476 - 477. 1818.

Summary Ejection of Servant.

[Appeal from an order of Sessions to the court of King's Bench. Affirmed.]

Two justices, by an order, removed a pauper from their parish. The pauper was, at the time, employed by the Board of Ordnance which let him live in a house, and deducted two shillings a week from his wages for his occupancy of the house. The Board of Ordnance had several houses which it in like manner permitted its employees to occupy upon the payment of weekly rents, but which the employee was required to vacate as soon as he quit such employment. In this instance the pauper at first refused to surrender the house, but afterwards yielded to the demands of the Board of Ordnance. There was an appeal from the order of the justices. The question presented was: Did the occupancy of the house by the pauper, under the circumstances here stated, confer a settlement upon the pauper within the statute of 13 & 14 Chas. II, c. 12?]

LORD ELLENBOROUGH, C. J. In this case it seems to me that the party occupied this house as a *servant only, and not in the character of a tenant*. It is like the case of a coachman, who frequently occupies a room over the stables; but such occupation is not within the meaning of 13 and 14 Car. 2. The pauper here was divested of the tenement as soon as his service terminated. He quitted the possession reluctantly, and was succeeded by the person who succeeded him in his employment under the Board of Ordnance. All this clearly shows that he was only entitled to hold it during and for the more convenient performance of his service. If the court should hold, in this and similar cases, that the legal relation of landlord and tenant subsisted, it would become necessary to turn such persons out of possession by the regular proceedings in ejectment; and every gentleman having twenty or thirty cottages in which his laborers resided, would be compelled on any change of their service to have recourse to such means. This would be productive of the most serious inconvenience. Upon the whole view of this case, I think it plainly appears that the relation of landlord and tenant never did subsist here, and unless that were so, this was not an occupation within 13 & 14 Car. 2. and no settlement could be gained by it.

ABBOTT, J. If the case had stated, instead of using the words *weekly rent*, that the pauper lived in the house, and received 18s. and not 20s. per week wages, there would have been no doubt. And I consider that in substance it is so stated. Here the

relation which existed was only that of master and servant, and not that of landlord and tenant.

See *State v. Steele*, 106 N. C. 766, inserted ante in this section. See *State v. Curtis*, 20 N. C. 363; *State v. Hoover*, 107 N. C. 795, 12 S. E. 451; *Hutchins v. Durham*, 118 N. C. at p. 469, 24 S. E. 723; *State v. Smith*, 100 N. C. 466, 6 S. E. 84, and observe the difference between this last case and the others. See *Bourland v. McKnight*, 96 S. W. 179, 4 L. R. A. (N. S.) 698-729, for an elaborate note covering all the cases in which the owner has, and has not, the right to summarily evict occupants, such as servants, curators of museums, light-house keepers, college professors, nuns, clerks, stewards, etc. See "Landlord and Tenant," Cent. Dig. §§ 1167-1176; Decennial and Am. Dig. Key No. Series, §§ 275-277.

JONES v. TOWNE, 58 N. H. 462, 42 Am. Rep. 602. 1878.

Forcible Ejection from Church Pew.

[The plaintiff sued the defendant in trespass for forcibly removing plaintiff from a church pew. Judgment against plaintiff, and he appealed. Affirmed.]

The facts, so far as they relate to the question under consideration, are, that Jones persisted in occupying a church pew and in excluding therefrom the rightful occupant. *At the request of Fletcher, the rightful occupant.* Towne forcibly ejected Jones from the pew. For this act Jones brought this action against Towne.]

CLARK, J. In *Fisher v. Glover*, 4 N. H. 180, the court, in discussing the question of the rights of pew-holders, says: "It is usual to grant to individuals the exclusive use of pews and these grants give to those individuals certain rights which are to be protected. The rights thus acquired are, however, limited, and are, in our opinion, subject to the right of the society to have the meeting-house in such place as will best accommodate the whole. A reservation of this right is implied in the grant of a pew in a house of public worship. The convenience of individuals must in such cases be subject to the general convenience of the whole; and whoever purchases a pew purchases it subject to this right of the society." The language of the court in this case, and the statement of the relative rights of the society and the pew-holders, apply equally to the right of the society to alter, or remodel, or to remove the church edifice, which was the question then under consideration. This declaration, that the rights of pew-holders, from the nature of the property, are subject to the superior rights of the society for certain purposes, was made many years before the adoption of any statute in this state relating to the sale, alteration or repair of houses of public worship.

In *Howe v. Stevens*, 47 Vt. 262, it is said: "A pew-holder's right is only a right to occupy his pew during public worship; and when the meeting-house is in such a ruinous condition that it cannot be and is not occupied for public worship, he can

recover only nominal damages for injury to his pew." "Pew-holders, in the ordinary cases of meeting-houses or churches, built by incorporations under the statute, have only a right of occupancy to their seats, subject to the superior right of the society owning the pew." *Perrin v. Granger*, 33 Vt. 101. "Pew holders have merely a qualified and usufructuary right in their pews, subject to the right of the religious society to remodel them, and to alter the internal structure of the building, or enlarge or remove it, or sell the edifice and rebuild elsewhere." *Sohier v. Trinity Church*, 109 Mass. 1. See also *Gay v. Baker*, 17 Id. 438, 9 Am. Dec. 159; *Daniel v. Wood*, 1 Pick. 102, 11 Am. Dec. 151; *Fassett v. First Parish in Boylston*, 19 Pick. 361; 3 Kent Com. 533; *Kimball v. Second Parish in Rowley*, 24 Pick. 347. Such is the common law of New Hampshire in relation to the pew-holder's right. It is a qualified ownership, subject to the superior title included in the ownership of the house. The pew-holder cannot remove the pew, nor use it for any purpose except occupancy when the house is opened for use, and pew-tenancy is as accurate a designation of his interest as pew-ownership.

. . . The society had the right to remove the pew, and there remained to the plaintiff only the right of compensation for its loss. No question is made but that the amount tendered by the society to the plaintiff was a sufficient compensation for the pew, and the rulings of the court upon this branch of the case were correct.

By persisting in the occupation of pew No. 25, and excluding Fletcher, the rightful occupant, the plaintiff became a trespasser, and upon his refusal to remove upon request, Fletcher, or any one acting at his request, had the right to remove him, using no more force than was necessary; and we think the ruling of the court upon this point was correct, that the exclusion of Fletcher from the occupation of his pew by the plaintiff, and his refusal to surrender it when requested, was such a disturbance and breach of the peace of the sanctuary as would justify the interference of the police. Exceptions overruled.

See "Religious Societies," *Century Dig.* §§ 168-179; *Decennial and Am. Dig. Key No. Series*, § 26.

(d) *Abatement of Nuisance.*

JAMES v. HAYWARD, Cro. Charles I, 184. 1631.

Abatement by Individual. Gate Across Highway.

[Trespass for breaking his close, and pulling up, cutting, and casting down a gate. The defendant justifies, because the gate was placed across the highway, and so fixed that the king's subjects could not pass without interruption by reason of the said gate, to the nuisance

of the king's subjects; and therefore he pulled up, cut, and cast down the said gate to use the said way. . . .

The first question was, whether the erecting of a gate across an highway, which may be opened and shut at the pleasure of the passengers, be a common nuisance in itself in the eye of the law, it being an open gate fixed upon hinges that subjects may pass the said way at their pleasure.

Secondly, admitting it to be a nuisance, whether every one may pull up and cast down the said gate at their pleasure?]

HYDE, Chief Justice, JONES and WHITLOCK (after holding the gate to be a nuisance) held; that admitting it to be a nuisance, although the usual course is to redress it by indictment, yet every person may remove the nuisance, and that the cutting of the gate was lawful; whereupon judgment was for the defendant. And Jones said, that, for *ancient* gates upon the highway, it shall be intended they are *by license from the king*.

See "Highways," Century Dig. §§ 432-435; Decennial and Am. Dig. Key No. Series, § 157.

ARUNDEL v. M'CULLOCH, 10 Mass. 70. 1813.

Abatement by Individual. Bridge Across Navigable Stream.

[Trespass brought against the defendant by the inhabitants of the town of Arundel for cutting down a bridge. The case was submitted upon agreed facts. The court nonsuits the plaintiff.]

The town of Arundel built a bridge across a navigable stream, or, rather, arm of the sea. The stream was navigable from a point some distance above the bridge to the sea. M'Culloch removed the bridge to facilitate the passage of a vessel he had built above the bridge. In such removal he did no more damage than was necessary to effect the free passage of his vessel. A bridge had existed at this point for more than fifty years, and in 1771 the Court of Sessions located a road over the stream in question, in the direction of the bridge.]

PER CURIAM. It is an unquestionable principle of the common law, that all navigable waters belong to the sovereign, or, in other words, to the public; and that no individual or corporation can appropriate them to his own use, or confine or obstruct them, so as to impair the passage over them without authority from the legislative power. It is upon this principle that so many acts of our legislature have been passed, authorizing the building of bridges over various rivers and streams within the commonwealth.

In this case, no such authority has been given; and the only claim of a right to continue the bridge rests upon the antiquity of the bridge, and the laying out of a road over the river in the year 1771. But we think that neither of these facts sanctioned the obstruction of the river, so as to prevent those who had occasion to transport vessels up and down from removing it, if necessary to a safe and convenient passage. Public rights cannot be destroyed by long continued encroachments; at least, the

party who claims the exercise of any right inconsistent with the free enjoyment of a public easement or privilege, must put himself upon the ground of prescription; unless he has a grant or some valid authority from the government, and a right by prescription does not exist in the present case.

With respect to the act of the Sessions in 1771, laying out a road across the river, nothing can be inferred from it in favor of the plaintiffs, because it was an act without authority, and void in law; as was determined in the case of *Commonwealth v. Coombs*, 2 Mass. 489.

The only question remaining, then is, whether the doings of the defendant, in cutting down and removing the bridge, were justifiable on his part. And it is clear that, when any public way is unlawfully obstructed, any individual, who wants to use it in a lawful way, may remove the obstruction; and it is settled that he may even enter upon the land of the party erecting or continuing the obstruction, for the purpose of removing it, doing as little damage as possible to the soil or buildings. Here nothing more was done than was necessary to procure a safe passage for the defendant's vessel; and we are satisfied that no trespass was thereby committed by him. Plaintiffs nonsuit.

See notes to the principal case at p. 72 of 10 Mass. To same effect as the principal case see *State v. Dibble*, 49 N. C. 107. See *Willson v. Blackbird C. M. Co.*, 2 Pet. 245, and *Cardwell v. Am. Bridge Co.*, 113 U. S. 205, 5 Sup. Ct. 423, which hold that a state may authorize a bridge across a navigable stream unless and until congress interferes. See "Navigable Waters," *Century Dig.* § 145; *Decennial and Am. Dig. Key No. Series*, § 26.

STATE v. PARROTT, 71 N. C. 311, 17 Am. Rep. 5. 1874.

Abatement by Individual. Bridge Across Navigable Stream.

[Parrott was indicted for trespass in tearing down a portion of a railroad bridge. Special verdict. Judgment of acquittal. State appealed.

The substance of the special verdict was, that a railroad corporation, chartered in North Carolina, had built a bridge over the Neuse, a navigable river, and thereby obstructed Parrott's boat in going up the river. On several previous occasions the railroad company had removed a portion of the bridge in order to let Parrott's boat pass; but no such provision being made for him on this occasion, he removed, with as little injury as possible, such part of the bridge as it was necessary to move in order to let the boat pass. This was done in the presence of, and against the protests of, the servants of the railroad company in charge of the bridge. At the time this occurred the railroad company was preparing a draw for the bridge which would have been completed, so as to let boats pass, within seven days.]

READE, J. The Neuse at the place under consideration is a navigable river. Any obstruction of a navigable river is a common or public nuisance. A common or public nuisance may be abated by any person who is annoyed thereby. The railroad

bridge across the Neuse obstructed the navigation thereof by the defendants' steamboat, and for that reason the defendants tore it down. It follows that the defendants are not guilty. It is not necessary to display the learning and decisions in support of these positions, although we have fully considered them, because they may be found collected in a well considered case in our own court, and we think it respectful and sufficient to support our decision in this case by that. *State v. Dibble*, 49 N. C. 107.

It is insisted, however, that while an *individual* cannot obstruct a navigable stream yet the *state* may do it on the inland streams unless congress oppose; and here the state did authorize the railroad to build a bridge. It is true the state did authorize the railroad to build a bridge across the Neuse, but it did not authorize the bridge to be so built as to obstruct navigation, but required a draw to be in the bridge so as to permit navigation. This was not done.

It is further insisted that the defendants acted *wantonly*, for that the railroad was preparing a draw and would have completed it in a few days—about seven days. The facts are that defendants had given the railroad several months' notice to prepare a draw. Prior to the day in controversy, as often as the defendants' boat passed, the railroad removed a span of the bridge to permit the passage, detaining the boat but a few hours; but on the day in question the span was not removed and the boat was detained for thirty hours, when the defendants removed a portion of the bridge. From these facts it appears that the *obstruction was wanton* and its removal necessary.

Let this be certified, to the end that the judgment may be entered discharging the defendants as upon a verdict of not guilty.

For a discussion of the right of a private individual to abate a public nuisance because of special injury—actual or threatened—to himself, see 43 Am. Rep. 21, and note. See "Navigable Waters," Century Dig. § 145; Decennial and Am. Dig. Key No. Series, § 26.

BROWN v. PERKINS AND WIFE, 12 Gray, 89, 100. 1858.

Abatement by Individual. Destroying Intoxicants, &c.

[Plaintiff sues in tort for breaking and entering his shop and destroying a barrel of vinegar and other goods. Verdict against plaintiff. Plaintiff moved for new trial, which motion was reserved for the consideration of the whole court. Verdict set aside and new trial ordered.

The defense was, that defendants were justified in breaking into the shop and destroying the liquors therein, because the plaintiff unlawfully kept such liquors for sale. There was evidence to the effect that about three hundred women, some of them armed with hatchets, met by appointment and marched to the plaintiff's store in a procession, broke into it, and destroyed the spirituous liquors found there. No further damage was done. There was a statute providing that all in-

intoxicating liquors kept for sale, and the vessels containing them, should be regarded and treated as *common nuisances*. Another statute made the same provision as to houses, buildings and places used for the illegal sale of such liquors. The judge charged the jury, in substance, that defendants were justified in what they did, if they participated in the acts complained of, provided no greater force was used than was necessary.]

SHAW, C. J. . . . Passing over all questions as to the plaintiff's case, and coming to the justification set forth in the answer, the court are of opinion, after argument, that the ruling and instructions to the jury were not correct in matter of law.

1. The court are of opinion that spirituous liquors are not, of themselves, a common nuisance, but the act of keeping them for sale, by statute, creates a nuisance; and the only mode in which they can be lawfully destroyed is the one directed by statute, for the seizure by warrant, bringing them before a magistrate, and giving the owner of the property an opportunity to defend his right to it. Therefore it is not lawful for any person to destroy them by way of abatement of a common nuisance, and a fortiori not lawful to use force for that purpose.

2. It is not lawful by the common law for any and all persons to abate a common nuisance, merely because it is a common nuisance, though the doctrine may have been sometimes stated in terms so general as to give countenance to this supposition. This right and power is *never entrusted to individuals in general*, without process of law, *by way of vindicating the public right; but solely for the relief of a party whose right is obstructed by such nuisance*.

3. If such were intended to be made the law by force of the statute, it would be contrary to the provisions of the Constitution, which directs that no man's property can be taken from him without compensation, except by the judgement of his peers or the law of the land; and no person can be twice punished for the same offense. And it is clear that under the statutes spirituous liquors are property, and entitled to protection as such. The power of abatement of a public or common nuisance does not place the penal law of the Commonwealth in private hands.

4. The true theory of abatement of nuisance, is that an individual citizen may abate a *private* nuisance injurious to him, when he could also bring an action; and also, when a *common* nuisance obstructs his individual right, he may remove it to enable him to enjoy that right, and he cannot be called in question for so doing. As in the case of the obstruction across a highway, and an unauthorized bridge over a navigable watercourse, if he has occasion to use it, he may remove it by way of abatement. But this would not justify *strangers*, being inhabitants of the other parts of the commonwealth, having no such occasion to use it, to do the same. Some of the earlier cases perhaps, in laying down the general proposition that private subjects may abate a common nuisance, did not expressly mark

this distinction: but we think, upon the authority of modern cases, where the distinctions are more accurately made, and upon principle, this is the true rule of law. *Lonsdale v. Nelson*, 2 B. & C. 311, 312, and 3 D. & R. 566, 567; *Mayor, etc. of Colchester v. Brooke*, 7 Ad. & El. N. R. 376, 377; *Gray v. Ayres*, 7 Dana, 375; *State v. Paul*, 5 R. 1. 185.

5. As it is the use of a building, or the keeping of spirituous liquors in it, which in general constitutes the nuisance, the abatement consists in putting a stop to such use.

6. The keeping of a building for the sale of intoxicating liquors, if a nuisance at all, is *exclusively a common nuisance*; and the fact that husbands, wives, children or servants of any person do frequent such a place and get intoxicating liquor there, does not make it a special nuisance or injury to their private rights, so as to authorize and justify such persons in breaking into the shop or building where it is thus sold and destroying the liquor there found, and the vessels in which it may be kept; but it can only be prosecuted as a public or common nuisance in the mode prescribed by law.

Upon these grounds, without reference to others, which may be reported in detail hereafter, the court are of opinion that the verdict for the defendants must be set aside and a new trial had.

As to the constitutional question touched upon in proposition 3 of the principal case, see *Daniels v. Homer*, 139 N. C. 219, 51 S. E. 992. See "Intoxicating Liquors," Century Dig. § 465; Decennial and Am. Dig. Key No. Series, § 325; "Nuisance," Century Dig. § 173; Decennial and Am. Dig. Key No. Series, § 74.

CAMPBELL v. RACE, 7 Cushing, 408. 1851.

Turning Out of Public Road When Impassable.

[Campbell sued Race for a trespass in breaking and entering his close. Race pleaded, *inter alia*, a right of way of necessity resulting from the impassable state of the adjoining highway. Verdict against the defendant. Defendant excepted, and his exceptions were sustained.

The evidence tended to prove that Race left the public road and drove his team across the adjoining field of Campbell, doing no unnecessary damage and returning to the public road as soon as he had passed some natural obstructions in the public road which rendered it impassable. The judge ruled that these facts were no defense.]

BIGELOW, J. It is not controverted by the counsel for the plaintiff, that the rule of law is well settled in England, that where a highway becomes obstructed and impassable from temporary causes, a traveler has a right to go *extra viam* upon adjoining lands, without being guilty of trespass. The rule is so laid down in the elementary books—2 Bl. Com. 36; *Woodrych on Ways*, 50, 51; 3 Cruise Dig. 89; *Wellbeloved on Ways*, 38; and it is fully supported by the adjudged cases—*Henn's case*, W. Jones, 296; 3 Salk. 182; 1 Saund. 223, note 3; *Absor v. French*, 2 Show. 28; *Young v. ———*, 1 Ld. Ray. 725; *Taylor v. Whitehead*, 2 Doug.

745. Bullard v. Harrison, 4 M. & S. 387, 393. Such being the admitted rule of law, as settled by the English authorities, it was urged in behalf of the plaintiff in the present case, that it had never been recognized or sustained by American authors or cases. But we do not find such to be the fact. On the contrary, Mr. Dane, whose great learning and familiar acquaintance with the principles of the common law, and their practical application at an early period in this commonwealth, entitle his opinion to very great weight, adopts the rule, as declared in the leading case of Taylor v. Whitehead, *ubi supra*, which he says "is the latest on the point and settles the law." 3 Dane, Ab. 258. And so Chancellor Kent states the rule. 3 Kent, Com. 424. We are not aware of any case in which the question has been distinctly raised and adjudicated in this country; but there are several decisions in New York, in which the rule has been incidentally recognized and treated as well settled law. Holmes v. Seely, 19 Wend. 507; Williams v. Safford, 7 Barb. 309; Newkirk v. Sabler, 9 Barb. 652. These authorities would seem to be quite sufficient to justify us in the recognition of the rule. But the rule itself is founded on the established principles of the common law, and is in accordance with the fixed and uniform usage of the community. Indeed, one of the strongest arguments in support of it is, that it has always been practised upon and acquiesced in, without objection, throughout the New England States. This accounts satisfactorily for the absence of any adjudication upon the question, in our courts, and is a sufficient answer to the objection upon this ground, which was urged upon us by the learned counsel for the plaintiff. When a right has been long claimed and exercised, without denial or objection, a strong presumption is raised, that the right is well founded.

The plaintiff's counsel is under a misapprehension in supposing that the authorities in support of the rule rest upon any peculiar or exceptional principle of law. They are based upon the *familiar and well settled doctrine, that to justify or excuse an alleged trespass, inevitable necessity or accident must be shown*. If a traveler in a highway, by unexpected and unforeseen occurrences, such as a sudden flood, heavy drifts of snow, or the falling of a tree, is shut out from the traveled paths, so that he cannot reach his destination without passing upon adjacent lands, he is certainly under a necessity so to do. It is essential to the act to be done without which it cannot be accomplished. Serious inconveniences, to say the least, would follow, especially in a climate like our own, if this right were denied to those who have occasion to pass over the public ways. Not only would intercourse and business be sometimes suspended, but life itself would be endangered. In hilly and mountainous regions, as well as in exposed places near the sea coast, severe and unforeseen storms not unfrequently overtake the traveler, and render highways suddenly impassable, so that to advance or retreat by the ordinary path, is alike impossible. In such cases, the only escape is, by turning out of the usually traveled way, and seeking an outlet over the fields adjoining the highway. If a necessity is not created, under such circumstances,

sufficient to justify or excuse a traveler, it is difficult to imagine a case which would come within the admitted rule of law. To hold a party guilty of a wrongful invasion of another's rights, for passing over land adjacent to the highway, under the pressure of such a necessity, would be pushing individual rights of property to an unreasonable extent, and giving them a protection beyond that which finds sanction in the rules of law. Such a temporary and unavoidable use of private property, must be regarded as one of those incidental burdens to which all property in a civilized community is subject. In fact, the rule is sometimes justified upon the ground of public convenience and necessity. Highways being established for public service, and for the use and benefit of the whole community, a due regard for the welfare of all requires, that when temporarily obstructed, the right of travel should not be interrupted. In the words of Lord Mansfield, "it is for the general good that people should be entitled to pass in another line." It is a maxim of the common law, that where public convenience and necessity come in conflict with private right, the latter must yield to the former. *A person traveling on a highway, is in the exercise of a public, and not a private right.* If he is compelled, by impassable obstructions, to leave the way, and to go upon adjoining lands, he is still in the exercise of the same right. The rule does not, therefore, violate the principle that individual convenience must always be held subordinate to private rights, but *clearly falls within the maxim, which makes public convenience and necessity paramount.*

It was urged in argument that the effect of establishing this rule of law would be to appropriate private property to public use without providing any means of compensation to the owner. If such an accidental, occasional and temporary use of land can be regarded as an appropriation of private property to a public use, entitling the owner to compensation, which may well be doubted, still the decisive answer to this objection is quite obvious. The right to go extra viam, in case of temporary and impassable obstructions, being one of the legal incidents or consequences which attaches to a highway through private property, *it must be assumed, that the right to the use of the land adjoining the road was taken into consideration and proper allowance made therefor,* when the land was originally appropriated for the highway, and that the damages were then estimated and fixed, for the private injury which might thereby be occasioned. . . .

From what has already been said, the limitations and restrictions of the right to go upon adjacent lands in case of obstructions in the highway can be readily inferred. Having its origin in necessity, it must be limited by that necessity; cessante ratione, cessat ipsa lex. Such a right is not to be exercised from convenience merely, nor when, by the exercise of due care, after notice of obstructions, other ways may be selected and the obstructions avoided. But it is to be confined to those cases of inevitable necessity or unavoidable accident, arising from sudden and recent

causes which have occasioned temporary and impassable obstructions in the highway. What shall constitute such inevitable necessity or unavoidable accident, must depend upon the various circumstances attending each particular case. The nature of the obstruction in the road, the length of time during which it has existed, the vicinity or distance of other public ways, the exigencies of the traveler, are some of the many considerations which would enter into the inquiry, and upon which it is the exclusive province of the jury to pass, in order to determine whether any necessity really existed, which would justify or excuse the traveler. In the case at bar, this question was wholly withdrawn from the consideration of the jury by the ruling of the court. It will therefore be necessary to send the case to a new trial in the court of the common pleas.

In *Holmes v. Seely*, 19 Wend. at pp. 510, 511, it is said: "In respect to a *public way*, if there be an obstruction so as to make the ordinary track dangerous, the traveler may go *extra viam*—passing as near to the original way as possible. . . . This rule, generally, is not applicable to a *private way* which becomes foundrous or impassable. . . . The better opinion, however, seems to be, that in the case of a *private way of necessity*, a passage *extra viam* may be justified where the usual track is obstructed. There is a distinction between a private way by *grant* and one of *necessity*," in this respect. Does the law of the principal case obtain in North Carolina under existing circumstances? See *State v. Brown*, 109 N. C. 802, 13 S. E. 940. For when self-preservation will justify an act which under ordinary circumstances would be a tortious invasion of another's premises, see *Ploof v. Putnam*, 71 Atl. 188, inserted at sec. 2 (a), *supra*. See "Highways," Century Dig. § 291; Decennial and Am. Dig. Key No. Series, § 82.

HUBBARD v. PRESTON, 90 Mich. 221, 51 N. W. 209, 15 L. R. A. 249.
1892.

Abatement by Individual. Killing a Dog.

[Carrie G. Hubbard brought case against Preston for killing her dog. Judgment against the defendant, and he carried the case to the supreme court by writ of error. Reversed. The facts appear in the middle of the opinion.]

LONG, J. On November 9, 1890, defendant shot and killed plaintiff's dog. An action was commenced in justice court, where defendant had judgment. On appeal to the circuit court for Wayne county, the cause was tried before a jury. The only question submitted to the jury on the trial in the circuit court was the value of the dog, which the jury found to be \$25, and verdict and judgment were entered for that amount. Defendant brings error.

On the trial the defendant introduced testimony tending to show justification for the killing. The court permitted the testimony to be introduced, but held that it did not amount to a justification. The only question raised in this case is whether the court should

have submitted that branch of the case for the determination of the jury. We think the court was in error in not so doing. [Facts.] It appeared that the defendant did not keep a dog. That he lived on Bagg street, city of Detroit, and for eight days prior to the shooting he and his family had been greatly annoyed by the congregation of a large number of dogs about his premises, barking, quarreling, and fighting there. That they came every night upon his lawn, about his house, when it became dark (on two occasions he counted twelve dogs), and that they kept up their cries all night at intervals. He complained to the police on three different days prior to the killing, but without any relief and he had driven them away on several nights. That the noise made by them kept the members of his family awake, and seriously annoyed them. He did not know the owners. On the night he killed plaintiff's dog, he drove them away twice, but they returned. He could not get near them, but they would return. That they became an intolerable nuisance, and finally, about eight o'clock in the evening, he went out with his revolver and shot among them, while on his lawn. He did not know who owned any of them, and did not shoot at any particular dog. The defendant had a right to protect his family from such nuisance; and it was a question for the jury whether he used such means as were reasonable and necessary, under the circumstances, to rid himself of it. The judgment must be reversed, with costs, and a new trial ordered.

For a valuable note on the subject of killing dogs—unlicensed, barking, howling, dangerous, trespassing, and predatory dogs; dogs that worry, attack, and injure sheep or other animals—as well as the criminal or negligent killing of dogs, and the killing of dogs by mistake, see note to the principal case in 15 L. R. A. 249. See also *Simmonds v. Holmes*, 31 Conn. 121, 23 Atl. 702, 81 Am. Dec. 221, 15 L. R. A. 253 and briefs there printed; for the law as to killing domestic animals other than dogs, see *Ross v. D. Levee Board*, 103 S. W. 380, 21 L. R. A. (N. S.) 699, and note. See "Animals," Century Dig. §§ 115-122; Decennial and Am. Dig. Key No. Series, § 44.

REX v. ROSEWELL, 2 Salkeld, 459. 1699.

Abating a Private Nuisance.

If H builds a house so near mine that it stops my lights or shoots the water upon my house, or is in any other way a nuisance to me, I may enter upon the owner's soil and pull it down; and for this reason only a small fine was set upon the defendant in an indictment for a riot in pulling down some part of the house, it being a nuisance to his lights, and the right found for him in an action for stopping his lights.

See "Adjoining Landowners," Century Dig. §§ 74-84; Decennial and Am. Dig. Key No. Series, § 10.

Remedies—C

HEATH v. WILLIAMS, 25 Me. 209, Finch's Cases 120. 1845.

Entry Upon Another's Land to Abate a Private Nuisance.

[The defendant entered upon plaintiff's land and tore out an artificial obstruction placed in a running stream, which obstruction caused the water to be ponded back upon defendant's mill wheel to his injury. The question presented is: Did the defendant have a right to enter upon plaintiff's land and remove the obstruction? Only that portion of the opinion which bears upon this question is here inserted.]

SHEPLEY, J. . . . A riparian proprietor who owns both banks of a stream below his mill has a right to have the water flow in its natural current without any obstruction injurious to him, over the whole extent of his land, unless his rights have been impaired by grant, license, or an adverse appropriation for more than twenty years. . . . The common law would afford him sufficient protection against the flow of water back upon his own land to the injury of his mill by the acts of another. Failing to obtain relief from the continuance of such an injury without it, he might lawfully enter upon the land of the plaintiff and remove, so far as necessary, the obstruction which occasioned it.

For further discussion of private abatement of private nuisances and entry upon another's land for that purpose, see Bishop Non-Cont. Law, ss. 430, 431; 29 Cyc. 1214-1218. See "Waters and Water Courses," Century Dig. §§ 42-49, 206; Decennial and Am. Dig. Key No. Series, §§ 58, 174.

GRANDONA v. LOVDAL, 70 Cal. 161, 11 Pac. 623, Finch's Cases, 99. 1886.

Abatement by Individual. Projecting Limbs and Roots of Trees.

[The action was brought by Grandona against Loydal for damages caused to plaintiff by trees planted in, or close to, his line by defendant. The case went off in the supreme court upon a question of pleading not material to the subject under consideration.]

McKINSTRY, J. . . . "Trees whose branches extend over the land of another are not nuisances, except to the extent to which the branches overhang the adjoining land. To that extent they are nuisances, and the person over whose land they extend may cut them off or have his action for damages, and an abatement of the nuisance against the owner or occupant of the land on which they grow: but he may not cut down the tree, neither can he cut the branches thereof beyond the extent to which they overhang his soil." Wood on Nuisance, s. 112, citing Commonwealth v. Blaisdell, 107 Mass. 234; Commonwealth v. McDonald, 16 Serg. & R. 390.

So, it would seem, he may abate the roots projecting into his soil; at least, if he has suffered actual damage thereby. . . .

See 55 N. W. 989, 21 L. R. A. 729; 32 Atl. 939, 29 L. R. A. 582; 29 S. E. 685, 40 L. R. A. 626; Bish. Non-Cont. Law, § 830; 8 Vermont, 115, Finch's Cases, 154; 48 N. Y. 201, Finch's Cases, 97. See "Adjoining Landowners," Century Dig. § 47; Decennial and Am. Dig. Key No. Series, § 5.

BARKLEY v. WILCOX, 86 N. Y. 140, 144-148, 40 Am. Rep. 519. 1881.

Defense of Land by Obstructing and Diverting Water.

Wilcox sued Barkley for damages resulting from Barkley's obstructing the passage of surface water across Barkley's land and thereby causing Wilcox's cellar to be flooded. Judgment against Wilcox, who appealed. Affirmed.

Wilcox and Barkley owned adjoining lots fronting on a street, but beyond the corporate limits of a village. By the natural elevations and depressions of the earth's surface the surface water—from rains and melting snows—would descend from different directions and accumulate in the street in front of Wilcox's lot and sometimes back up upon it. When there was an unusual rainfall the water accumulating therefrom would naturally flow across Barkley's lot and the lands of other proprietors until it reached the Neversink river. Barkley built a house upon his lot and filled up and graded his lot—raising it more than a foot. As a consequence of such filling up and grading, the surface water, accumulated from rains and snows, was backed upon Wilcox's lot to his serious damage. There was no natural watercourse—i. e. natural stream flowing in a defined bed or channel, with banks and sides, and having permanent sources of supply—across Barkley's lot.]

ANDREWS, J. . . . Whether, when the premises of adjoining owners are so situated that surface water falling upon one tenement naturally descends to and passes over the other, the incidents of a watercourse apply to and govern the rights of the respective parties, so that the owner of the lower tenement may not, even in good faith and for the purpose of improving or building upon his own land, obstruct the flow of such water to the injury of the owner above, is the question to be determined in this case. This question does not seem to have been authoritatively decided in this state. It was referred to by Denio, C. J., in *Goodale v. Tuttle*, 29 N. Y. 467, where he said: "And in respect to the running off of surface water caused by rain or snow, I know of no principle which will prevent the owner of land from filling up wet and marshy places on his own soil, for its amelioration and his own advantage, because his neighbor's land is so situated as to be incommoded by it. Such a doctrine would militate against the well-settled rule, that the owner of land has full dominion over the whole space above and below the surface." . . . The question has been considered by courts in other states, and has been decided in different ways. In some, the doctrine of the *civil law* has been adopted as the rule of decision. *By that law* the right of drainage of surface waters as between owners of adjacent lands of different elevations, is governed by the law of nature—the lower proprietor is bound to receive the waters which naturally flow from the estate above, provided the industry of man has not created or increased the servitude. (Corp. Jur. Civ. 39, tit. 3, §§ 2, 3, 4, 5; Domat, Cushman, Ed. 616; Code Napoleon, art. 640; Code Louisiana, art. 656.) The courts of Pennsylvania, Illinois, California and Louisiana have adopted this rule, and it has been referred to with approval by the courts of Ohio and Missouri. . . . On the other hand, the courts of Massachusetts, New Jersey, New Hampshire and Wisconsin

have rejected the doctrine of the civil law, and hold that the relation of dominant and servient tenements does not *by the common law* apply between adjoining lands of different owners, so as to give the upper proprietor the legal right, as an incident of his estate, to have the surface water falling on his land discharged over the land of the lower proprietor, although it naturally finds its way there; and that the lower proprietor may lawfully, for the improvement of his estate and in the course of good husbandry, or to make erections thereon, fill up the low places in his land, although by so doing he obstructs or prevents the surface water from passing thereon from the premises above, to the injury of the upper proprietor. . . . It may be observed that in Pennsylvania, house lots in towns and cities seem to be regarded as not subject to the rule declared in the other cases in that state, in respect to surface drainage. . . . Professor Washburn states, that the prevailing doctrine seems to be that, if for the purposes of improving and cultivating his land, a land owner raises or fills it, so that the water which falls in rain or snow upon an adjacent owner's land, and which formerly flowed on to the first-mentioned parcel, is prevented from so doing, to the injury of the adjacent parcel, the owner of the latter is without remedy, since the other party has done no more than he had a legal right to do. Wash. on Easements (2 ed.) 431.

Upon this state of the authorities, we are at liberty to adopt such rule on the subject as we may deem most consonant with the demands of justice, having in view on the one hand individual rights, and on the other interests of society at large. Upon consideration of the question, we are of the opinion that the rule stated by Denio, C. J., in *Goodale v. Tuttle*, is the one best adapted to our condition and accords with public policy, while at the same time it does not deprive the owner of the upper tenement of any legal right of property. The maxim, *aqua currit et debet currere ut currere solebat*, expresses the general law which governs the rights of owners of property on watercourses. The owners of land on a watercourse are not owners of the water which flows in it but each owner is entitled, by virtue of his ownership of the soil, to the reasonable use of the water as it passes his premises, for domestic and other uses, not inconsistent with a like reasonable use of the stream by the owners above and below him. Such use is incident to his right of property in the soil. But he cannot divert or unreasonably obstruct the passage of the water, to the injury of other proprietors. These familiar principles are founded upon the most obvious dictates of natural justice and public policy. The existence of streams is a permanent provision of nature, open to observation by every purchaser of land through which they pass. The multiplied uses to which, in civilized society, the water of rivers and streams is applied, and the wide injury which may result from an unreasonable interference with the order of nature, forbid an exclusive appropriation by any individual, of the water in a *natural watercourse*, or any unreasonable interruption in the flow. It is said, that the

same principle of following the order of nature should be applied between coterminous proprietors, in determining the right of *mere surface drainage*. But it is to be observed, that the law has always recognized a wide distinction between the right of an owner to deal with surface water falling or collecting on his land, and his right in the water of a natural watercourse. In such [surface] water, before it leaves his land and becomes part of a definite watercourse, the owner of the land is deemed to have an absolute property, and he may appropriate it to his exclusive use or get rid of it in any way he can, provided only that he does not cast it by drains or ditches upon the land of his neighbor; and he may do this, although by so doing he prevents the water reaching a natural watercourse, as it formerly did, thereby occasioning injury to mill-owners or other proprietors on the stream. So also he may, by digging on his own land, intercept the *percolating* waters which supply his neighbor's spring. Such consequential injury gives no right of action. *Acton v. Blundell*, 12 M. & W. 324; *Rawstron v. Taylor*, 11 Exch. 369; *Phelps v. Nolen*, 72 N. Y. 39. Now in these cases there is an interference with *natural* laws; but those laws are to be construed in connection with *social* laws and the *laws of property*. The interference in these cases with natural laws, is justified, because the general law of society is, that the owner of land has full dominion over what is above, upon, or below the surface, and the owner, in doing the acts supposed, is exercising merely a legal right. The owner of wet and spongy land cannot, it is true, by drains or other artificial means, collect the surface water into channels, and discharge it upon the land of his neighbor to his injury. This is alike the rule of the civil and common law. *Corp. Jur.* Civ. 39, tit. 3, §§ 2, 3, 4, 5; *Noonan v. City of Albany*, 79 N. Y. 475; *Miller v. Laubach*, 47 Penn. St. 154. But it does not follow, we think, that the owner of land, which is so situated that the *surface* waters from the lands above naturally descend upon and pass over it, may not, in good faith and for the purpose of building upon or improving his land, fill or grade it, although thereby the water is prevented from reaching it, and is retained upon the lands above. *There is a manifest distinction between casting water upon another's land, and preventing the flow of surface water upon your own.* Society has an interest in the cultivation and improvement of lands, and in the reclamation of waste lands. It is also for the public interest that improvements shall be made, and that towns and cities shall be built. To adopt the principle that the law of nature must be observed in respect to *surface drainage* would, we think, place undue restriction upon industry and enterprise, and the control by an owner of his property. Of course, in some cases the opposite principle may cause injury to the upper proprietor. But the question should, we think, be determined largely upon consideration of public policy and general utility. Which rule will, on the whole, best subserve the public interests, and is most reasonable in practice? For the reasons stated, we think the rule of the *civil law should not be adopted in this*

state. The case before us is an illustration of the impolicy of following it. Several house lots (substantially village lots), are crossed by the depression. They must remain unimproved, if the right claimed by the plaintiff exists. It is better, we think, to establish a rule which will permit the reclamation and improvement of low and waste lands, than one which will impose upon them a perpetual servitude, for the purpose of drainage, for the benefit of upper proprietors. We do not intend to say that there may not be cases which, owing to special conditions and circumstances, should be exceptions to the general rule declared. But this case is within it, and we think the judgment below should be affirmed.

In *Porter v. Durham*, 74 N. C. at p. 779, it is said: "It has been held that an owner of lower land is obliged to receive upon it the *surface water* which falls on adjoining higher land, and which naturally flows on the lower land. Of course when the water reaches his land, the lower owner can collect it in a ditch and carry it off to a proper outlet so that it will not damage him. *He cannot, however, raise any dyke or barrier by which it will be intercepted and thrown back on the land of the higher owner.* While the higher owner is entitled to this service, he cannot artificially increase the natural quantity of water, or change its natural manner of flow, by collecting it in a ditch and discharging it upon the servient land at a different place, or in a different manner, from its natural discharge. These elementary principles being founded on reason and equity are common to both the civil and the common law, and are *impliedly recognized by our acts of assembly* respecting draining." See further for the position of the North Carolina courts upon the questions discussed in the principal case, *Davis v. Smith*, 141 N. C. 108, 53 S. E. 745; *Greenwood v. R. R.*, 144 N. C. 446, 57 S. E. 157; *Clark v. Guano Co.*, 144 N. C. 64, 56 S. E. 858, and numerous cases there cited, also *Briscoe v. Parker*, 145 N. C. 14, 58 S. E. 443. These cases fully sustain the above quotation from *Porter v. Durham*. However, in *R. R. v. Wicker*, 74 N. C. at p. 228, it is said: "Every one has a right to build on or otherwise improve his land, subject to certain equitable limitations which it is not necessary now to state. If, as an incidental consequence of this lawful use, the flow of the surface water from adjoining land is obstructed, the owner of such land cannot recover damages as for a tort." See *Wills v. Babb*, 222 Ill. 95, 78 N. E. 42, 6 L. R. A. (N. S.) 136, and note (right to embank against water turned out of a running stream); 25 L. R. A. 527, and note (surface water defined); 65 Ib. 250, and note (rights and duties of municipalities with respect to surface water); 21 Ib. 593, and note (rights as to the flow of surface water. This note cites the principal case and many others). From a letter to the editors from Mr. H. P. Farnham, managing editor of L. R. A., we quote, by permission: "By an examination of the note in 21 L. R. A. 593, we think you will discover that the case to which you refer in 86 N. Y. 140, represents the minority rule, and is opposed to both the common and civil law." For a discussion of the civil and the common-law rights with respect to surface water, see *Farnham on Waters*, § 839.

See 30 Am. & Eng. Enc. L. 326-347, for a full discussion of the law of surface water. It is there stated that what is known as the "common law rule" on the subject discussed in the principal case, originated in Massachusetts, and that the English courts do not appear to have had the subject before them for consideration (p. 331, end of note 3). The majority of the states seem to have adopted the "common law rule" (see pp. 326, note 7, 330, note 3; and see *Gould on Waters*, §§ 265, 266). The two rules are fully treated in 30 Am. & Eng. Enc. L. at pp. 326 et seq. and 330 et seq.

As to the respective rights and remedies of adjacent proprietors with regard to *percolating* waters, see 19 L. R. A. 92, 64 Ib. 236, 17 Ib. (N. S.) 650, and notes (giving the older rule) and 23 Ib. (N. S.) 331, and note (giving the modern rule).

See "Waters and Water Courses," Century Dig. §§ 128-136; Decennial and Am. Dig. Key No. Series, §§ 118-121, 170.

(e) *Distress for Rent.*

GIVEN v. BLANN, 3 Blackford, 64. 1832.

Nature and Extent of the Remedy. What May Be Taken.

[Given brought replevin against Blann for some shocks of wheat. Judgment against plaintiff. Plaintiff took the case to the supreme court by writ of error. Reversed.]

Given owed Blann the rent of a parcel of land, which rent being past due and unpaid, Blann seized the wheat in controversy—the wheat being at the time in shocks on the demised land. These facts were set up by way of avowry and plaintiff demurred thereto. The court overruled this demurrer. In short, Blann distrained the wheat for rent due.]

STEVENS, J. . . . The first point is, did the court err in overruling the demurrer to the avowry?

The power of distraining for rent is, to say the least of it, tyrannical, and may be made an engine of oppression, and is almost irreconcilable with the spirit of our laws and institutions. It is an extraordinary remedy, and is limited to the strict letter of the law, confined strictly to the authority given, and nothing can be taken by implication. It is a proceeding by which a landlord is permitted to seize and dispose of the property of his tenant, without his consent, and without the assent of his judges or peers, and, as Sir Edward Coke expresses it, a proceeding in which he is a judge in his own cause, contrary to the solid maxim of common law; and therefore an avowry must be as certain, direct and special, in both form and substance, as a plea of justification in an action of trespass.

The first objection raised is, that the property taken as a distress is not distrainable. The common law imposes several benign restrictions on this summary authority of distress. It forbids the distraining of many articles, such as: First, things fixed to the freehold or which savor of the realty, as fixtures, growing crops, etc.; 2d, things of a perishable nature, as milk, etc.; 3d, things that cannot be removed without sustaining some injury, and which cannot be returned in the same plight in which they were when taken, as *sheaves and shocks of corn*; 4th, things delivered to a person exercising a trade, to be worked up or used in the way of his trade; 5th, beasts of the plow and implements of husbandry; and 6th, instruments of a man's trade. 3 Bl. Com. 9, 10; 3 Kent, Com. 382; *Simpson v. Hartopp*, Willes, 512. The two last mentioned exemptions are only exempt *sub modo*, that is, upon the supposition that there is a sufficiency of other property to be distrained.

The property distrained in this case, is sheaves and shocks of corn in the field, which are exempt from distress by the common law, and, if our statute does not authorize such a distress, the proceedings are illegal and void.

It has not been contended that the statute expressly authorizes such a distress, but that it has taken away the reason of the common law, and, therefore, the law is virtually, as to that, repealed; that, at common law, the distress was taken as a pledge, and was held until the tenant paid the rent or replevied the property; and, therefore, sheaves and shocks of corn could not be taken, because the removal and the return would injure them; but, *by our statute*, the distress is to be absolutely sold, unless the rent is paid or the property replevied; and therefore the reason of the common law cannot apply. To this argument it may be correctly answered, that the reason of the common law remains unimpaired; the right of the tenant to pay the rent or to replevy the distress, remains in full force; no alteration as to that is made, only the time is limited to a few days; but if he does pay the rent or replevy the property within the time limited, it must be returned to him without damage, and in the same plight it was in when seized; and, in the case of sheaves and shocks of corn, that is impossible, and therefore they certainly remain as things forbidden to be taken as a distress. It may be further answered that nothing can be taken by implication, and that, unless the statute expressly authorizes the distress, it is illegal. . . .

If this view of the case, and the law governing it, is correct, no doubt can exist as to the illegality of the distress. The property seized was not distrainable, and the demurrer to the avowry ought to have been sustained.

Distress for rent is a remedy which landlords have never enjoyed in North Carolina. *Howland v. Forlaw*, 108 N. C. top p. 570, 13 S. E. 173; *Deaver v. Rice*, 20 N. C. at p. 568. For distress warrant to force payment for use of property other than land, see *Wickham v. Richmond S. & I. Co.*, 57 S. E. 647, 11 L. R. A. (N. S.) 836, and note. See "Landlord and Tenant," *Century Dig.* § 1083; *Decennial and Am. Dig.* Key No. Series, § 269.

SEC. 3. BY AGREEMENT OF PARTIES.

(a) *Accord and Satisfaction.*

SIEBER v. AMUNSON, 78 Wis. 679, 682, 47 N. W. 1126. 1891.

Definition and Essentials of Accord and Satisfaction.

[Sieber sued Amunson for damages resulting from the alleged negligence, etc., of Amunson in colliding with a sleigh in which the plaintiff was riding. Verdict and judgment against the defendant, and he appealed. Affirmed.]

Amunson, Sieverson, and Narracong were riding in a sled. Amunson was partially drunk, and, by his yelling, etc., caused the team to run away and injure the plaintiff. Amunson pleaded as a defense that the

plaintiff had received compensation, for all of her injuries, from Sieverson and in full settlement thereof.

There was no proof that Sieverson was a joint tortfeasor with Amunson in causing plaintiff's injury; but it was shown that plaintiff's attorney, Mr. Perry, in a conversation with Sieverson, stated that the plaintiff was very poor and asked Sieverson if he could help her—stating at the time that he was satisfied that Sieverson was not in fault in the matter of plaintiff's injury. Narracong, who was present at this interview, handed the plaintiff's attorney five dollars for her, and Sieverson said he would help her if he were able. Narracong then proposed that he pay plaintiff fifty dollars which he owed Sieverson. When this proposition was made to Sieverson, he seemed to assent thereto. Plaintiff knew nothing about this proposition or of what took place at this interview.]

ORTON, J. . . . Narracong, as a witness, speaks of this transaction as a settlement, but it could not have been a settlement or an accord and satisfaction, for Mr. Perry not only had not charged and did not charge Sieverson with being guilty of any wrong or with any liability on account of the plaintiff's injury, but expressly told him that he did not believe him to be liable or to have been in any fault. There was no consideration whatever for the promise to pay anything to the plaintiff or for her benefit, and it was void for that reason, if not for having been made on the Sabbath. The court instructed the jury that there was no accord and satisfaction, because there was no satisfaction. As an abstract proposition this was correct. The legal meaning of an accord is that "it is a satisfaction agreed upon between the party injuring and the party injured, which, when performed, is a bar to all actions upon this account." "It must be advantageous to the creditor, and he must receive an actual benefit therefrom." "Everything must be done which the party undertakes to do." 2 Greenl. Ev. 28; 3 Bl. Comm. 15; Bouv. Law Dict. tit. "Accord," and cases cited; Ogilvie v. Hallam, 58 Iowa, 714, 12 N. W. Rep. 730; Evans v. Wells, 22 Wend. 325. "An accord not followed by a satisfaction is no bar." Palmer v. Yager, 20 Wis. 91; Barnes v. Lloyd, 1 How. (Miss.) 585. "To constitute a good accord and satisfaction, it must be accepted as such." This was neither an accord and satisfaction, nor a settlement of the matter, either in fact or in law. But, if the \$50 had been actually received by the plaintiff, it would have been a mere gratuity. Mr. Perry no doubt understood the effect of the transaction to be a mere act of charity or benevolence, or a loan. The idea of an accord and satisfaction of the cause of action in this suit probably never entered his mind. As an attorney of the plaintiff in this action, he had no power, unless specially authorized, to make any contract or do anything by which the action would be barred. We find no error in the record. The judgment of the circuit court is affirmed.

See Broom's Legal Maxims, 666, 667, 1 Am. & Eng. Enc. Law 411; McIntosh Cent. 511, 584, and note at 513; Harshaw v. McKesson, 65 N. C. 688. Formerly the rule was, that no sealed executory contract for a debt could be discharged by an unsealed contract, because of the maxim *in legamine quo ligatur*, etc.; but that rule never did extend to nulliquidated

damages for breach of a sealed contract. *Broom's L. Maxims*, 666. The maxim *ex ligamine*, etc., is of little, if any, force in North Carolina at this time. *Adams v. Battle*, 125 N. C. 152, 34 S. E. 245; *May v. Getty*, 140 N. C. 310, 53 S. E. 75. See also *Fuller v. Kemp*, 20 L. R. A. 785; *Melroy v. Kemmerer*, 67 Atl. 622, 11 L. R. A. (N. S.) 1018; *Can Fish Co. v. McShane*, 114 N. W. 394, 14 L. R. A. (N. S.) 443; *Farnsworth v. Wilbur*, 95 Pac. 642, 19 L. R. A. (N. S.) 320; *Ex parte Zeigler*, 64 S. E. 513, 21 L. R. A. (N. S.) 1005; which cases and the valuable notes thereto in the L. R. A. give practically all the law on the subject of accord and satisfaction and compromise by the payment and acceptance, or agreement to accept, a smaller sum in discharge of a contract to pay a greater. For the distinction between a *novation* and a compromise or executory accord, see *Bandman v. Finn*, 78 N. E. 175, 12 L. R. A. (N. S.) 1134, and note. See "Accord and Satisfaction," *Century Dig.* §§ 1-45; *Decennial and Am. Dig. Key No. Series*, §§ 1-5.

(b) *Arbitration and Award.*

TITUS v. SCANTLING, 4 Blackford, 89. 1835.

Submission to Arbitration. Arbitration Bonds. Enforcing Awards.

[Scantling and wife sued Titus, in debt, on an arbitration bond made to Mrs. Scantling while sole. Judgment against Titus, and he appealed. Affirmed.]

The declaration set out a bond, made by Titus, conditioned to perform the award of certain arbitrators to whom was submitted a matter of difference between Titus and Sarah McAfee, afterwards Mrs. Scantling. *The bond contained no provision that the submission and award should be a rule of court.* The bond was made in Ohio. Titus pleaded, *inter alia*, that the bond was void under the laws of Ohio, because it failed to provide that the submission might be made a rule of court. There was a demurrer to this plea, and the demurrer was sustained.

The only error assigned is the sustaining of the demurrer, and the question presented is: Is an arbitration bond void under the Ohio statute because there is no clause in the bond making the submission a rule of court?]

BLACKFORD, J. . . . To determine this question, it is necessary to advert, for a moment, to the history of arbitrations. They are, as every one knows, of common law origin. In the earliest periods of the history of that law, we find that any persons, though no suit was pending between them, might agree to submit their matters of difference to arbitrators; and that their agreement for this purpose might be without any writing, or by a writing without seal, or might be by mutual bonds. If the agreement was by bond, and either party refused to comply with the award, his opponent might sue him on the award or on the bond. 2 Saund. 61, notes. We find in the old English books of Reports, previously to any statute on the subject, frequent suits on arbitration bonds. These bonds contained no agreement that the submission should be made a rule of court. The insertion of such an agreement in the bond, originated with the English statute of 9th and 10th of Will. 3. The object of that statute was to give to persons, submitting their disputes to arbitration where *no suit was pending*, the same remedy

that the common law gives in cases referred *after the commencement of a suit*. *Lucas v. Wilson*, 2 Burr. 701. The defaulting party, where the submission is made a rule of court, becomes liable to an attachment. The statute thus gives a new remedy, when the bond contains an agreement for the rule; but, at the same time, it leaves the validity of the common law bonds, not containing such an agreement, entirely unimpaired. All the difference is, that on the statutory bond the rule of court may be obtained, but on the common law bond it cannot. The party, in the latter case, is limited to the old remedy by an action on the award or on the bond.

These observations respecting the English law of arbitration, apply to the laws of Ohio on the subject. We are bound to presume that the common law, so far as it does not interfere with her statutes, is in force in Ohio. That point was so decided by this court, in the case of *Stout v. Wood*, 1 Blkfd. 70. Arbitration bonds, therefore, in the common law form, without any agreement respecting a rule of court, are valid in the state of Ohio by the common law, unless their validity is impaired by the statute law of that state. The defendant below has not informed us in his plea of any other statute of Ohio on the subject, than the one to which we have referred. That statute is, substantially, as to the matter in question, the same with the English statute of Will. 3; and it consequently does not, as is shown by our previous remarks, affect the legality of arbitration bonds made, like the one now before us, in the common law form. The obligees are excluded, by the form of the bond, from the summary remedy by attachment under a rule of court, but that does not prove the bond to be void, or that an action of debt may not be maintained on it.

The statute on arbitrations in Indiana, is, as to the matter under consideration, the same with the Ohio statute; and we think it is clear that this arbitration bond, had it been executed here with a view to our laws, might have been enforced in our courts as a common law bond, by an action of debt.

Our opinion for these reasons is, that the obligor's plea, that the bond in question is void by the laws of Ohio where it was executed, cannot be supported. The bond is valid, and the demurrer to this plea was correctly sustained.

Per Curiam. This judgment is affirmed.

See *Dickerson v. Hayes*, 4 Blackford, at mid. pp. 46 to 49, for the enforcement of awards made in actions pending in court and of awards in controversies not pending in court, under the common law practice and under statutes of England and of this country. See "Arbitration and Award," *Century Dig.* § 59; *Decennial and Am. Dig. Key No. Series*, § 14.

KILL v. HOLLISTER, 1 Wilson, 129 1746

What May Be Submitted to Arbitration.

This is an action upon a policy of insurance, wherein a clause was inserted, *that in case of any loss or dispute about the policy it*

should be referred to arbitration, and the plaintiff avers in his declaration that there has been no reference: upon the trial at Guildhall the point was reserved for the consideration of the court, whether this action well laid before a reference had been, and by the whole court if there had been a reference depending, or made and determined, it might have been a bar, *but the agreement of the parties cannot oust this court*, and as no reference has been nor any is depending, the action is well brought, and the plaintiff must have judgment.

Rules of a board of trade requiring arbitration, see *Pacaud v. Walt*, 75 N. E. 779, 2 L. R. A. (N. S.) 672, and note. See "Insurance," Century Dig. §§ 1522-1528; Decennial and Am. Dig. Key No. Series, § 612.

MANUFACTURING CO. v. ASSURANCE CO., 106 N. C. 28, 46-48, 10 S. E. 1057. 1890.

Validity of Agreement to Arbitrate. Insurance Clause.

[Action upon an insurance policy to recover for loss by fire. Verdict and judgment against defendant, who appealed. Reversed. The facts appear in the beginning of the opinion.]

SHEPHERD, J. The defendant relies upon several defenses, but the only one necessary to be considered in order to dispose of this appeal is founded upon the following clause in the policy of insurance, which is the basis of this action: [The clause in the policy was to the effect that any differences arising as to the *amount of loss or damage* should be submitted to arbitration, if either party should make a written request to that effect. Upon such request being made, no action could be maintained on the policy until after an award fixing the *amount of the damage*, but not the *liability of the insurance company under its policy*.]

It is, we think, well settled that such a provision in a contract of insurance is not against public policy, and that it will be upheld by the courts, in so far as it provides for the submission to arbitration of *the amount of loss or damage sustained* by the assured.

A policy of insurance, precisely similar to the one under consideration, was declared to be valid by the Supreme Court of New Jersey, in the case of *L. L. & G. Ins. Co. v. Wolff*, 17 Ins. Law Journal, 714; 14 Atl. Rep. 561, and this decision is abundantly sustained by the highest authority.

"Agreements for determining *only the amount to be recovered* by arbitration are valid, and the determination by arbitration of the amount of damages to be recovered, or the time of payment, may lawfully be made a condition precedent." *Scott v. Avery*, 5 H. L. Cas. 811; 2 Addison, Cont. 294; *Morse on Arbitration and Award*, 93; *May on Insurance*, 493; *Perkins v. U. S. Electric Light Co.*, 16 Fed. Rep. 513; *Gauche v. London & Lancashire Ins. Co.*, 10 Fed. Rep. 347; *Carroll v. G. F. Ins. Co.*, 13 Pac. Rep. (Cal.) 863.

In *Russell v. Pellegrini*, 38 E. L. & E. 101, Lord Campbell said:

"When a cause of action has arisen, the courts cannot be ousted of their jurisdiction," but added that "parties may come to agreement that there shall be no cause of action until their differences have been referred to arbitration."

"Both sides admit that it is not unlawful for parties to agree to impose a condition precedent, with respect to the mode of settling *the amount of damage*, or the time of paying it, or any matters of that kind, *which do not go to the root of the action*. On the other hand, it is conceded that any agreement which is to *prevent the suffering party from coming into a court of law*—or, in other words, *which ousts the courts of their jurisdiction*—cannot be supported." *Edwards v. The Aberayron Mutual Ship Ins. Co.* (limited), 1 Q. B. Div. 593 (1875).

"I take the law as settled by the highest authority—the House of Lords—to be this: There are two cases where such a plea as the present is successful—first, where the action can only be brought for the sum named by the arbitrator; secondly, where it is agreed that no action shall be brought till there has been an arbitration, or that arbitration shall be a condition precedent to the right of action." *Dawson v. Fitzgerald*, 1 Exchequer Div. 260 (1876).

"Since the case of *Scott v. Avery*, in the House of Lords, the contention that such a clause is bad, as an attempt to oust the courts of jurisdiction, may be passed by." See also *Porter's Laws of Insurance*, 210, and *Gasser v. Sun Fire Office* (Supreme Court Minn. 1890), *Insurance L. J.* 44 N. W. 252.

The contention of the defendant company is, that a difference arose as to the *amount of damage* to the engine, boilers, etc., and that defendant made a written request of the plaintiff that the *said difference* should be submitted to, and determined by, arbitrators, and in accordance with the terms of the policy; and that the plaintiff, without legal excuse, refused to comply with said request.

The submission to arbitration upon the written request of the defendant is clearly a condition precedent to the right of action. . . . Reversed. [The remainder of the opinion is omitted because not necessary to the presentation of the point under consideration here—i. e., the validity of the "arbitration clause" in a policy.]

See *Grady v. Home F. & M. Ins. Co.*, 63 Atl. 173, 4 L. R. A. (N. S.) 288, and note; *Pres. D. & H. Canal Co. v. Pa. Coal Co.*, 50 N. Y. 250; *McIntosh Cont.* 368, and note. See 23 L. R. A. (N. S.) 347, and note (effect of ruling of arbitrator as to the performance of a building contract). For practice in causes submitted to arbitrators, selection of umpire, notice to parties, setting aside the award, etc., see *Bray v. Staples*, 63 S. E. 789, 19 L. R. A. (N. S.) 696, and note. See "Insurance," *Century Dig.* § 1420; *Decennial and Am. Dig. Key No. Series*, § 567.

KEENER v. GOODSON, 89 N. C. 273. 1883.

Arbitration and Reference Distinguished. Duty of Arbitrators. Enforcing Award.

[Keener sued Goodson in ejectment. Verdict and judgment against defendant, and he appealed. Affirmed.]

Plaintiff claimed title under an execution sale. The validity of such execution sale depended upon whether or not a judgment, entered upon the award of certain arbitrators, was valid. In an action duly pending in the Superior Court an order was made, by compromise, referring the controversy to arbitrators, "their award or a majority of them to be a rule of court." The arbitrators filed their award stating that they had heard all the testimony produced; examined "all the books and papers;" investigated the case; and that in their opinion the defendant owed the plaintiffs a specified sum. Upon the docket was a memorandum of judgment. *The award did not contain any findings of fact.* Only so much of the case and opinion is here produced as bears upon the question under consideration.]

ASHE, J. The first contention of defendant was, that the record of the judgment produced in evidence did not show a valid judgment, and that the sale thereunder was void, and the plaintiff acquired no title to the land by the sheriff's deed. The counsel insisted that the judgment upon the award was interlocutory, and that *the award itself was defective, because the arbitrators did not find the facts.* The counsel argued these points as if the order of reference was under the Code of Civil Procedure; if it had been so, there would have been a good deal of force in his position; but he seems to have entirely overlooked the distinction between *a reference under the Code and a reference to arbitrators*, and their award to be a rule of court. The provisions of the Code of Civil Procedure have not repealed the common law practice of reference to arbitrators. The practice is still extant, notwithstanding the Code. *Crisp v. Love*, 65 N. C. 126; *Gudger v. Baird*, 66 N. C. 438; *Hilliard v. Rowland*, 68 N. C. 506.

Arbitrators are not bound to find the facts. The effect of a reference to arbitrators is very different from that of a reference under the Code. The arbitrators may choose an umpire; they are not bound to find the facts separately from their conclusions of law; they are not bound to decide according to law; and their award may be general; thus, "that plaintiff recover \$— and costs." *Lusk v. Clayton*, 70 N. C. 184; *Pickens v. Miller*, 83 N. C. 543. And where the award is made and no exceptions taken, or, if taken, not sustained, the practice has uniformly been for the court to render judgment according to the award.

In England, where the submission of a cause to arbitrators was made a rule of court, the practice was to grant an attachment for all disobedience of a rule of court to stand to the submission and award. But it has been said by CHIEF JUSTICE RUFFIN that, instead of the attachment in this state, the practice, from a period so early that no one of the profession knows when it did not exist, has been to enter judgment for the debt or damages according to the award. *Cunningham v. Howell*, 23 N. C. 9; same principle in

Simpson v. McBee, 14 N. C. 531. In the former of these cases, where the judgment was sustained by this court, the entries were very similar to those in this case. There, there was an order of reference submitting the cause to arbitrators, whose award was to be a rule of court. An award was made and returned that Hyatt should pay to the plaintiff the sum of \$155, and there was judgment for the sum of \$155, according to the award. . . . There is no error. Affirmed.

In Henry v. Hilliard, 120 N. C. mid. p. 486, 27 S. E. 132, it is said: "But it is not necessary that the arbitrators shall decide or undertake to decide any matter before them *according to law*. It is said '*they are a law unto themselves*.' Osborne v. Calvert, 83 N. C. 365; Keener v. Goodson, 89 N. C. 273. Neither is it necessary that they set out the facts upon which they base their findings, or assign any reason for their findings. It is said it is best they should not do so. Osborn v. Calvert, supra. Neither can an award be set aside where exceptions are made to the award upon the ground of error alone, in the findings, unless they appear upon the face of the award and the terms of the submission. To set aside an award, it must appear there has been fraud, undue influence or some improper conduct on the part of the arbitrators. No such allegations are made here, or, if they are, nothing of the kind is found by the judge who set aside the judgment. King v. Mfg. Co., 79 N. C. 360, and cases there cited." See "Arbitration and Award," Century Dig § 266; Decennial and Am. Dig. Key No. Series, § 52.

CHAPTER II.

REMEDIES BY JUDICIAL PROCEEDINGS.

SEC. 1. CRIMINAL AND CIVIL PROCEEDINGS DISTINGUISHED.

STATE (AND SUSANNA ADAMS) v. PATE, 44 N. C. 244. 1853.

Criminal and Civil Actions Explained. Bastardy.

[Proceedings in bastardy against Pate. Verdict and judgment against plaintiff, and the State appealed. Reversed.]

On the trial below, the solicitor for the state claimed the right of making four peremptory challenges to jurors. The judge ruled against this claim.]

PEARSON, J. By the Revised Statutes, ch. 31, sec. 37, "each party in all civil suits" may challenge peremptorily four jurors. So the question is, are proceedings in bastardy "civil suits?"

Suits are either civil or criminal. All criminal suits are prosecuted in the name of the state; but all suits prosecuted in the name of the state are not criminal suits:—an action of debt may be prosecuted in the name of the state. The true test is, when the proceeding is by *indictment*, it is a criminal suit; when by *action or other mode*, although in the name of the state, it is a civil suit, and should be by the clerks put on the civil, as distinguished from the state docket. By the "Declaration of Rights," no free man shall be put to answer any criminal charge, but by indictment, presentment, or impeachment. By Rev. Stat. ch. 35, sec. 6, no person can be charged in a criminal proceeding except upon a bill of indictment. Tested in this way, the present is a "civil suit," although prosecuted in the name of the state, and the plaintiff was entitled to four peremptory challenges. The object of the suit is not to punish the defendant for an act done to the injury of the public, but to indemnify the county of Wayne against a liability for the support of a bastard child, of which the defendant is, by law, the reputed father. . . . Judgment reversed, and venire de novo awarded.

At one while, since this decision, bastardy proceedings were held to be criminal; but now they are again declared to be civil. *State v. Liles*, 134 N. C. 735, 47 S. E. 750. See in support of the principal case, *Marston v. Jenness*, 11 N. H. 156, *Smith's Cases* L. P. 117. See "Bastards," *Century Dig.* § 35½; *Decennial and Am. Dig.* Key No. Series, § 19.

STATE v. OATES, 88 N. C. 668. 1883.

Peace Warrant—Civil or Criminal?

[Oates was arrested under a peace warrant, issued by a justice of the peace, and required to give bond to keep the peace. Pugh became his surety. Oates being accused of a breach of this bond, the justice issued a sci. fa. to Oates and Pugh, and, they not appearing, adjudged the bond forfeited, and that it be prosecuted according to law. From this judgment Oates appealed to the Superior Court. In that court the justice's judgment was affirmed. Oates and his surety then appealed to the Supreme Court, assigning as error that the justice of the peace had no jurisdiction in the matter of enforcing the bond, because the penalty thereof exceeded two hundred dollars. Affirmed.]

ASHE, J. The defendants' appeal seems to be founded upon the idea that this was a *civil action*, and the jurisdiction of the justice was restricted by the constitution to two hundred dollars. That is so, if it is a civil action. The constitution gives to justices of the peace, under such regulations as the general assembly shall prescribe, jurisdiction of *civil actions* founded on contract, wherein the sum demanded shall not exceed two hundred dollars. Art. IV, s. 27. *But this is not a civil action.* It is an action prosecuted by the state, at the instance of an individual, to prevent an apprehended crime against his person or property (Bat. Rev. ch. 17, s. 5, sub. s. 2) and this provision of the Code has had a construction given it by this court in the case of *State v. Locust*, 63 N. C. 574, where it was held that a proceeding upon a peace warrant was a *criminal action*.

Actions by the Code are divided into two kinds—civil and criminal. A criminal action is, 1. An action prosecuted by the state, as a party, against a person charged with a public offense for the punishment thereof; and 2. An action prosecuted by the state, at the instance of an individual, to prevent an apprehended crime against his person or property. Every other is a civil action. Bat. Rev. ch. 17, s. 6. The distinction between criminal actions is founded upon the difference, whether it is a proceeding for a public offense, in the nature of an indictment for a misdemeanor, or to prevent (as in this case, for example) a threatened crime against a private person. In the former case, the constitution has restricted the jurisdiction of justices, by declaring that a justice should have jurisdiction of all criminal matters arising within their counties, where the punishment cannot exceed a fine of fifty dollars or imprisonment for thirty days. Art. IV, s. 27. This provision was evidently intended to limit the jurisdiction of justices in criminal actions in the nature of indictments, where final jurisdiction was given them. But we do not think it has any application to criminal actions of the second kind, which affect only private rights. This action is left by the constitution to be regulated by the legislature; and it has been regulated by the acts of 1868-69, ch. 178, and of 1879, ch. 92. The latter act gives to justices of the peace exclusive original jurisdiction of peace warrants and proceedings thereunder, and contains no repealing clause. The former

act provides that justices of the peace may take recognizances to keep the peace, in any sum not exceeding one thousand dollars, and prescribes the proceedings to be had to enforce the same. Those provisions of the act that are not inconsistent with the exclusive jurisdiction given by the act of 1879, are not repealed; therefore, sub-chapter 2, section 10 of the act (Bat. Rev. ch. 33, s. 103) is still in force, which provides that "every person, who shall have entered into a recognizance to keep the peace, shall appear according to the obligation thereof; and if he fail to appear, the court shall forfeit his recognizance and order it to be prosecuted, unless reasonable excuse for his default be given."

The justice of the peace, in the case before us, has strictly followed this provision of the statute. The recognizance imposed upon the defendants the duty to appear before the justice and show cause whenever he should notify them to appear before him to answer the alleged breach of the conditions of the recognizance, and in default thereof, the law required the justice to declare the forfeiture. There is no error. Let this be certified to the superior court of Sampson county, that the court may certify to the justice's court to the end that the case may be proceeded with according to law. Affirmed.

See "Breach of the Peace," Century Dig. § 7; Decennial and Am. Dig. Key No. Series, § 16.

WHITTEM v. THE STATE, 36 Ind. 196, 202-204. 1871.

Contempt Proceedings—Civil or Criminal?

[Whittem was sued for seduction. Counsel for the female plaintiff announced in open court that they were credibly informed that Whittem had abducted their client who was a necessary witness in her own behalf. After an ineffectual attempt to have their client served with process commanding her presence in court, an attachment for contempt was issued against Whittem, by which he was brought into court to answer the charge of contempt in abducting the plaintiff. At the investigation of this charge the judge, *ex mero motu*, examined Whittem as to the alleged contempt. *Whittem declined to answer questions as to the charge, on the ground that his answers would tend to convict him of a crime.* The judge sustained Whittem in his refusal to answer, but gave judgment that Whittem was guilty of contempt in abducting the plaintiff; and that he be imprisoned until he produced her in court, unless sooner discharged. There were sundry motions by Whittem after this judgment and his imprisonment thereunder. Eventually Whittem appealed. At the threshold the Supreme Court was confronted with the question whether an appeal would lie in this case, and whether the court had jurisdiction to review the judgment of the lower court. To determine these questions, in view of the statutes of the state regulating appeals and appellate jurisdiction, it became necessary to determine whether the proceedings in contempt against Whittem were *civil or criminal in their nature*. Only so much of the opinion as bears upon this question is inserted here.]

BUSKIRK, J. Was the proceeding under consideration a civil or criminal action; or did it so far partake of the nature of

either that it is to be governed by the principles of law and rules of practice applicable to either of those actions? That it was not a civil action is too plain to admit of a doubt, or to justify a reference to authorities.

The criminal law of this state is entirely statutory, and not of common law origin. *Beal v. The State*, 15 Ind. 378. This is not, strictly speaking, a criminal action; for such a charge must either be presented by indictment or information. The record discloses the fact that this proceeding is in the name of the State of Indiana against William Whittom, charging him with a contempt of court; and a final judgment was rendered by which he was imprisoned in the jail of the county for an uncertain and indefinite period of time.

The case of *Crook v. The People*, 16 Ill. 534, was a proceeding against Crook and others for contempt, in disobeying an injunction, and the court held that it was not, strictly speaking, a criminal action, because no indictment had been found by the grand jury; but it was called a criminal prosecution for contempt; and while the court declined to decide whether an appeal could be taken in an information for contempt, it was held that the answer of the party charged with contempt could be controverted, and the fact alleged in excuse be disproved.

In *Pitt v. Davison*, 37 N. Y. 235, the court held that there was a distinction between *proceedings to punish for criminal contempts*, and *proceedings as for contempts to enforce civil remedies*, and that in the former cases personal notification of the accusation was necessary.

The Supreme Court of the United States, in *Ex parte Kearney*, 7 Wheat. 38, which was an application for a habeas corpus to bring up the body of John T. Kearney, then in jail, upon the order and judgment of the Circuit Court of the District of Columbia, for contempt of court in refusing to testify as a witness, held, that that court had no jurisdiction of the case, for the reason that it had no appellate jurisdiction of *criminal cases*, and, *that being a criminal charge*, no right of appeal existed. The court say: "If this were an application for a habeas corpus, after judgment on an indictment for an offense within the jurisdiction of the circuit court, it could hardly be maintained that this court could revise such a judgment, or the proceedings which led to it, or set it aside and discharge the prisoner. There is, in principle, no distinction between that case and the present; for when a court commits a party for contempt, their adjudication is a conviction, and their commitment, in consequence, is execution."

Lord Chief Justice DE GREY, in *Brass Crosby*, Lord Mayor of London, 3 Wils. 188, said: "When the House of Commons adjudged anything to be a contempt, or a breach of a privilege, their adjudication is a conviction, and their commitment, in consequence, is execution; and no court can discharge, on bail, a person that is in execution by the judgment of any other court."

In our opinion, *these authorities demonstrate that a proceeding for contempt is in the nature of a criminal prosecution*. The re-

sults and consequences are the same in the one proceeding as in the other. In both the party convicted may be deprived of his liberty and confined in jail, and subjected to the payment of a fine. As has been shown, our statute gives an appeal to this court from all final judgments.

[The court ruled that the appeal would lie, and for divers errors committed in the lower court, none of which are germane to the subject of this chapter, the judgment appealed from was reversed and Whitten ordered to be discharged.]

See "Contempt," Century Dig. § 124; Decennial and Am. Dig. Key No. Series, § 40.

EX PARTE GOULD, 99 Cal. 360, 21 L. R. A. 751, 33 Pac. 1112. 1893.

Contempt Proceedings—Civil or Criminal?

[Gould being committed to prison for alleged contempt of court, petitioned for a writ of habeas corpus. He was discharged from custody upon the hearing. The facts appear in the beginning of the opinion.]

HARRISON, J. In an action pending in the superior court in and for the county of Yuba, wherein the county of Sacramento is plaintiff, and the petitioner one of the defendants, a writ of injunction was served upon the defendant, requiring him to refrain from doing certain acts therein specified. While this writ was in full force, the petitioner was charged before said court with having violated its terms, and was ordered to show cause why he should not be adjudged guilty of contempt therefor. Upon the hearing of this charge the court required the petitioner to be sworn as a witness, to which he objected upon the ground *that he could not be compelled to be a witness against himself in the proceedings, for the reason that they were of a criminal nature*. The court, however, overruled his objection, and required him to be sworn as a witness; and he, acting under the advice of his counsel, still declining and refusing to be sworn, for the aforesaid reason, the court adjudged him guilty of contempt, and committed him to the county jail, there to remain until he should purge himself of said contempt by consenting to be sworn as a witness in said case, and to testify therein.

Article 1, s. 13, of the Constitution of this state, declares that "no person shall be compelled, in any criminal case, to be a witness against himself." Section 1323 of the Penal Code provides that "a defendant in a criminal action or proceeding cannot be compelled to be a witness against himself." Contempt of court is a public offense, and by section 166 of the Penal Code is expressly declared to constitute a misdemeanor, and the refusal of a witness to be sworn is an offense committed in the presence of the court. It is none the less a criminal offense that the statute authorizes it to be punished by indictment or information, as well as by summary proceedings provided in sections 1209-1222 of the Code of Civil Procedure. By these provisions, the procedure for the

investigation of the charge is analogous to the criminal procedure, and the judgment against the person guilty of the offense is visited with fine or imprisonment, or both—the essential elements of a judgment for a criminal offense. “*Contempt of court is a specific criminal offense. It is punished sometimes by indictment and sometimes in a summary proceeding, as it was in this case. In either mode of trial the adjudication against an offender is a conviction, and the commitment in consequence is execution.*” *Williamson’s case*, 26 Pa. 19, 67 Am. Dec. 374.

“Although the alleged misconduct of the defendants occurred in the progress of a civil action, the proceeding to punish them for such misconduct is no part of the process in the civil action, but is in the nature of a criminal prosecution. Its purpose is not to indemnify the plaintiff for any damages he may have sustained by reason of such misconduct, but to vindicate the dignity and authority of the court. It is a special proceeding, criminal in character, in which the state is the real plaintiff or prosecutor.” *Haight v. Lucia*, 36 Wis. 360.

In *Ex parte Hollis*, 59 Cal. 408, it was said: “To adjudge a party guilty of contempt of court, for which he is fined and imprisoned, is to adjudge him guilty of a specific criminal offense. The imposition of the fine is a judgment in a criminal case.” See also *Ex parte Kearney*, 20 U. S. (7 Wheat.) 38, 5 L. Ed. 391; *Ex parte Crittenden*, 62 Cal. 534; *New Orleans v. New York Mail S. S. Co.*, 87 U. S. (20 Wall.) 387, 22 L. Ed. 354; *Re Mullee*, 7 Blatch. 23; *Fed. Cas. No. 9,911*; *Rapalje, Contempt*, s. 21.

In *Boyd v. United States*, 116 U. S. 616, 6 Sup. Ct. 524, 29 L. Ed. 746, Justice BRADLEY has given an exhaustive and interesting historical discussion of the power of a court to compel a defendant in a criminal proceeding to give testimony against himself. In that case an information was filed against certain property for its confiscation under the Revenue Laws of the United States, and the claimants, having been directed by the court to produce in evidence certain invoices, for the purpose of establishing the claim of the government, objected thereto on the ground that the statute under which the order was made was in violation of the 4th and 5th amendments to the Constitution. It was held that, although the proceeding was in rem, and in the nature of a civil proceeding, yet an action for the forfeiture of property for the violation of law is, in effect, a criminal proceeding, and that the owner of the goods, after making his claim, is entitled to all the privileges which appertain to a person who is prosecuted for a forfeiture of his property by reason of committing a criminal offense, and cannot be compelled to furnish evidence against himself. Personal liberty is, however, more sacred than mere rights of property, and the reasons for protecting the owner of property against being compelled to give evidence against himself in a proceeding for its forfeiture are in the same degree more cogent when his personal liberty is at stake. It was said by Justice BRADLEY in the *case* last cited: “Constitutional provisions for the security of person and property should be liberally construed. A close and literal con-

struction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon. Their motto should be 'obsta principiis.' We hold, therefore, that the court was not authorized to direct the petitioner to be sworn as a witness in the proceeding, and that its order adjudging him guilty of contempt for his refusal, and punishing him therefor, was without authority, and that the petitioner should be discharged, and it is so ordered.

In 4 Blackstone, *287, 288, it is said that one charged with contempt may be required "to answer upon oath such interrogatories as shall be administered to him for the better information of the court with respect to the circumstances of the contempt. This method of making the defendant answer upon oath to a criminal charge, is not agreeable to the genius of the common law in any other instance; and seems to have been derived to the courts of King's Bench and Common Pleas through the medium of the courts of equity. The method of examining the delinquent himself upon oath with regard to the contempt alleged, is of high antiquity and by long and immemorial usage is now become the law of the land." See *Kane v. Haywood*, 66 N. C. bot. p. 30, which seems to hold with this quotation from Blackstone. In *re Haines*, 67 N. J. L. 442, 51 Atl. 929, sustains the principal case. As to whether the proceedings are civil or criminal, see 13 L. R. A. (N. S.) 591, 598, and notes. See "Contempt," Century Dig. § 124; Decennial and Am. Dig. Key No. Series, § 40.

BAKER v. CORDON, 86 N. C. 116. 1882.

Contempt Proceedings. Trial by Jury.

[Rule on Cordon to show cause why he should not be attached for contempt. Judgment against Cordon, and he appealed. Affirmed.]

Cordon was charged with violating an injunction theretofore issued in a civil action entitled *Baker v. Cordon*. Upon the hearing of the contempt proceedings the judge sentenced Cordon to jail for ten days. Only so much of the opinion as relates to trial by jury is here inserted:

SMITH, C. J. . . . The brief filed by defendant's counsel points us to two alleged errors in the action of the court.

1. The defendant was entitled to a jury trial of the controverted facts:

The exception is untenable. The proceeding by attachment for violating an order of court made in furtherance of a pending action, is necessarily summary and prompt, and, to be effectual, it must be so. The judge determines the facts and adjudges the contempt, and while he may avail himself of a jury and have their verdict upon a disputed and doubtful matter of fact, it is in his discretion to do so or not. *State v. Yancey*, 4 N. C. 133; *State v. Woodfin*, 27 N. C. 199; *Moye v. Cogdell*, 66 N. C. 403; *Crow v. State*, 24 Tex. 12.

But if it were not so, it is sufficient in meeting the exception, to say, that a jury trial was not demanded and the judge proceeded to pass upon the case, if not with the consent, at least without

objection from either party. *Isler v. Murphy*, 71 N. C. 436.
 . . . Affirmed.

For a full review of the law as to contempts committed in the actual or constructive presence of the court—such as assaulting a judge, in or out of court, for his acts while on the bench; the inherent powers of courts in such cases; the invalidity of legislation attempting to curtail this power of the courts; and when an appeal or habeas corpus does or does not lie to review the judgments of lower courts in proceedings for contempt, see *Ex parte McCown*, 139 N. C. 95, 51 S. E. 957. For a further discussion of the right of appeal in such cases, see *Whittem v. The State*, 36 Ind., at pp. 210 et seq.

If a criminal prosecution be pending in the supreme court of the United States, on writ of error to the state court, the sheriff and jailor will be committed for contempt of the supreme court of the United States if the prisoner be lynched by reason of a want of proper precautions and preventive measures on the part of those officials; also if such officers be derelict in their duty to apprehend or identify the lynchers. The lynchers are also in contempt. *U. S. v. Shipp*, 214 U. S. 386, 29 Sup. Ct. 637.

For the powers of committing magistrates, mayors, and other inferior courts, to punish for contempt, see *Scott v. Fishplate*, 117 N. C. 265; *Farnham v. Colman*, 1 L. R. A. (N. S.) 1135, and note. For what constitutes contempt, see notes to *Ex parte McCown*, in 2 L. R. A. (N. S.) 603; see also 5 Ib. 916; 15 Ib. 389, 621; 16 Ib. 1063; 17 Ib. 572, 582, 585, 1049, and notes; 23 Ib. 255, 1295, and notes.

See "Jury," *Century Dig.* § 139; *Decennial and Am. Dig. Key No. Series*, § 21.

STATE v. CANNADY, 78 N. C. 539. 1878.

Marking One as Prosecutor and Taxing Him With Costs. Imprisonment Till Costs Be Paid. Civil or Criminal?

[Cannady obtained a peace warrant against McCullers. Upon the hearing of the matter the judge ruled that the prosecution was frivolous and malicious on the part of Cannady, and ordered him to pay the costs, and to be held in custody by the sheriff until the costs were paid. Cannady appealed. Affirmed.]

READE, J. The questions are: (1) Can a prosecutor be ordered to pay the costs where the prosecution is frivolous or malicious; and (2) be imprisoned therefor if he fail to pay?

The statutes answer both questions in the affirmative: "The party convicted shall be always adjudged to pay the costs, and if the party charged be acquitted, the complainant shall be adjudged to pay the costs, and may be imprisoned for non-payment thereof." *Bat. Rev.* ch. 35, s. 132.

"If a defendant be acquitted, the costs shall be paid by the prosecutor, if any be marked on the bill, unless the judge shall certify," etc. *C. C. P.* s. 560; *State v. Lupton*, 63 N. C. 483; *State v. Darr*, *Ibid.* 516. But then it is said that the statute is unconstitutional.

The Constitution provides that in a criminal prosecution no one shall be compelled "to pay costs unless found guilty." And that "no person shall be put to answer a criminal charge except by indictment, presentment or impeachment." And that "no one shall

be convicted, but by the unanimous verdict of a jury." And that "there shall be no imprisonment for debt, except in cases of fraud." Const. art. 1, ss. 11, 12, 13, 16. And thence it is insisted that, as the prosecutor has not been indicted, and has not been convicted, he cannot be compelled to pay costs, if costs be regarded as a fine or punishment; and even if indicted and convicted, and the costs be regarded, not as a fine or punishment, but as a debt, he cannot be imprisoned for debt in the absence of fraud.

The questions were well argued, and we have had some difficulty in arriving at a satisfactory conclusion.

It is manifestly the sense of the Constitution and of the statutes, that a *defendant* should not pay costs unless convicted. Why be more careful of the *defendant* than of the *prosecutor*? The answer is, that the acquittal of the defendant is substantially the conviction of the prosecutor, where the prosecution is frivolous or malicious. And the same section of the Constitution which provides that no one shall be convicted but by the verdict of a jury, provides further, "that the legislature may provide other means of trial for petty misdemeanors, with the right of appeal." And so it is not a strained construction to say that the legislature has prescribed another mode of trial for a petty misdemeanor, when it enables the court to compel the prosecutor to pay costs, when he has frivolously or maliciously charged a man with crime, whom the jury acquits.

It is not with a prosecutor as it is with a defendant. A defendant is brought in whether he will or not and ought not to pay costs unless convicted; but the prosecutor comes voluntarily. He is the actor with knowledge of the consequences of failure. He stipulates beforehand that if his clamor be false, he will pay the costs. And if the defendant is acquitted, and the prosecution is adjudged to be frivolous or malicious, he stands guilty confessed, as if he had submitted or pleaded guilty, and there is no need of a jury to convict him.

It has too long been the practice both in England and America to make the prosecutors pay costs in such cases, to doubt its propriety; and we do not think it was the purpose of our Constitution to prohibit it.

It is insisted that the costs in a criminal prosecution are not a fine or punishment, but that they are a *debt*; and that there can be no imprisonment for debt.

In *State v. Manuel*, 20 N. C. 20 (144), it is said that fine and costs are both *punishment*, and that neither is a *debt* in the sense contemplated by the constitution where the relation of debtor and creditor is meant. And manifestly where the judgment is that he pay a fine of so much and the costs, one is as much a punishment as the other. And where the judgment is, that he be imprisoned, for say so long, and pay the costs, our statute prescribes that when the term of imprisonment is out, he shall still remain in prison until he pay the costs, or be otherwise discharged according to law. Pat. Rev. ch. 33, s. 129.

In *State v. Manuel*, *supra*, there is an exhaustive discussion of

the questions involved by Judge GASTON in delivering the opinion of the court. In that case the defendant was a free-negro, and was fined \$20 for an assault and battery, and ordered to be hired out to pay the fine, under the statute then existing. His defense was threefold. 1st. That the fine was a *debt*, and that the constitution forbids imprisonment for debt; 2nd. That the fine was excessive, in that, it was laid, and directed by the statute to be laid, high enough to cover the costs, although the crime itself did not deserve so high a fine; 3rd. That the punishment was cruel and unusual, in that, it directed the defendant to be *hired out*.

1. The conclusion arrived at on the first defense was, that a fine was not a debt within the meaning of the constitution. That "the constitution itself discriminates between debts and fines; it provides against unnecessary and wanton imprisonment for the *collection of debts*, but in regard to fines, its language is, 'excessive bail shall not be required, nor *excessive fines* imposed, nor cruel or unusual punishments inflicted.' Here we find a fine classed where it ought to be, among the means used in the administration of *criminal justice* and in immediate connection with other punishment *imposed* or inflicted in the course of that administration. The costs of a convicted offender are not a debt. . . . They are a part of the sentence of the court. From this review of our usages, legislative acts and judicial interpretations of them, it follows, that the sentence pronounced against a convicted criminal, that he should pay the costs of prosecution, is as much a part of his punishment as the fine imposed *eo nomine*."

2. In regard to the second defense, that the fine was excessive, in that, it required the fine to be high enough to cover the costs, although the crime itself might not deserve so high a fine, it was said, that the legislature had the power to prescribe that a convicted criminal should be fined to the amount of the costs; that it was the peculiar province of the legislature to declare what should be crimes and their punishments, and that the judiciary could not control the legislature except perhaps, "which it would be almost indecent to suppose," the legislature should grossly exceed its constitutional restraints; that although "the language of the Bill of Rights is addressed directly to the judiciary for the regulation of their conduct in the administration of justice, it is the courts that require bail, impose fines, and inflict punishment; and they are required not to require excessive bail, not to impose excessive fines, not to inflict cruel or unusual punishments, and it would seem to follow that the command is addressed to them only in those cases where they have a discretion over the amount of bail, the quantum of fine, and the nature of the punishment. No doubt the principles of humanity sanctioned and enjoined in this section ought to command the reverence and regulate the conduct of all who owe obedience to the constitution." But when the legislature, whose peculiar duty it is to make laws, prescribed a punishment, the courts were bound thereby, except, perhaps, in extraordinary cases, as that was not.

3. In regard to the third defense, that the punishment of hiring

out was cruel and unusual, it was held that it was not; because a bond was taken from the hirer conditioned as an apprentice bond for his humane treatment, and the well known relation of master and apprentice was established. And as we had no penitentiary or workhouse, it was appropriate and just to make a convict work out his fine instead of allowing him to go without punishment for his crimes.

So our opinion is: 1st. That neither a fine nor costs inflicted as a punishment is a debt within the meaning of the constitution in relation to this matter; 2nd. That the legislature had the power to prescribe as it has done, that the prosecutor may be made to pay costs, where the defendant is acquitted and the prosecution is frivolous or malicious; 3rd. That there is nothing cruel or unusual in requiring a prosecutor, who has not been indicted and convicted by a jury, to pay costs, nor is it contrary to the constitution, because it has long been the practice to do so, and because substantially he stands convicted by his false clamor and the acquittal of the defendant. . . . Judgment affirmed.

See "Costs," Century Dig. §§ 1129, 1202; Decennial and Am. Dig. Key No. Series, §§ 298, 322.

ATCHESON v. EVERITT, Cowper, 382, 391. 1776.

Action for a Penalty—Civil or Criminal?

[Action of debt for a penalty, upon the statute of 2 Geo. 2, against bribery. Judgment against defendant. Motion for new trial. New trial refused.

On the trial of the action for the penalty before Nares, J., a Quaker was permitted to give evidence against the defendant. The Quaker was not sworn, but was only required to affirm. Under the acts of parliament then in force a Quaker was allowed to give evidence in a *civil case* upon his affirmation; but he *was not allowed to do so in a criminal case*.]

LORD MANSFIELD. . . . We come then to this question: Is the present a criminal cause? A Quaker appears and offers himself as a witness; can he give evidence without being sworn? If it is a criminal case, he must be sworn, or he cannot give evidence.

Now there is no distinction better known than the distinction between civil and criminal law; or between criminal prosecutions and civil actions.

Mr. Justice BLACKSTONE and all modern and ancient writers upon the subject distinguish between them. *Penal actions were never yet put under the head of criminal law, or crimes*. The construction of the statute must be extended by equity to make this a criminal cause. It is as much a civil action, as an action for money had and received. The legislature, when they excepted to the evidence of Quakers in criminal causes, must be understood to mean causes technically criminal; and a different construction would not only be injurious to Quakers, but prejudicial to the rest of the King's subjects who may want their testimony. The case

mentioned by Mr. Rooke of Sir Watkyn Williams Wynne versus Middleton, is a very full authority, and alone sufficient to warrant the distinction between civil and criminal proceedings. In that case the question was, whether the Stat. 7 & 8 Wm. 3, c. 7, was penal or remedial. The court held "it was not a penal statute. But supposing it was to be considered as a penal statute, yet it was also a remedial law; and therefore the objection taken was cured by Stat. 16 & 17 Car. 2, c. 8." Now the words of exception in that statute, and also in Stat. 32 Hen. 8, c. 30, and in Stat. 18 Eliz. c. 14, are "*penal actions, and criminal proceedings.*" But Lord Chief Justice WILLES, in delivering the solemn judgment of the court, says, there is another act which would decide of itself, if considered in the light of a new law, or as an interpretation of what was meant by penal actions in the Stat. 16 & 17 Car. 2, c. 8. This is the statute of jeofails 4 Geo. 2, c. 26, for turning all law proceedings into English, and it has this remarkable conclusion, "that every statute of jeofails shall extend to all forms and proceedings in English (except in criminal cases); and that this clause shall be construed in the most beneficial manner." This is very decisive.

No authority whatever has been mentioned on the other side, nor case cited where it has been held that a penal action is a criminal case; and perhaps the point was never before doubted. The single authority mentioned against receiving the evidence of the Quaker in this case is an appeal of murder. *But that is only a different mode of prosecuting an offender to death.* Instead of proceeding by indictment in the usual way, it allows the relation to carry on the prosecution for the purpose of attaining the same end which the king's prosecution would have had, if the offender had been convicted, namely, execution; and therefore, *the writers on the law of England class an appeal of murder in the books under the head of criminal cases.* . . .

We are not under the least embarrassment in the present case; for there is not a single authority to prove that upon a penal action a Quaker's evidence may not be received upon his affirmation. Therefore, I am of opinion that Mr. Justice NARES did perfectly right in admitting this Quaker to be a witness upon his affirmation, and consequently that the rule for a new trial should be discharged.

Under the Code practice such actions are still classed as civil. *Wilmington v. Davis*, 63 N. C. at p. 584. See "Action," Century Dig. § 96; Decennial and Am. Dig. Key No. Series, § 18.

MURRAY v. KELLER, 32 N. C. 398. 1849.

Action for a Penalty Imposed for an Offense to the Public. When the Informer May Sue.

[Murray sued, on behalf of himself and the Wardens of the Poor, to recover a penalty given by statute. Plea, not guilty. Case submitted on a case agreed. Judgment against defendant, and he appealed.]

The action was commenced before a justice of the peace, and carried to the Superior court by appeal, and thence to the Supreme court. The facts appear in the opening of the opinion.]

RUFFIN, C. J. The writ was commenced by warrant to recover the penalty of \$100, given by the Revised Statutes, ch. 34, s. 75, for selling spirituous liquors to a slave. It was submitted to the court upon a case agreed, in which the facts charged were admitted, and the only objection to the recovery was, that the act does not give the *informer* an action. His Honor held that it did; and from a judgment against him the defendant appealed.

The opinion of the court is, that the judgment was right. The act gives the penalty, "to be recovered by warrant before any justice of the peace, and applied one-half to the use of the wardens of the poor of the county." The single question is, in whose name the suit is to be brought; and it seems difficult to imagine a clearer direction than that it is to be in the name of any person who will bring the suit—"the party suing for the same." It is true, that an informer has no right, at common law, to an action for a penalty; and, therefore, he cannot bring an action unless the statute give it to him. [After commenting on and approving *Fleming v. Bailey*, 5 East, 313, the opinion proceeds:] When a statute prohibits a thing as an offense to the public, under a penalty, no debt arises to a private person, unless the statute also gives the penalty or a part of it to him who will sue for it, as laid down, long before the case cited, by Sergeant Hawkins. Pl. C. Bk. 2, ch. 25, s. 17. The reason is, that the penalty for such public offense belongs to the sovereign as a debt, and is to be recovered by action in the name of the sovereign. *Rex v. Malland*, Str. 828. The case of *Fleming v. Bailey* is, then, an authority to this only, that applying a part of the penalty, after its recovery, to the benefit of an informer, does not confer on him the power of suing for the penalty. In other words, that the term "*informer*," in the statute, does not *per se* imply, that in such a case he may be "*the plaintiff*" in an action for the recovery, but only the informer or prosecutor, as he is sometimes called. But the provision in this statute is not of that kind. It creates a penalty, "to be recovered by warrant, and applied one-half to the use of the party suing for the same, and the other half to the wardens of the poor." This recognizes the right of action in some person. In whom? Why, "*the person suing*," as plainly as it can be. Sergeant Hawkins, in the section already quoted, states, that when a statute gives a part of a penalty "to him who will sue for it," he took it to be settled, that any one may bring an action and lay it *tam pro domino rege quam pro seipso*; thus using the very terms in which the act under consideration is expressed. There are, indeed, many acts in which the like language is found, on which informers have sued in their own names. Both the English statute and our own against usury, for example, have the words, "the one moiety of which forfeitures to be to him that will sue for the same by action of debt, and the other," etc.; and we know that in both countries the action of debt in such cases is constantly

brought in the name of the informer *qui tam*. Those words, "to him that will sue for the same" and "to the use of the party suing for the same," not only determine the interest which the informer is to have in the penalty, but necessarily imply, if they do not expressly confer, his right of action *qui tam*. . . . Judgment affirmed.

See "Penalties," Century Dig. §§ 20-22; Decennial and Am. Dig. Key No. Series, §§ 22-25.

THE GOVERNOR v. HOWARD, 5 N. C. 465. 1810.

Action for Penalty. Repeal of Statute Imposing the Penalty.

[Action of debt to recover a forfeiture or penalty, imposed by the act of 1794, for knowingly buying an imported slave. The cause was transferred to the Supreme court, where it was decided against the plaintiff.

After this action was commenced and after issue joined, the act of 1794 was repealed. Such repeal was pleaded by defendant by way of a plea since the last continuance. Plaintiff demurred to this plea, and the defendant having joined in the demurrer, the case was sent to the Supreme court.]

HALL, J. It is laid down in Cro. Eliz. 138, that the Attorney General cannot enter a *nolle prosequi* to an action *qui tam*, *except for the king's part of the penalty*; nor can the king, after action commenced, release any but his own part of the penalty. 2 Bl. Com. 436; 11 Co. 65. But it is in the power of parliament to release the informer's interest. 2 Bl. Com. 436. If so, they surely have the power of taking away the informer's right of action, by repealing the act which gave birth to it. It is said (Wm. Bl. 451) in Sir William Blackstone's Reports, "that no proceeding can be had or pursued under a repealed act of parliament, though begun before the repeal, unless by special exception." And by Sir Matthew Hale (P. C. 291), "that when an offense is made treason or felony by an act of parliament, and then that act is repealed, the offense committed before such repeal, and the proceedings thereupon are discharged by such repeal." From these authorities, and others which might be referred to, as well as from the circumstance that the suit in the present instance must be brought in the name of the governor alone (the act having directed the forfeiture to be sued for in his name), although after a recovery one moiety thereof is to go to the informer or the person who brought the suit, the demurrer must be overruled and the plea allowed.

In *State v. Mooney*, 74 N. C. 98, it is decided that a pardon after judgment does not affect the informer; for which is cited 5 Gill, 244; 35 Iowa, 419; 2 Bay, 565; 2 Durn. & East, 569; 5 Co. 51; 3 Inst. 238; 46 Penn. 446; 8 Blackford, 229; 2 Whart. 416. See "Forfeitures," Century Dig. § 1; Decennial and Am. Dig. Key No. Series, § 2; "Statutes," Century Dig. § 348; Decennial and Am. Dig. Key No. Series, § 266.

DUNHAM v. ANDERS, 128 N. C. 207, 38 S. E. 832. 1901.

Action for a Penalty. Repeal of Statute Imposing the Penalty.

[Action by the state, ex rel. Dunham, against Anders, commenced before a justice of the peace. The justice gave judgment against Anders, who appealed to the Superior court. In the Superior court judgment was rendered against plaintiff, and he appealed. Reversed.]

The action was brought to recover a penalty under a statute. The plaintiff recovered a judgment for the penalty in the justice's court on March 25, 1899. Pending the appeal to the Superior court, to-wit, on March 2, 1901, the act imposing the penalty was repealed. This repealing act contains this clause: "This act shall apply to suits now pending for the collection of such penalties." The judge of the Superior court ruled that this statute "destroyed the plaintiff's cause of action and relieved the defendant of" the penalty.]

DOUGLAS, J. The only point presented for our consideration is whether a plaintiff can by a justice's judgment, remaining unreversed, acquire such a vested right in the penalty as cannot be taken from him by the legislature.

Cooley in his work on Constitutional Limitations, says at page 443: "So, as before stated, a penalty given by statute may be taken away by statute at any time before judgment is recovered." But the same distinguished author says at page 443: "But a vested right of action is property in the same sense in which tangible things are property, and is equally protected against arbitrary interference."

In the recent case of *Dyer v. Ellington*, 126 N. C. 941, 36 S. E. 177, this court says on page 944: "An informer has no natural right to the penalty, but only such a right as is given to him by the strict letter of the statute. It is not such a right as is intended to be *protected* by the act, but is one *created* by the act. *He has in a certain sense an inchoate right when he brings his suit*, that is, the bringing of the suit designates him as the man thereafter exclusively entitled to sue for that particular penalty; *but he has no vested right to the penalty until judgment*. Until it becomes vested, we think it can be destroyed by the legislature. *If the penalty had been reduced to judgment*, or had been given to the injured party in the nature of liquidated damages, *the case would be essentially different*."

In that case the act of remission was passed while the action was pending in the justice's court, *and before judgment*. *In the case at bar, the act was passed after judgment in the justice's court*, and while the action was pending on appeal in the Superior court. Upon the trial in the latter court, all the issues involved in the case before the magistrate were found for the plaintiff. It thus appears that no error was found in the justice's judgment, which neither was, nor could have been, reversed upon its original merits. It therefore stands in full force and effect, subject only to the plea in bar of the remitting statute, upon which alone the judge below based his judgment in favor of the defendant.

This brings us to the consideration of the nature of a judgment obtained before a justice of the peace, and the effect thereon of an

appeal to the Superior court. If such a judgment is a final judgment, that is, a judgment finally disposing of the subject-matter of the action, subject only to reversal on appeal, and remains in full force and effect until such reversal, notwithstanding the mere fact of appeal, then, in our opinion, it becomes a vested right of property in the plaintiff that cannot be divested except by a reversal on its original merits. In other words, the plaintiff cannot be divested of his property therein by merely legislative action.

Of course if the plaintiff had failed to recover before the justice of the peace, and had himself appealed, he would have had no vested right, as he would have had no judgment to which such a right could attach. He would have only a qualified right of action, exclusive as far as the particular penalty is concerned, but subject to loss by legislative interference. A judgment of a justice of the peace is a final judgment when it fully disposes of the subject-matter of the action, since, unless reversed on appeal, it finally determines the rights of the parties. An appeal to the Superior court does not vacate the judgment, nor even suspend its operation. Code, s. 875. [The North Carolina statutes and cases on judgments of justices of the peace are commented on, and the opinion proceeds:] We are, therefore, of the opinion that when the plaintiff obtained judgment for the penalty before the justice of the peace, he acquired a vested right of property that could be divested only by judicial, and not by legislative, proceedings.

On the issues found in the Superior court, judgment should have been rendered for the plaintiff, and its judgment is therefore reversed.

See also *Norris v. Crocker*, 13 Howard, 429. The principal case is approved in *Bray v. Williams*, 137 N. C. 387, 49 S. E. 887, which also holds that an act of the legislature repealing a penal law after action brought for the penalty, cannot be attacked upon the ground that it was introduced and passed through the efforts of the defendant who is sued for the penalty. The repealing act relieves the defendant of all costs in the absence of a contrary provision. *Ibid.* See "Constitutional Law," Century Dig. § 233; Decennial and Am. Dig. Key No. Series, § 164.

SEC. 2. WHEN BOTH CRIMINAL AND CIVIL ACTIONS LIE. MERGER.

"In all cases the crime includes an injury; every public offense is also a private wrong, and somewhat more; it affects the individual, and it likewise affects the community. Thus treason, in imagining the king's death, involves in it conspiracy against an individual, which is also a civil injury; but, as this species of treason in its consequences principally tends to the dissolution of government, and the destruction thereby of the order and peace of society, this denominates it a crime of the highest magnitude. Murder is an injury to the life of an individual; but the law of society considers principally the loss which the state sustains by

being deprived of a member, and the pernicious example thereby set for others to do the like. Robbery may be considered in the same view; it is an injury to private property; but were that all, a civil satisfaction in damages might atone for it; the public mischief is the thing, for the prevention of which our laws have made it a capital offense. In these gross and atrocious injuries the private wrong is swallowed up in the public; we seldom hear any mention made of satisfaction to the individual; the satisfaction to the community being so very great. And, indeed, as the public crime is not otherwise avenged than by forfeiture of life and property, it is impossible afterwards to make any reparation for the private wrong, which can only be had from the body or goods of the aggressor. But there are crimes of an inferior nature, in which the public punishment is not so severe, but it affords room for a private compensation also; and herein the distinction of crimes from civil injuries is very apparent. For instance: in the case of battery, or beating another, the aggressor may be indicted for this at the suit of the king, for disturbing the public peace, and be punished criminally by fine and imprisonment; and the party beaten may also have his private remedy by action of trespass for the injury which he in particular sustains, and recover a civil satisfaction in damages. So, also, in case of a public nuisance, as digging a ditch across a highway, this is punishable by indictment, as a common offense to the whole kingdom and all his majesty's subjects; but if any individual sustains any special damage thereby, as laming his horse, breaking his carriage, or the like, the offender may be compelled to make ample satisfaction, as well for the private injury as for the public wrong." 4 Blk. Com. *6.

BD. OF COMRS. v. WHITE WATER V. C. CO. AND COFFIN, 2 Ind. 162, 163. 1850.

Indictment and Civil Action for Same Offense.

[The plaintiffs sued the defendants in case founded on tort. Judgment against plaintiffs, who carried the case to the Supreme court by writ of error. Reversed.]

The declaration alleged, in substance, that the defendant had cut a canal across the public highways which were under the care of the plaintiffs, and which plaintiffs were bound to repair; that thereby the highways in question were rendered unfit for travel; that the plaintiffs had been forced to spend twenty thousand dollars for bridges, etc., in order to restore the highways. The defendants filed a general demurrer to the declaration, which demurrer was sustained in the court below. Only so much of the opinion is here inserted as bears upon the subject under consideration.]

BLACKFORD, J. . . . We see no substantial objection to the first count as respects the defendant, Coffin. By making the canal across said highways, he has, for aught that appears, created a public nuisance. He may be indicted for such nuisance, because of the injury it occasions to the public generally. 4 Bl. Com. 167;

R. S. p. 974. He is also liable, in a civil suit, to any person who may have sustained any special damage by the offense. Thus, where a person driving laden asses was delayed several hours in consequence of the defendant's keeping a gate shut across a highway, it was held that an action on the case would lie for the particular damage thus sustained. *Greasly v. Codling et al.*, 2 Bing. 263; see also *Martin v. Bliss*, 5 Blackf. 35. . . . Judgment reversed.

See "Highways," Century Dig. §§ 440, 444; Decennial and Am. Dig. Key No. Series, §§ 160, 163.

WHITE v. FORT, 10 N. C. 251, 262-265. 1824.

Merger of the Civil Into the Criminal Action.

[Trespass vi et armis for burning plaintiff's tavern and furniture. Verdict for plaintiff subject to the court's opinion on a point reserved. The court being of opinion that plaintiff could not maintain this action, because the charge against the defendant amounted to a *felony* for which the defendant had not been tried under an indictment, rendered judgment against the plaintiff. Plaintiff appealed. Reversed.]

It appeared in evidence that the tavern was situated a short distance from the house in which plaintiff and his family lived; that one of plaintiff's household slept in the tavern, and that travelers who became plaintiff's guests slept there; that the burning was done "privately in the night;" that plaintiff had preferred to the grand jury a bill of indictment against the defendant for arson in burning the house, which was returned "not a true bill;" and that no other criminal proceedings were had upon the charge.]

TAYLOR, C. J. The two objections taken to the plaintiff's recovery are that the civil trespass is merged in the felony, a prosecution for which ought first to have been regularly had to the conviction or acquittal of the defendant; and that the rejection of the bill by the grand jury is not a sufficient compliance with the law to enable the plaintiff to maintain the action.

It is difficult to ascertain with precision the source whence the doctrine of merger was derived. As it exists *only in those cases where forfeiture is the consequence of attainder or conviction*, a presumption is furnished that the primary object was to cause persons to prosecute crimes, and thereby to increase the resources of the crown; on the other hand, as forfeitures were annexed only to the higher crimes, treason and felony, the suppression of which was most essential to the peace and welfare of society, the civil remedy may have been suspended in order to prompt the injured to bring offenders to justice; not to increase the treasure of the sovereign, but to guard society against the effects of these more aggravated and, in early ages, more frequent offenses. Many offenses below the grade of felony are now more dangerous to society than many felonies; and when it is inquired why the civil remedy is not suspended in them until the offender is brought to trial criminally, the answer is, such offenses have grown out of

the artificial state of society, and were unknown to the rude simplicity of its early condition. In that, robbery and rapine were the crimes to be punished; in its more advanced stages, artifice and fraud.

Whatever may have been the origin of the rule, there are ample proofs scattered through the books of its having been a fixed rule of the common law before the period of our revolution; and that in cases of conviction trover or trespass would lie against the wrongdoer. The principle of the action is referred to the policy of effecting the punishment of felons, and preventing the injured party from compounding them. Lofft. 90. There are dicta, but no adjudged case, countenancing a suit after acquittal until that cited from 12 East. What is said in that case is so strong, and to my mind unanswerable, as to conclude the question. "All the cases which show that an action lies after the conviction of the defendant for the felony apply strongly in support of it after acquittal; for it is a stronger case to permit the party injured to proceed upon his civil remedy to recover damages after a conviction of the offender when the law has, by means of the forfeiture of his property consequent upon a conviction, taken away from him the means of satisfying the damages. Besides, when a defendant, after an acquittal of the felony, is called upon to make recompense in civil damages to the party grieved, it would be stranger for him to be permitted to allege that he was not properly acquitted than in the case it would be to allege that he had not been properly convicted. And here the defendant cannot say, against the record of acquittal, that this was a felony."

If this suspension of the remedy was the consequence of forfeiture alone, I should hold that it had no existence here; but I cannot satisfy myself that it is so. On the contrary, it appears to me to be one among the many inducements held out by the general policy of the criminal law for persons to prosecute. The rewards and immunities given to persons who bring offenders to justice, as well in cases where there is no forfeiture as where there is, afford abundant proofs of this policy. *I cannot think that forfeiture has had any force in this state since 1778, when it was declared what part of the common law should be in force here.* It is not probable that a prerogative should be designedly introduced which a most devoted, but at the same time an enlightened, supporter of the throne pronounced an "odious one." Lofft. 90. It was introduced originally to increase the king's ordinary revenue, a branch of which it constituted; and if such means of increasing the revenues of the state rightfully existed, it would not have been overlooked by the succession of able men who have filled the office of attorney general at different periods. Yet, with exceptions of the confiscations and attainders during the war, not a single instance has occurred in the memory of any one wherein a forfeiture has been exacted. Yet some unfortunate persons have fallen victims to the law, leaving wealth which is now enjoyed by their posterity. I lay no stress on the two acts which have been passed, suggested, no doubt, by the fears of relations and creditors

and obtained from abundant caution. They ought not to be considered as legislative declarations that forfeitures existed, for every one knows how little interest is taken in private acts generally.

As to the manner in which the injured party shall prosecute, it is vain to search the books, because instances of suit after acquittal have only recently occurred. All that good sense and reason seem to require is that the matter should be first heard and disposed of before a criminal tribunal. If the party prefer an accusation in good faith, although the bill should be rejected by the grand jury, he has done as much as he can towards prosecuting, and has satisfied the policy of the rule. In England he might have his appeal, but here he can do nothing more than has been done in this case. I think the plaintiff is entitled to judgment.

For valuable information on the subject of merger or suspension of the civil remedy where the injury amounted to a felony, see *Hyatt v. Adams*, 16 Michigan, at p. 185, and *B. & W. R. R. v. Dana*, 1 Gray, 83. The doctrine does not obtain as part of the common law in Massachusetts, 1 Gray, 83. See Bishop *Crim. Law* (8 Ed.), s. 267, for the confusion which exists in the common law as to the merger of the civil remedy into criminal prosecution. The *Revisal* of 1905, s. 353, abolishes the doctrine of merger in such cases. See, also, 1 Cyc. 681; 20 Am. & Eng. Enc. L. 600. See "Action," *Century Dig.* § 25; *Decennial and Am. Dig. Key No. Series*, § 5.

SEC. 3. CHANGE OF REMEDY BY STATUTE.

BRONSON v. KINZIE, 1 Howard (U. S.) 311, 315, 317, 318-320. 1843.

To What Extent the Legislature May Change the Remedy.

[In 1838 Kinzie made a mortgage to Bronson. In February, 1841, the legislature passed an act allowing mortgagors and their judgment creditors to redeem lands sold under decree of foreclosure, upon certain terms. Bronson had filed a bill for foreclosure before the act of 1841 was passed. The case went to the supreme court upon a division of opinion. The question presented is: Was the act of 1841 a *valid* change in the remedy. Only a portion of the opinion is here inserted.]

TANEY, C. J. . . . If the laws of the state passed afterwards had done nothing more than change the remedy upon contracts of this description, they would be liable to no constitutional objection. For, undoubtedly, a state may regulate at pleasure the modes of proceeding in its courts in relation to past contracts as well as future. It may, for example, shorten the period of time within which claims shall be barred by the statute of limitations. It may, if it thinks proper, direct that the necessary implements of agriculture, or the tools of the mechanic, or articles of necessity in household furniture, shall, like wearing apparel, not be liable to execution on judgments. Regulations of this description have always been considered, in every civilized community, as properly

belonging to the remedy, to be exercised or not by every sovereignty, according to its own views of policy and humanity. It must reside in every state to enable it to secure its citizens from unjust and harassing litigation, and to protect them in those pursuits which are necessary to the existence and well-being of every community. And, although a new remedy may be deemed less convenient than the old one, and may in some degree render the recovery of debts more tardy and difficult, yet it will not follow that the law is unconstitutional. Whatever belongs merely to the remedy may be altered according to the will of the state, provided the alteration does not impair the obligation of the contract. But if that effect is produced, it is immaterial whether it is done by acting on the remedy or directly on the contract itself. In either case it is prohibited by the constitution. . . .

It is difficult, perhaps, to draw a line that would be applicable in all cases between legitimate alterations of the remedy, and provisions which, in the form of remedy, impair the right. But it is manifest that the obligation of the contract, and the rights of a party under it, may, in effect, be destroyed by denying a remedy altogether; or may be seriously impaired by burdening the proceedings with new conditions and restrictions, so as to make the remedy hardly worth pursuing. And no one, we presume, would say that there is any substantial difference between a retrospective law declaring a particular contract or class of contracts abrogated and void, and one which takes away all remedy to enforce them, or encumbers it with conditions that render it useless or impracticable to pursue it. . . .

We proceed to apply these principles to the case before us. According to the long-settled rules of law and equity in all of the states whose jurisprudence has been modeled upon the principles of the common law, the legal title to the premises in question vested in the complainant upon the failure of the mortgagor to comply with the conditions contained in the proviso; and at law he had a right to sue for and recover the land itself. But in equity this legal title is regarded as a trust estate, to secure the payment of the money; and, therefore, when the debt is discharged, there is a resulting trust for the mortgagor. *Conard v. The Atlantic Ins. Co.*, 1 Pet. 441. It is upon this construction of the contract that courts of equity lend their aid either to the mortgagor or mortgagee, in order to enforce their respective rights. The court will, upon the application of the mortgagor, direct the reconveyance of the property to him, upon the payment of the money; and, upon the application of the mortgagee, it will order a sale of the property to discharge the debt. But, as courts of equity follow the law, they acknowledge the legal title of the mortgagee, and never deprive him of his right at law until his debt is paid; and he is entitled to the aid of the court to extinguish the equitable title of the mortgagor, in order that he may obtain the benefit of his security. For this purpose, it is his absolute and undoubted right, under an ordinary mortgage deed, if the money is not paid at the appointed day, to go into the court of chancery and obtain its

order for the sale of the whole mortgaged property (if the whole is necessary), free and discharged from the equitable interest of the mortgagor. This is his right by the law of the contract; and it is the duty of the court to maintain and enforce it, without any unreasonable delay.

When this contract was made, no statute had been passed by the state changing the rules of law or equity in relation to a contract of this kind. None such, at least, has been brought to the attention of the court; and it must, therefore, be governed, and the rights of the parties under it measured, by the rules above stated. They were the laws of Illinois at the time; and, therefore, entered into the contract and formed a part of it, without any express stipulation to that effect in the deed. Thus, for example, there is no covenant in the instrument giving the mortgagor the right to redeem, by paying the money after the day limited in the deed and before he was foreclosed by the decree of the court of chancery: yet no one doubts his right or his remedy, for, by the laws of the state then in force, this right and this remedy were a part of the law of the contract, without any express agreement by the parties. So, also, the rights of the mortgagee, as known to the law, required no express stipulation to define or secure them. They were annexed to the contract at the time it was made, and formed a part of it; and any subsequent law, impairing the rights thus acquired, impairs the obligation which the contract imposed.

This brings us to examine the statutes of Illinois which have given rise to this controversy. As concerns the law of February 19, 1841, it appears to the court not to act merely on the remedy, but directly upon the contract itself, and to engraft upon it new conditions injurious and unjust to the mortgagee. It declares that, although the mortgaged premises should be sold under the decree of the court of chancery, yet that the equitable estate of the mortgagor shall not be extinguished, but shall continue for twelve months after the sale; and it moreover gives a new and like estate, which before had no existence, to the judgment creditor, to continue for fifteen months. If such rights may be added to the original contract by subsequent legislation, it would be difficult to say at what point they must stop. An equitable interest in the premises may, in like manner, be conferred upon others; and the right to redeem may be so prolonged as to deprive the mortgagee of the benefit of his security, by rendering the property unsalable for anything like its value. This statute gives to the mortgagor and to the judgment creditor an equitable estate in the premises, which neither of them would have been entitled to under the original contract; and these new interests are directly and materially in conflict with those which the mortgagee acquired when the mortgage was made. Any such modification of a contract by subsequent legislation, against the consent of one of the parties, unquestionably impairs its obligations, and is prohibited by the constitution.

The second point certified arises under the law of February 27, 1841. The observations already made in relation to the other act

apply with equal force to this. It is true that this law apparently acts upon the remedy, and not directly upon the contract. Yet its effect is to deprive the party of his pre-existing right to foreclose the mortgage by a sale of the premises, and to impose upon him conditions which would frequently render any sale altogether impossible. And this law is still more objectionable, because it is not a general one, and prescribing the mode of selling mortgaged premises in all cases, but is confined to judgments rendered, and contracts made, prior to the 1st of May, 1841. The act was passed on the 27th of February in that year; and it operates mainly on past contracts, and not on future. If the contracts intended to be affected by it had been specifically enumerated in the law, and these conditions applied to them, while other contracts of the same description were to be enforced in the ordinary course of legal proceedings, no one would doubt that such a law was unconstitutional. Here a particular class of contracts is selected, and incumbered with these new conditions; and it can make no difference, in principle, whether they are described by the names of the parties, or by the time at which they were made. . . .

See *Myers v. K. Trust Co.*, 139 Fed. 111, 1 L. R. A. (N. S.) 1171, and note; *Harrison v. R. Paper Co.*, 140 Fed. 385, 3 L. R. A. (N. S.) 954, and note; *Best v. Baumgardner*, 1 L. R. A. 356, and note; 4 Rose Notes, 253 et seq.; 8 Cyc. 995, and notes

CHAPTER III.

REMEDIES CONCERNING REAL ESTATE.

SEC. 1. WRITS OF ENTRY, ASSIZE AND RIGHT.

DEN v. MORRIS, 7 New Jersey Law, 6, 7-10. 1822.

Writs of Entry and Assize Explained.

[This was an action of ejectment. In the course of the opinion is the following discourse on the ancient writs of Entry and Assize.]

KIRKPATRICK, C. J. . . . By the common law, estates of freehold in lands passed by livery of seisin only; that is, by a delivery over of the actual possession. He, therefore, who was in the actual possession of land, was, *prima facie*, the tenant of the freehold, and had in him the heritable seisin *facit stipitem*. If he were ousted or dispossessed of this freehold, by one who had no right, he might, without process of law, make a peaceable entry, or, if deterred from that, he might make claim from year to year, which was called continual claim, as near the land as he could, and such entry or claim restored him to his lawful seisin, and made him capable again of conveying, transmitting either by descent or purchase. This right of entry, though it might be tolled or taken away by a descent cast, and so, generally speaking, must be pursued during the life of him that made the ouster, or be forever lost, yet it was limited to no particular period or number of years; so that if it was not actually lost by descent or otherwise, the lawful owner might, at all times, restore himself by entering upon the wrongdoer, in a peaceable manner, and turning him out, but if he suffered it to be once lost, he could no longer restore himself by his own act, but must have recourse to his action at law. And, indeed, even where it was not lost, as it but seldom happened that the wrongdoer would tamely submit to be turned out without force, the owner, if his object was to gain the actual possession and enjoyment of the land, and not merely to put himself in the capacity to make a lawful conveyance, was generally obliged to have recourse to such action, and to call to his aid the process of the law, to restore to him that right which he could not obtain by peaceable means without it; so that, in most cases it may be said, he was put to his action, even when his right of entry was not tolled or taken away.

This action might be, in the first place, by Writ of Entry, in which he undertook to prove his own former possession, and that the defendant, or some one under whom he held, had dispossessed

him; to which the defendant might answer by denying the fact of the dispossession, or by showing in himself an older and a better possession; and then, upon the trial, it was adjudged for him who had the clearest right; or it might be, in the second place, after the reign of Henry II., by Writ of Assize, which went upon the suggestion, that the demandant's ancestor had died in possession, and that he was the next heir; and therefore directed the sheriff to inquire, by a jury, whether this were so, and, if found for the demandant, the land was immediately restored. But still, even if the demandant prevailed in these actions, *it only restored to him his former possession, it decided nothing with respect to the right of property*; all that he had to show, in order to maintain his suit, was the possession of himself or his ancestor, and this might be overcome by the defendant showing an older and a better possession; for it never was pretended that the demandant's must be such a possession as established the ultimate right: for this, either party might afterwards resort to his Writ of Right. In these *possessory actions*, therefore, neither the deed of feoffment, by which the estate was created, nor the actual livery of seisin upon such deed were necessarily given in evidence, but the mere possession only. And so also after the 29 Car. II., which directed that all conveyances of land should be in writing, and not otherwise, it was not necessary, upon the same principle, to give the writing in evidence, and the reason was that the deed of feoffment and livery of seisin thereupon, in ancient times, and the written conveyance under the statute, related to and were evidence of, the commencement of the estate, and of the ultimate right only, which was not at all in question; but that they could be no proof of the actual and subsequent possession upon which the ouster was alleged to have been committed, and which was the foundation of those possessory actions, and the only thing to be proved in them, or recovered by them. It is true that those might be given in evidence, and might greatly strengthen the proof of possession, but they were not essential to the maintenance of the action; that depended upon the mere possession.

To these real actions for the recovery of the possession of lands, succeeded, in common use, the action of ejectment. This was not originally devised as a remedy for injuries done to real estates, that is, to estates of freehold in land, but as a remedy for injuries done to chattels real, such as terms for years, which were considered as mere chattel interests. But then, as one who came into a court of justice to complain that he had been ousted of his term, must necessarily show that such term existed, and that the lease under which he claimed was a good and valid lease, and, of course, that the lessor had a right to make it, the title of the lessor was thereby brought into question, as fully and upon the same principles as it would have been in the real action; so that though the action of ejectment got clear of all the intricacy and perplexity of the real action, and so became an easy and expeditious method of trying the title to land, yet it required precisely the same proof of title

in substance as the real action did. For though the form of action may have been changed, yet the great principles of right have not been changed, nor can they be without a total subversion of the whole system of property in land. In a real action, the demandant must show his possession, his ouster, and his right to re-enter; in an ejectment, the lessor of the plaintiff must show the very same thing—he must show that he has been in possession of the land; that it is now withholden from him, which is an ouster; and that he had a right to re-enter and make the lease in question. I say he must show those things, for the lease, entry and ouster, which are confessed, are the mere form of the action, and have nothing to do with the substantial right. The title, therefore, which the lessor of the plaintiff, by the consent rule, is bound to rest upon, and which he is obliged to make out at the trial, is his right of entry (for if he had this right, it is always confessed that he had a right to make, and did make the lease) a right which, upon the principles of the common law, necessarily results from his having had an anterior and peaceable possession of the lands in question, and their being now withholden from him by the defendant; a right to which cannot be overcome by any subsequent possession, unless it has been tolled or taken away in the manner before mentioned, or is restrained by the statutes of limitation. . . .

See "Entry, Writ of," Century Dig. § 1; Decennial and Am. Dig. Key No. Series, § 1; "Ejectment," Century Dig. §§ 30-40; Decennial and Am. Dig. Key No. Series, § 10.

GREEN v. LITER, 8 Cranch, 229, 244. 1814.

Writ of Right Explained.

[Writ of right brought by Green, the demandant, against the tenants to recover seisin of lands in Kentucky. The writ was sued out under the Virginia statute regulating the practice in such cases. The case was carried to the supreme court of the United States, from the United States circuit court for the Kentucky district, upon a division of the lower court upon certain questions of law. In the opinion appear the following observations upon the ancient Writ of Right.]

STORY, J. . . . The fifth question is that which has been deemed most important; and to this the counsel on each side have directed their efforts with great ability.

It is clear, by the whole current of authority, that actual seizin, or seizin in deed, is, at common law, necessary to maintain a Writ of Right. Nor is this peculiar to actions on the mere right. It equally applies to writs of entry; and the language of the court, in both cases, is, that the demandant, or his ancestor, was, within the time of limitation, seized in his demesne as of fee, etc., taking the esplees, etc. It is highly probable that the foundation of this rule was laid in the earliest rudiments of titles at the common law. It is well known that, in ancient times, no deed

or charter was necessary to convey a fee simple. The title, the full and perfect dominion, was conveyed by a mere livery of seizin in the presence of the vicinage. It was the notoriety of this ceremony, performed in the presence of his peers, that gave the tenant his feudal investiture of the inheritance. Deeds and charters of feoffment were of later age; and were held not to convey the estate itself, but only to evidence the nature of the conveyance. The solemn act of livery of seizin was absolutely necessary to produce a perfect title, or, as Fleta calls it, *juris et seisinæ conjunctio*. But whatever may be its origin, the rule as to the actual seizin has long since become an inflexible doctrine of the common law.

It has been argued, that the act of Virginia, of 1786, c. 27, meant in this respect to change the doctrine of the common law, because that act has given the form of the count in a writ of right, and omits any allegation of seizin and taking esplees. There is certainly some countenance in the act for the argument. But, on mature consideration, we are of the opinion that it cannot prevail. The form of joining the mise in a writ of right, is also given in the same act; and that form includes the same inquiry, namely, "which hath the greater right," as the forms at common law. It would seem to follow that the legislature did not mean to change the nature of the facts which were to be inquired into, but only to provide a more summary mode of proceeding. The clause in the same act allowing any special matter to be given in evidence on the mise joined, may also be called in aid of this construction. That clause certainly shows that it was not intended to relieve the demandant from the effect of any existing bar; and want of seizin was, at common law, a fatal bar. The statute of limitations of Virginia, of 19th December, 1792, c. 77, which, as to this point, is a revisal of the old statute, limits a writ of right upon ancestral seizin, to fifty years, and upon the demandant's own seizin, to thirty years next before the teste of the writ. It is, therefore, incumbent on the demandant to prove a seizin within the time of limitation; otherwise, he is without remedy; and if so, it must be involved in the issue joined on the mere right. We are therefore of opinion, that the act of 1786 did not mean to change the nature of the inquiry as to the titles of the parties, but merely to remedy some of the inconveniences in the modes of proceeding.

If then an actual seizin or seizin in deed be necessary to be proved, it becomes material to inquire what constitutes such a seizin. It has been supposed, in argument, that an actual entry under title, and perception of esplees were necessary to be proved in order to show an actual seizin. But this is far from being true, even at the common law. There are cases in which there is a constructive seizin in deed, which is sufficient for all the purposes of action in legal intendment. In Hargrave's note, 3 Co. Litt. 29. a. it is said, that an entry is not always necessary to give a seizin in deed; for if the land be in lease for years,

curtesy may be without entry or even receipt of rent. The same is the doctrine as to a seizin in a case of *possessio fratris*. So if a grantee or heir of several parcels of land in the same county enter into one parcel in the name of the whole, where there is no conflicting possession, the law adjudges him in the actual seizin of the whole. Litt. s. 417, 418. In like manner, if a man have a title of entry into lands, but dare not enter for fear of bodily harm, and he approach as near the land as he dare, and claim the land as his own, he hath presently, by such claim, a possession and seizin in the lands, as well as if he had entered in deed. Litt. s. 419. And livery within view of the land will, under such circumstances, give the feoffee a seizin in deed as effectually as an actual entry. There are, therefore, cases in which the law gives the party a constructive seizin in deed. They are founded upon this plain reason, that either the claim is made sufficiently notorious by an actual entry into part, of which the vicinage can take notice, or the party has done all that, under the circumstances of the case, he was bound to do. *Lex non cogit sen ad vana aut impossibilia*. The same is the result of conveyances deriving their effect under the statute of uses; for there, without actual entry or livery of seizin, the bargainee has a complete seizin in deed: Com. Dig. Uses (B. 1.) (I.), Cro. Eliz. 46; 1 Cruise Dig. 12; Shep. Touch. 223, &c. Harg. Co. Litt. 271, note. And the Kentucky act respecting conveyances, which is, in substance, like the statute of uses, gives to private deeds the same legal effect.

It has, however, been supposed, in argument, that not only an actual seizin or complete investiture of the land, but also a perception of the profits, or, as it is technically called, a taking of the *esplees*, is absolutely necessary to support a writ of right. It cannot, however, be admitted that the taking of the *esplees* is a traversable averment in the count. It is but evidence of the seizin; and the seizin in deed once established, either by a *pedis positio*, or by construction of law, the taking of *esplees* is a necessary inference of law. If, therefore, a seizin be established, although the land be leased for a term of years, and thereby the profits belong to the tenant, still, the legal intendment is that the *esplees* follow the seizin. And so it would be, although a mere trespasser, without claiming title, should actually take the profits during the time of the seizin alleged and proved. And, indeed, of certain real property, as a barren rock, a complete seizin may exist without the existence of *esplees*.

The result of this reasoning is, that wherever there exists the union of title and seizin in deed, either by actual entry and livery of seizin, or by intendment of law, as by conveyances under the statute of uses, or in the other instances which have been before stated, there the *esplees* are knit to the title, so as to enable the party to maintain a writ of right. And it will be found extremely difficult to maintain that a deed, which, by the *lex loci*, conveys a perfect title to waste and vacant lands, without further

ceremony, will not yet enable the grantee to support that title by giving him the highest remedy applicable to it, without an actual entry.

And this leads us to say, that even if, at common law, an actual *pedis positio*, followed up by an actual perception of the profits, were necessary to maintain a writ of right, which we do not admit, the doctrine would be inapplicable to the waste and vacant lands of our country. The common law itself, in many cases, dispenses with such a rule; and the reason of the rule itself ceases when applied to a mere wilderness. The object of the law in requiring actual seizin was to evince notoriety of title to the neighborhood, and the consequent burdens of feudal duties. In the simplicity of ancient times there were no means of ascertaining titles but by the visible seizin; and, indeed, there was no other mode, between subjects, of passing title, but livery of the land itself by the symbolical delivery of turf and twig. The moment that a tenant was thus seized, he had a perfect investiture; and if ousted, could maintain his action in the realty, although he had not been long enough in possession even to touch the esplees. The very object of the rule, therefore, was notoriety, to prevent frauds upon the lord and upon the other tenants. But in a mere uncultivated country, in wild and impenetrable woods, in the sullen and solitary haunts of beasts of prey, what notoriety could an entry, a gathering of a twig or an acorn, convey to civilized man at the distance of hundreds of miles? The reason of the rule could not apply to such a state of things; and *cessante ratione, cessat ipsa lex*. We are entirely satisfied that a conveyance of wild or vacant lands gives a constructive seizin thereof, in deed, to the grantee, and attaches to him all the legal remedies incident to the estate. A fortiori, this principle applies to a patent; since, at the common law, it imports a livery in law. Upon any other construction, infinite mischiefs would result. Titles by descent and devise, and by purchase, where the parties from whom the title was derived were never in actual seizin, would, upon principles of the common law, be utterly lost. . . .

"The mise joined in a writ of right necessarily involves the titles of both parties to the suit and institutes a comparison between them. It is consequently the right of each party to put any fact in evidence which destroys the title of the other; for the question in controversy is, which hath the better mere right to hold the demanded premises. . . . Among the best established doctrines of the common law is, that seizin in deed either by possession of the land and perception of the profits, or by construction of law, is indispensable to enable the demandant to maintain his suit. The tenant may, therefore, show in his defense, that the demandant had no such actual seizin; for the seizin of the freehold by the tenant, which is admitted by the bringing of the suit against him, is a sufficient title for the tenant until the demandant can show a better title." *Green v. Watkins*, 7 Wheat. *30. See as to "*Assize of Novel Disseizin*," *Den v. Craig*, 15 N. J. L. 191. See further as to these ancient and obsolete remedies, 3 Blk. C. 10. See "*Real Actions*," *Century Dig.* §§ 1-17; *Decennial and Am. Dig. Key No. Series*, §§ 1-3.

SEC. 2. EJECTMENT PRIOR TO THE CODE PRACTICE.

“The action of ejectment is a fictitious mode of legal proceeding by which almost all titles to lands and tenements may be tried, and possession obtained by the party entitled to it. It is termed a mixed action, being real in respect of the lands, but personal in respect of the damages and costs. It is also deemed a possessory action, because it is founded on the right to the possession of the premises in dispute. In the earlier period of our history, the only mode of recovering the possession of lands wrongfully withheld was by a real action or writ of assize, which were applicable only to freehold titles, estates for years being then considered only a precarious possession, and as not transferring to the lessee any title to the land; the only remedy which a lessee had, in case he was wrongfully ousted by the lessor, was by a writ of covenant on the breach of contract, whereby he was enabled to recover his term as well as damages, if ousted by the lessor; but if dispossessed by any person claiming under the lessor, he could recover damages only from the lessor for a breach of the covenant, but not the possession of the land from which he was ousted.

“As a writ of covenant lay only between the immediate parties to the grant, if the lessee was ejected by a stranger, his remedy was by a writ of *ejectione firmæ*, which was a mere personal action of trespass, whereby he was enabled to recover damages only, the true measure of which was the mesne profits but not the term, though in such a case the landlord himself might recover the possession by a real action. In progress of time, however, when agricultural interest became a subject of legislative regard, a full remedy was provided for the lessee, by the introduction of the writ of *quare ejectionis terminum*, whereby the lessee was enabled to recover both his term and damages from any person whatsoever that ousted him. It is upon this writ that the modern action of ejectment is founded. The precise period when this remedy was adopted is not satisfactorily ascertained, but all the authorities agree that it was between the years 1455, in the reign of Hen. VI. and 1499, in the reign of Hen. VII. ‘The action of ejectment,’ said Lord MANFIELD, C. J., ‘is the creature of Westminster Hall, introduced within the time of memory and moulded gradually into a course of practice by the rules of the courts.’

“As originally a term for years only could be recovered in an action of ejectment, in order to convert it into a method of trying freehold titles, it was necessary that a term should be created. To obtain that requisite, the party claiming a right to the possession entered upon the premises in dispute, and there sealed a lease for years, which he delivered to another person who accompanied him. An actual entry was necessary, for, according to the old law, it would be maintenance if a person not in possession conveyed a

title to another. The lessee having acquired a right to the possession by means of the lease, remained upon the land, and then the person who came next upon the freehold *animo possidendi*, or by accident or by agreement beforehand, was accounted an ejector of the lessee, and a trespasser on his possession. An action of ejectment was then commenced against the person in possession or the party so entering, who was denominated the casual ejector. But as the person in possession might thus be deprived of his lands without having any opportunity of defending his title, when the action was instituted against any other person than himself, it was made a standing rule of court, that the plaintiff should not proceed against the casual ejector without serving the party in possession with notice of the proceedings or a copy of the declaration. The party in possession having received such notice might, upon application to the court, defend the suit in the name of the casual ejector, if he thought proper, and if he neglected to do so, the suit proceeded against the casual ejector. When the cause came on to be tried, the plaintiff was obliged to prove the lessor's title, since his own depended upon it. He was also obliged to prove the lease, his own entry on the premises, and his ouster by the defendant. The claimant's title was thus indirectly determined. In form an ejectment has been not inaptly described, 'an ingenious fiction for the trial of title to the possession of lands; it appears as a trick between two to dispossess a third by a sham suit and judgment, an artifice which would be highly criminal, unless the court converted it into a fair trial with the proper party.'

"The proceedings in ejectment continued to be conducted in the manner above described until the time of Lord Chief Justice ROLLE, who presided in the court of upper bench, so called during the protectorate, by whom a new method was invented of trying titles by ejectment, without resorting to the troublesome, and sometimes inconvenient formalities which attended the actual making of the lease, entry and ouster. By the new method, the suit is conducted in fictitious names, and all the preliminaries required by the ancient practice are feigned, for no lease is sealed, no entry or ouster is actually made; the process consists entirely of a string of legal fictions." Leigh's *Nisi Prius*, vol. 2 p. *819.

In 3 Burrows, 1294, Lord MANSFIELD said: "An ejectment is an ingenious fiction, for the trial of titles to the possession of land. In form, it is a trick between two, to dispossess a third by a sham suit and judgment. The artifice would be criminal unless the court converted it into a fair trial with the proper party. The control the court have over the judgment against the casual ejector enables them to put any terms upon the plaintiff, which are just. He was soon ordered to give notice to the tenant in possession. When the tenant in possession asked to be admitted defendant, the court was enabled to add conditions; and therefore obliged him to allow the fiction, and to go to trial upon the real merits. It might happen, that the tenant in possession was a mere farmer at will. He was bound to give notice to his land-

lord. The same reason, of a fair trial with the proper party, required the landlord to be admitted defendant; with the tenant, if he was amicable, or without him, if he, contrary to the duty of his relation, should betray the cause. There can be no ground for admitting the landlord to be a co-defendant, which does not hold to his defending alone in case the other abandons. The plaintiff ought not to recover by collusion with one, to the prejudice of a third: he ought not to recover, without a trial with the person interested in the question and affected by the judgment. Every point relative to the proceeding in ejectments is of consequence. I am glad we have this occasion."

FORMS:

DECLARATION IN EJECTMENT ON A SINGLE DEMISE. (Eaton's Forms, 196.)

North Carolina,
Warren County.

Superior Court of Law,
Spring Term, 1848.

Richard Roe was attached to answer John Doe of a plea, wherefore the said Richard Roe, with force and arms, entered into a certain messuage and tract of land, containing five hundred acres, situate in the county of Warren aforesaid, and bounded as follows, to-wit: (boundaries), which A. B. had demised to the said John Doe for a term which is not expired, and ejected him from his said farm, and other wrongs to him then and there did, etc. And thereupon the said John Doe, by J. S., his attorney, complains: That whereas the said A. B., on the first day of January, A. D. 1848, in the county aforesaid, had demised to said John Doe the said tenement, to have and to hold the same to him and his assigns, from thenceforth, for and during, and unto the full end and term of, twenty-one years thence next ensuing. By virtue of which demise, the said John Doe entered into the said tenement, and became and was possessed thereof for the said term so to him thereof granted. And the said John Doe, being so thereof possessed, the said Richard Roe, afterwards, to-wit, on the day and year aforesaid, with force and arms, entered into the said tenement in which the said John Doe was so interested, in manner and for the term aforesaid, which is not yet expired, and ejected the said John Doe from his said farm, and other wrongs to him then and there did, to the great damage of the said John Doe, and against the peace of the state. Wherefore the said John Doe saith, that he is injured and hath sustained damage to the value of fifty dollars, and therefore he brings suit, etc. Signed: J. S., Plaintiff's Attorney.

NOTICE TO TENANT IN ACTUAL POSSESSION OF PREMISES. (Eaton 200.)

Mr C. D.: I am informed that you are in possession of, or claim title to the premises in this declaration of ejectment, or to some part thereof, and I being sued in this action as a casual

ejector only, do advise you to appear in the Superior Court of Law of Warren county, at the term to be held at the court house in Warrenton, on the third Monday after the fourth Monday of March, 1849, then and there, by rule of said court, to cause yourself to be made defendant in my stead; otherwise I shall suffer judgment to be entered by default against me, and you will be turned out of possession. Yours, etc., Richard Roe.

Dated this 15th day of January, A. D. 1849.

PROSECUTION BOND TO BE GIVEN BY PLAINTIFF'S LESSOR. (Eaton, 201.)

Know all men by these presents, that we, A. B. and E. F., are held and firmly bound unto J. S., clerk of the Superior court of Warren county, in the sum of five hundred dollars, for the payment whereof, we bind ourselves, our heirs, executors and administrators. Sealed with our seals, and dated this 15th day of April, A. D. 1849.

The condition of this obligation is such, that whereas a declaration in ejectment in the name of John Doe, on the demise of A. B., against Richard Roe, with a notice to C. D. as tenant in possession, has been returned by the sheriff of Warren County to the Spring Term, 1849, of said court; now if the said A. B. shall prosecute the same with effect, or otherwise pay all such costs and damages as shall be awarded on failure thereof, then the said obligation is to be void, otherwise to remain in full force and effect. (Signatures and seals.)

CONSENT RULE. (Eaton, 202.)

North Carolina,
Warren County.

Superior Court of Law,
Spring Term, 1849.

John Doe, on the demise of A. B. v. Richard Roe.

It is ordered by the consent of the attorneys of both parties, that C. D. be made defendant in the stead of the now defendant Richard Roe, and do forthwith appear at the suit of the plaintiff, and receive a declaration in an action of trespass and ejectment for the premises in question. And it is further ordered by the like consent, that the said C. D. shall forthwith plead not guilty thereto; and on the trial of the issue shall confess lease, entry and ouster, and insist on his title only; otherwise that judgment be entered for the plaintiff against the said Richard Roe by default. And if on the trial of the said issue the said C. D. shall not confess lease, entry and ouster, whereby the plaintiff shall not be able further to prosecute his suit against the said C. D., then no costs shall be allowed for not further prosecuting the same, but the said C. D. shall pay costs to the plaintiff in that case, to be taxed by the clerk. And it is further ordered, that if, on the trial of the said issue, a verdict shall be given for the said C. D., or it shall happen that the plaintiff shall not further prosecute his said suit for any other cause than for not confessing lease,

entry and ouster as aforesaid, then the lessor of the plaintiff shall pay the said C. D. his costs in that case to be adjudged.

(Signed) E. F., Attorney for Plaintiff.
G. H., Attorney for Defendant.

AFFIDAVIT OF SERVICE OF DECLARATION. (Eaton, 203.)

(Title of case as above.)

J. S., sheriff of Warren County, maketh oath, that on the 10th day of February, 1849, he did personally serve C. D., the tenant in the actual possession of the premises mentioned in the declaration of ejectment hereunto annexed, with a true copy of the said declaration, and of the notice thereunder written, and at same time read over to him the said notice, and explained to him the intent and meaning of the said declaration and notice, and of the service thereof.

PLEA IN EJECTMENT. (Eaton, 252.)

C. B., defendant, ats. John Doe, on the demise of A. B., plaintiff.

And the said defendant, by E. F., his attorney, comes and defends the force and injury, when etc., and says, that he is not guilty of the said supposed trespass and ejectment above laid to his charge, or any part thereof, in manner and form as the said John Doe hath above complained, and of this he puts himself upon the country.

BOND OF DEFENDANT BEFORE HE IS ALLOWED TO PLEAD. (Eaton, 254.)

(Title of the case.)

Know all men by these presents, that we, C. D. and E. F., are held and firmly bound unto John Doe in the sum of two hundred dollars, for the payment whereof we bind ourselves, our heirs, executors and administrators. Sealed with our seals and dated this 23d day of November, 1858.

The condition of this obligation is such, that whereas a declaration in ejectment, in the name of the said John Doe, on the demise of A. B., against Richard Roe, with a notice to said C. D. as tenant in possession, has been served upon the said C. D. by the sheriff of Warren County, and returned to November Term, 1858, of the Court of Pleas and Quarter Sessions of said county, and the said C. D. desires to be made a defendant in said action according to law; now if the said C. D. shall answer said action, and abide by the judgment which may be rendered therein, then the said obligation is to be void, otherwise to remain in full force and effect. (Signed and sealed by C. D. and E. F.).

VERDICT AND JUDGMENT FOR PLAINTIFF. (Eaton, 297.)

(Title of the case.)

The following jurors, to-wit (name them), being chosen, tried and sworn to speak the truth of the matter within contained, say,

that the defendant is guilty of the trespass and ejectment in the declaration mentioned, and they assess the plaintiff's damages by reason thereof to sixpence. Therefore it is considered that the said John Doe do recover against the defendant his term yet to come of and in the tenements specified in the declaration, and also his said damages and costs of suit. And the said plaintiff prays for a writ of possession accordingly, which is granted unto him.

VERDICT AND JUDGMENT FOR DEFENDANT. (Eaton, 299.)

(Title of the case.)

The following jurors, to-wit (——), being chosen, tried and sworn to speak the truth of and concerning the issue joined between the parties, say, that the defendant is not guilty of the trespass and ejectment laid to his charge, in manner and form as the plaintiff hath complained. Therefore it is considered that the plaintiff take nothing by his writ, and that the defendant do recover against the plaintiff's lessor, and also against E. F., the surety for the prosecution, his costs of suit.

DECLARATION IN TRESPASS FOR MESNE PROFITS. (Eaton, 210.)

(Title of the case.)

C. D. was attached to answer A. B., of a plea of trespass with force and arms, etc. And thereupon the said plaintiff, by E. F., his attorney, complains, for that the said defendant, heretofore, to-wit, on the first day of May, 1848, with force and arms, broke and entered into a certain messuage, close and tract of land of the said plaintiff, situate in the county of Warren aforesaid, and bounded as follows, to-wit (——), and containing five hundred acres, and ejected, expelled and removed the said plaintiff from his possession and occupation thereof, and kept him so expelled and removed for a long time, to-wit, from thenceforth, until the first day of January, 1850, and during that time took and received to the use of the said defendant, all the issues and profits thereof, being of great yearly value, to-wit, of the value of one hundred and fifty dollars. Whereby the said plaintiff, during all that time, not only lost the issues and profits of the said tenement, with the appurtenances, but was deprived of the use and means of cultivating the same, and was forced to, and did necessarily, lay out and expend a large sum of money, to-wit, the sum of fifty dollars, in and about the recovery of the possession of the said tenement, with the appurtenances, to-wit, in the county aforesaid. And other wrongs to the said plaintiff then and there did against the peace of the state, and to the damage of the said plaintiff of four hundred dollars, and therefore he brings suit.

PLEA OF TRESPASS FOR MESNE PROFITS. (Eaton, 255.)

(Title of the case.)

And the said defendant, by E. F., his attorney, comes and defends the force and injury, when etc., and says, that he is not

guilty of the said supposed trespasses above laid to his charge, or any or either of them, or any part thereof, in manner and form as the said plaintiff hath complained. And of this he puts himself upon the country.

And for a further plea in this behalf, the said defendant says, that the said plaintiff ought not to have or maintain his aforesaid action against him, because he says, that the several supposed causes of action in the declaration mentioned, did not, nor did any or either of them accrue to the said plaintiff, at any time within three years next before the commencement of this suit, in manner and form as the said plaintiff hath above complained: and this he is ready to verify. Wherefore he prays judgment, if the said plaintiff ought to have or maintain his aforesaid action against him.

VERDICT AND JUDGMENT IN TRESPASS FOR MESNE PROFITS. (Eaton, 300.)

(Title of the case.)

The following jurors, to-wit (—), being chosen, tried and sworn to speak the truth of and concerning the issues joined between the parties, as to first of said issues, say, that the defendant is guilty of the trespasses laid to his charge, in manner and form as the plaintiff hath complained; and as to the second of said issues, they say, that the causes of action in the declaration mentioned did accrue to the plaintiff within three years next before the commencement of this suit; and they assess the plaintiff's damages, by reason of the trespasses aforesaid, to one hundred and fifty dollars. Therefore it is considered that the plaintiff do recover against the defendant his damages aforesaid, with interest thereon from the first day of this term until paid, and also his costs of suit.

In *Goodtitle v. Tombs*, 3 *Wilson*, at p. 120, it is said by *WILMOT, C. J.*: "Before the time of Hen. 7, plaintiffs in ejectment did not recover the term; but until about that time, the mesne profits were the measure of damages. I brush out of my mind all fiction in an ejectment, the nominal plaintiff, the nominal defendant, the casual ejector, the *dramatis personae* or *actores fabulae*, and consider the recovery by default, or after a verdict as the same thing, viz.: a recovery by the lessor of the plaintiff, of his term against the tenant, in the actual wrongful possession of the land. By the old law and practice in an action of ejectment (as I before said) you recovered nothing but damages, the measure whereof was the mesne profits; no term was recovered; but when it became established that the term should be recovered, the ejectment was licked into the form of a real action; the proceeding was in rem, and the thing itself, the term only was recovered, and nominal damages, but not the mesne profits; whereupon this other mode of recovering the mesne profits in an action of trespass was introduced, and grafted upon the present fiction of ejectment; and I take it, that the present fiction is put in the place of the ejectment at common law, which was indeed a true, and not a fictitious action, and in

which the mesne profits only, and not the term, were recovered, for it was no other than a mere action of trespass. You have turned me out of possession, and kept me out ever since the demise laid in the declaration, therefore I desire to be paid the damages to the value of the mesne profits which I lost thereby; and this is just and reasonable."

In an anonymous case in 6 Modern, 309, we find:

Per Curiam. It is a great abuse, in ejectment, that people make nominal lessees persons not in *rerum natura*, or at best not known to the defendant; so that he thereby may lose his costs. And *Per Omnes.* The attorney that does so ought to pay costs. And in this case an attorney was put to answer interrogatories for such a practice.

ADDERTON v. MELCHOR, 31 N. C. 349. 1849.

John Doe and Richard Roe. Lessor of the Plaintiff. Legal Fictions in Ejectment.

[Ejectment by Den on the demise of Adderton. Judgment against plaintiff, and he appealed. Affirmed.]

In the declaration were counts on the demise of persons who were dead when the action was commenced. The court below ordered these counts to be stricken out.]

PEARSON, J. There was no error in making the rule absolute. Indeed, the counsel for the real parties admits, that the idea of laying a demise in the name of one, who had died many years before the institution of the suit, was an "experiment." The experiment ought not to have succeeded. It was obviously an attempt to pervert a fiction of law from its true purpose and intent. The proper time for making the motion was at the appearance term, but the court should, at any time (at least before verdict), have allowed the application, and should have permitted the plea and consent rule to be withdrawn, if necessary, to enable the defendant to make the motion.

The action of ejectment is admirably adapted to try questions of title to land, and the fiction of "lease, entry, and ouster" is a beautiful illustration of the fact, that a fiction of law "works wrong to no one," and is never introduced into legal proceedings, except for the purpose of avoiding useless delay and expense, and furthering the ends of justice. It is true "*John Doe and Richard Roe*" are very much abused by persons, who are not well acquainted with them, but they are deservedly favorites with those who have cultivated their acquaintance. No one, who comprehends the full scope and object of the fiction, can fail to be struck with it, as an enduring monument of the wisdom and clear-sightedness of the fathers of the law.

After it became common for freeholders, instead of bringing real actions, to enter upon the land and make leases for years, so that the lessees might bring ejectment, it occurred to the

courts, that the fact of making the "entry and lease" was unnecessary, and was attended with useless expense and delay. How was this to be avoided? If the lease and entry were supposed, and the action was brought against the tenant in possession, he had a right to enter his plea, and could not be called on to make any admissions. The expedient adopted was, to bring the action against the casual ejector: let him give notice to the tenant in possession: who, when he applied to be made defendant, might be required to admit "lease, entry and ouster," as a condition of his being allowed to defend. He had no right to complain—he was not required to admit anything that would prejudice his right, but simply to admit those things to have been done, which the lessor might easily have done, by increasing the trouble and expense. But to require him to admit a thing, which could not have been done, at the institution of the action—for instance, that a lease had been made by a dead man—would be unreasonable. The proposition would have shocked Chief Justice ROLLE, who, nearly two centuries ago, had the honor of inventing the action of ejectment in its present form. 3 Blk. 199, 207.

Besides being unreasonable, as requiring the admission of an impossibility, it would be a palpable violation of a fundamental principle of the action of ejectment. "The lessor must not only have title at the date of the demise, but must have title and a right of entry at the commencement of the suit." At the death of the proposed lessors, the title passed out of them to their heirs or some one else. When this action was instituted, the dead lessors had neither title nor right of entry. The decision of the court below must be affirmed.

See "Ejectment," Century Dig. § 173; Decennial and Am. Dig. Key No. Series, § 65.

ATWELL v. McLURE, 49 N. C. 371. 1857.

Ejectment. Rule as to Proving Defendant to be in Possession.

[Ejectment by Doe on the demise of Atwell. Judgment against plaintiff, and he appealed. Reversed.]

Plaintiff filed his declaration on December 7, but it was not placed in the hands of the sheriff for service on the defendant until several days thereafter, and was not actually served on defendant until the following March. The defendant moved from the locus in quo on December 7, the day the declaration was filed, but on the same day he placed Saunders in possession as his tenant. Saunders attorned to the plaintiff, Atwell, immediately after the return day of this action and was accepted by Atwell as his tenant. There was a verdict for plaintiff, the court reserving the question of law as to whether plaintiff could recover on the above facts. The defendant insisted that plaintiff should be nonsuited because he had failed to show that the defendant was in possession. The court ordered the nonsuit.]

PHILSON, J. We concur with his Honor upon the first point. The commencement of an action of ejectment is the time when

the declaration is served; in other actions, it is the time when the writ is issued. This is settled, and the reason of the distinction explained in *Thompson v. Red*, 47 N. C. 412.

A copy of the declaration was served on the defendant, with a note from his "loving friend, Richard Roe," saying: "I am informed you are in possession of, or claim title to, the premises, etc." He entered his appearance to the action, and, by leave of the court, had himself made defendant, entered his plea, and went to trial on the question of title. Both parties claimed under one Alexander McLure, and the question turned upon the bona fides of a deed, alleged to have been executed by said McLure to the lessor of the plaintiff. There was no question as to the identity of the land sued for, and a verdict was for the plaintiff upon the merits.

It would be a strange result if, after all this, the defendant is entitled to a judgment, on the ground that, although he claimed title to the land, yet he was not in possession when the action commenced. It would be a mockery of justice to allow the defendant, after fighting the case upon its merits and losing it, to turn around and say, if the verdict had gone in my favor, I would have been entitled to a judgment, and I am equally entitled to a judgment notwithstanding the verdict has gone against me. So, I was safe anyhow, and had a chance to gain the case upon the merits. Yet this is contended for, and was so held by the presiding judge, under the rule as laid down in *Albertson v. Redding*, 6 N. C. 283; S. C., 4 N. C. 28. "In ejectment, the plaintiff is bound to prove the defendant in possession of the land which he seeks to recover."

We fully approve of, and feel bound by this, as a general rule. But in order to fix the extent of its application, and determine the exceptions to its operation, it is necessary to examine into the "reason" upon which it is based.

The action of ejectment is, in form, "trespass." The judgment is, that the plaintiff "recover his damages and costs." The order for a writ of possession is no part of the judgment. No one is compelled to become a defendant. A copy of the declaration is served to give notice of the action, and to enable the person, if he is concerned in the matter, either because he is in possession, or because he claims title to the land, to apply and have himself made defendant. The object of the fiction of a "casual ejector" is to put it in the power of the court to refuse to allow any one to be made a defendant, unless he will enter into the common or special rule. In this, it differs from all other actions. In detinue, the defendant is compelled to appear by mesne process, and the judgment is that the plaintiff recover the specific thing. For these reasons it is necessary for the plaintiff to prove that the defendant had the article in his possession at the time the action was commenced. These reasons, as we have seen, do not apply to the action of ejectment; consequently, the general rule above referred to, in respect to that action, must be based on some other ground.

If no one applies to defend the action, the plaintiff cannot take judgment by default against the casual ejector, unless he proves that the person upon whom a copy of the declaration was served, was in possession; for, without this, no case is constituted in court, and if a judgment was rendered against the casual ejector, A would be turned out of possession without notice or an opportunity to be heard, simply by serving a copy on B, who is a stranger and has no concern with the land. This branch of the rule is, therefore, founded upon a universal principle of justice, and admits of no exceptions.

If any one applies to defend the action, and is permitted to make himself a party defendant for that purpose, the other branch of the rule is called into action, and it is based, as we shall see, upon particular principles, and, consequently, admits of many exceptions.

Suppose the declaration is for twenty acres of meadow, and twenty acres of pasture, situate in the parishes of Over Stowey and Nether Stowey, in the county of Somerset: the party who is made defendant proves title to two pieces of land, answering that general description; but the plaintiff proves title to two other pieces of land, answering the same general description; the defendant shall have judgment, unless the plaintiff proves that he (the defendant) was in possession of one, or both, of the latter two pieces to which the plaintiff had proved title; and although it be said that the defendant ought to have disclaimed in regard to the two pieces of land claimed by the plaintiff, the reply is, how could he tell what land the plaintiff sued for? If he had not defended the action, he might have been turned out of possession of his own two pieces of land. This was the point in the famous case of *Goodright v. Rich*, 7 Term Rep. 327, where the branch of the general rule now under consideration, is established. The rule is based on a particular reason—to prevent surprise on a party who makes himself defendant. The Chief Justice, Kenyon, says in that case, “when the declaration is delivered, the lessor claims, in general terms, so many acres of land, which communicates but little intelligence to the person served with the copy. If the latter happen to be in possession of any land falling within the description in the declaration, he must defend, in order to preserve his own right. Then it would be unjust that a verdict should be found against him, although he can prove title to every acre of land in the parishes, of which he was ever in possession; and yet this is the consequence of the plaintiff’s argument.”

Or suppose the declaration is for a tract of land setting out the metes and boundaries. The party upon whom the declaration is served, makes himself defendant. On the trial, it turns out that the defendant has title to so much of this tract as he is in possession of; the plaintiff has title to the remainder; but the defendant never was in possession of that part; the defendant is entitled to a judgment, because the plaintiff has failed to prove that he was in possession of any land to which he had title. This was the point in *Albertson v. Redding*, *supra*, where the English rule is

adopted by a majority of the court; although Taylor, C. J., dissents on the ground that, as our declarations are more specific in the description, the reasons for the English rule do not apply, and he prefers to require defendants to enter a disclaimer. But the general rule has ever since been considered settled, as laid down by the majority of the court. HENDERSON, J., in delivering the opinion of the court, puts it on this reason: "If the defendant's possession does not interfere with the plaintiff's claim, the mischief (that is the costs) should be borne by the plaintiff, who has misled the defendant, rather than by the defendant, who has trusted to the plaintiff's assertion; otherwise the defendant would be compelled to decide, at his own peril, whether the lands described are those possessed by him; although he is told so by the plaintiff, and this, too, when the plaintiff describes by artificial boundaries, the beginning and extent of which may be entirely unknown to the defendant."

So the principle of the rule is to prevent surprise on the party who makes himself a defendant; and the exceptions are, that when there is no surprise, and the parties go to trial on the question of title, there being no difficulty as to the identity of the land, and both plaintiff and defendant setting up title to the whole of it, if the verdict goes against the defendant, it is not for him to say that he was not in possession at the time the action was commenced. It is sufficient, so far as he is concerned, that he claimed title to the land, and made himself a defendant for the purpose of asserting it. Accordingly in *Mordecai v. Oliver*, 10 N. C. 479, it was ruled in the court below, that under the circumstances of that case, it was not necessary that there should be an actual possession by the defendant, to maintain the action; "that if the defendant claimed to be in possession, or claimed the lands in controversy, and entered himself a defendant, with a view of maintaining such claim, that was sufficient to enable the plaintiff to maintain the action." This ruling was approved in this court, and the case of *Albertson v. Redding* was referred to as fixing the general rule; but the case under consideration was held to be an exception. We will remark in passing, that the form of the notice set out by Blackstone in the appendix to the third book is, "you are in possession of, or claim title to," etc. So in *Gorham v. Brenon*, 13 N. C. 174, the defendant had never been in possession, but he came in and defended the title and possession of one Brenon, and there was judgment for the plaintiff, making that case also an exception. So in *Wise v. Wheeler*, 28 N. C. 186, the defendant had never been in possession, and never made an admission in regard to possession, but he had himself made defendant, and succeeded in showing title, and there was judgment, but there was no intimation that the plaintiff would not have been entitled to judgment had he succeeded in the question of title; in fact, this is assumed by the direction given to the case. So in *McDowell v. Love*, 30 N. C. 502, the defendant never was in possession, but he procured himself to be made defendant upon an affidavit setting out "that the premises in dispute were his."

and that Chambers went into possession as his tenant; the declaration had been served on Chambers, and Love was made defendant on this affidavit. The principal contest was as to a part of the land covered by the defendant's grant, but the plaintiff insisted that he was entitled, at all events, to a judgment in respect to a small slip of land not covered by defendant's grant, on the ground that by coming in as landlord to defend, he admitted himself to be in possession, and no evidence was necessary. The court below held otherwise, applying the general rule. In this court that judgment was reversed, on the ground that "the affidavit supplied proof of the tenant's possession of all the land within the boundaries described in the declaration," and the case fell within the exception. In *Carson v. Burnett*, 18 N. C. 546, the declaration described several tracts. The defendant having succeeded in showing title to all the parts of which his tenant was in possession, the plaintiff attempted to secure a verdict by proving title to a part covered by the declaration, but of which the tenant had never been in possession; it was held he could not be allowed to do so, "for it would be a surprise if the defendant were called on to defend for portions of the land of which his tenant never had possession," although they were set out in the declaration; and the general rule was, for that reason, applied to the case.

These are all the cases in the reports on the subject. They fix the general rule, that the plaintiff must show the defendant in possession, on the principle of preventing surprise, and the exceptions are plainly deducible therefrom.

Our case falls under the exceptions. There is no pretense of surprise. The defendant claimed the land in controversy, and entered himself a defendant, with a view of maintaining such claim. There was no difficulty in regard to the identity of the land, and the case is stronger, because he had, a very short time before the declaration was served, put one Saunders in possession as his tenant. If a copy had been served on Saunders, the defendant, as landlord, might have come in and defended. It can make no difference, so far as he is concerned, that the declaration was served on him. He availed himself of the opportunity of trying the question of title, under the same advantages, as if the declaration had been served on his tenant. Having done so, he can, with no show of justice, insist, not only that it should all pass for nothing, but that he should have judgment for his costs. As to Saunders, when the plaintiff asked for a writ of possession (but for his attornment), he might have opposed the issuing of the writ, or had it superseded upon motion of *audita querela*. The order for the writ of possession is no part of the judgment, but is now in most instances granted as of course, unless there be special grounds for not allowing it. It was ordered in analogy to the writ of *habere facias seisinam* in a real, or mixed action, to prevent the necessity of the tenant's resorting to a court of equity. It would be refused, unless there was proof that a copy of the declaration had been served on the tenant, even although the landlord, as in this case, had come in and made him-

self defendant, in order to try the title, and there was judgment against him.

Per Curiam. The judgment of nonsuit set aside, and judgment for the plaintiff on the verdict.

See "Ejectment," Century Dig. §§ 65, 202; Decennial and Am. Dig. Key No. Series, § 19.

HARGROVE v. POWELL, 19 N. C. 97. 1836.

Ejectment by Cotenant Against Cotenant. General and Special Consent Rule.

[Ejectment by Den on the demise of Hargrove, against Powell. Judgment against defendant, and he appealed. Affirmed.]

Hargrove was ousted by the defendant, his cotenant. This ouster was in April, 1833; but the declaration alleged that the demise was on August 1, 1832, and the ouster on August 2, 1832. Upon these facts the defendant insisted that there was no proof of an actual ouster at the time alleged in the declaration. The court instructed the jury that the actual ouster of April, 1833, was a circumstance from which they might infer a previous adverse possession by defendant. Upon a motion being made for a new trial, the court refused it, saying that even if the above instructions were erroneous, the defendant could not avail himself of plaintiff's failure to prove an actual ouster, for the reason that the defendant had entered into the consent rule.]

DANIEL, J. We are of opinion that the judge was correct in refusing a new trial, on both points in the case. First, the demand of the plaintiff to be let into possession in April, 1833, and the refusal by the defendant, accompanied with the declaration that he held the lands for his father-in-law, was a circumstance properly left to the jury, from which they might infer the previous adverse possession, or an actual ouster at the date of the demise, as stated in the declaration. Secondly, the general consent rule will in all cases be sufficient to prevent a nonsuit for want of a real lease, entry, and ouster, except when it is necessary that an actual entry should be made upon the land previously to the commencement of the suit; as in cases when fines with proclamations have been levied. Adams on Ejectment, 90, 236. When, therefore, an ejectment is brought by a joint tenant, partner, or tenant in common, against his companion (to support which, an actual ouster is necessary), the defendant ought to apply to the court upon affidavit, for leave to enter into a special rule, requiring him to confess lease and entry at the trial; but not ouster also, unless an actual ouster of the plaintiff's lessor by him, the defendant, should be proved; and this special rule will always be granted unless it appear that the claimant has been actually obstructed in his occupation. He (a tenant in common) shall not be compelled to confess "ouster," when he does not dispute the title; but when he does dispute it, he shall be compelled to confess lease, entry, and ouster, before he pleads. Oates ex dem. Wigfall v. Brydon, 3 Burr. 1897; Doe ex dem. Ginger v. Roe,

2 Taun. 397; Prindle v. Lytte, 4 Cowen's Rep. 16. Jackson v. Stiles, 6 Cowen's Rep. 391. We think the judgment must be affirmed.

See note by Judge Battle at the end of this case for further discussion of ejectment between cotenants; also Mordecai's L. L. 574. See "Ejectment," Century Dig. §§ 143, 203; Decennial and Am. Dig. Key No. Series, § 48.

JARED v. GOODTITLE, 1 Blackford, 29-30. 1818.

Ejectment. Title Involved—Legal or Equitable?

[This action was brought by Hill against Jared. It was ejectment, and entitled Goodtitle, on the demise of Hill, v. Jared. There was a verdict and judgment against Jared, the defendant below, who carried the case to the supreme court by writ of error. Reversed.

The defendant below, Jared, requested the court to instruct the jury that the plaintiff must prove a clear *legal* title to the locus in quo, or he could not recover. This the court declined to do, and Jared excepted.]

BLACKFORD, J. . . . In the case before us, it appears from the record, that the defendant below requested the court, among other things, to instruct the jury, that to entitle the plaintiff to recover, he should prove a clear *legal* title in his lessor to the land in question. This is certainly the law, and without such proof the plaintiff below had no right to a verdict. The court ought to have given the instruction, and in consequence of their refusal, the judgment is erroneous. . . .

Per Curiam. The judgment is reversed.

See "Ejectment," Century Dig. §§ 16-62, 136; Decennial and Am. Dig. Key No. Series, §§ 8-15, 42.

SMITH v. ALLEN, 1 Blackford, 22-23. 1818.

Ejectment. Title Involved—Legal or Equitable?

[Ejectment by Allen, on the demise of Bigger, against Smith. Verdict and judgment against Smith, the defendant below, and he took the case to the supreme court by writ of error. Affirmed.

On the trial Smith offered to show by parol evidence that the former owner, under whom both parties claimed title, had sold him the land; that he had taken possession and made improvements; and that all this was before the sheriff's deed under which the plaintiff claimed.]

BLACKFORD, J. The object of the parol testimony, rejected by the Circuit Court, was to prove the existence of an equitable title in the defendant below, to the premises in question, prior to the date of the judgment. This principle, however, is clearly laid down, that, in the action of ejectment, an equitable title cannot be set up in opposition to a legal one. Jackson d. Smith v. Pierce,

2 Johns. Rep. 221; Jackson d. Whitbeck v. Deyo, 3 Johns. Rep. 422. We think, therefore, the court were right in rejecting the testimony objected to. . . . Affirmed.

Equitable defenses were not available at law, when law and equity were administered in separate courts; but by bringing a suit in equity, one having an equitable estate could obtain relief. Under the Code practice, law and equity are administered in the same court and in the same action; and hence, an equitable defense may be set up in the defendant's answer. See *Turner v. Lowe*, 66 N. C. 413, and *Condry v. Cheshire*, 88 N. C. 375, inserted at ch. 3, s. 3. So one may recover on an equitable title. *Geer v. Geer*, 109 N. C. 679, 14 S. E. 297; *Arrington v. Arrington*, 114 N. C. 116, 19 S. E. 278; *Westfelt v. Adams*, 131 N. C. 379, 42 S. E. 823; *Mordecai's L. L.* 817. See "Ejectment," *Century Dig.* § 107; *Decennial and Am. Dig. Key No. Series*, § 26.

PRICE v. OSBORN, 34 N. C. 26. 1851.

Ejectment. What Title Plaintiff Must Prove.

[Ejectment by Doe on the demise of Price. Judgment of nonsuit against the plaintiff, and he appealed. Affirmed. The facts appear in the opinion.]

NASH, J. We concur with his Honor, before whom the case was tried, in the judgment he gave. The demise in the declaration is laid on the 25th of December, 1848. In the latter part of the year 1847, David Price, the lessor of the plaintiff, and who was the owner of the land, leased it to Robert L. Osborn for the year 1848. Osborn entered into possession, and continued it during the whole of that year, and until some time in 1849, when he died, and the defendant, his widow, continued on the land. On the 26th of December, 1848, the date of the demise, R. L. Osborn, the lessee, was in possession of the premises under his unexpired lease. His possession was a lawful one, and David Price, the lessor, had no right of entry, and without such right he could make no lease to the plaintiff. *In ejectment, the lessor of the plaintiff must recover upon the strength of his own title; he must show a good title to the premises, and a right of entry vested in him at the time of the demise, otherwise he cannot recover.* *Brown on Actions*, 466; 1 Chit. Pl. 880; 2 East. 250; 13 East, 210, 212.

Per Curiam. Judgment affirmed.

See "Ejectment," *Century Dig.* § 64; *Decennial and Am. Dig. Key No. Series*, § 17.

DOE v. WEST, 1 Blackford, 133-134. 1820.

Ejectment. What Title Plaintiff Must Prove.

[Ejectment by Doe on the demise of Wood. Verdict and judgment against plaintiff, and he appealed. Reversed. The court below instructed the jury that the plaintiff must trace his title back to the gov-

ernment and, there being no evidence to that effect, they should find for the defendant. Plaintiff excepted. The facts appear in the outset of the opinion.]

SCOTT, J. In this case there was a judgment for the defendant in ejectment. We are informed by the record that, on the trial of the cause, the plaintiff produced no patent from the government to Heth, from whom he derived his title; but a deed of conveyance was produced from Heth and wife to Ogden, in which deed it was mentioned that Heth held the premises by patent from the President of the United States of America. Conveyances were also produced from Ogden and wife to Baird, and from Baird and wife to Wood, the plaintiff's lessor. The plaintiff also proved that Baird was in peaceable possession of the premises previously to the possession of the defendant. No evidence was offered on the part of the defendant, nor was any objection made to the validity of the deeds produced by the plaintiff. On motion of the defendant's counsel, the court instructed the jury that, in order to recover, the plaintiff must trace his title back to the government; and having no evidence before them that the premises in controversy were held by Heth by patent from the President of the United States, they were bound to find a verdict for the defendant.

It is often necessary for the plaintiff to show a right of property in order to establish a right of possession. In some instances he must show an estate in fee; in others a less estate is sufficient. But it is in all cases indispensable, that the plaintiff show a clear, legal right of possession in his lessor. And whatever title he has, must be derived from a legitimate source. A mere conveyance from A to B is no evidence of title, unless it appears that A had a subsisting right. Whatever kind of title the plaintiff may show, or from whatever source it may be derived, the right of possession is the object to which the eye of the law is uniformly directed; and to that object the evidence should always apply. Ejectment is a possessory action. The subject of controversy is not the ultimate title to the land itself, but the legal right of possession. 1 Burr. 119; 5 Burr. 2830; 3 Dall. 457; 1 Bibb. 128; 2 Bibb. 150; Runn. 42. The right of property may be in one person, the right of possession in another, and the actual possession in a third. 2 Blk. Com. 202. The plaintiff in ejectment asserts a legal right of possession in his lessor. It is immaterial how minute his interest is, provided it be a legal interest. Runn. 1; 3 Dall. 455. The first and lowest grade of interest in real estate is actual occupancy, which, in lapse of time, may ripen into a perfect and indefeasible title. 2 Blk. Com. 198. So far as it goes, however, it is a legal interest, and gives a right against every man who cannot show a better title. Runn. 15. In England, and in some of our sister states, it has been decided that twenty years' peaceable possession gives a right which is sufficient to maintain ejectment. 2 Bac. Abr. 423; 1 Burr. 119; 2 Bibb. 150. In those decisions, the precise time of twenty years has reference to a statute of limitations; and the decisions are

predicated on the supposition of some pre-existing right of possession, which is lost by the continuance of an adverse possession for such a length of time. We have no operative statute of limitations, and if such a statute existed, it could have no bearing on the first occupant. The title here set up is a prior peaceable possession, and actual occupancy derived from Heth, who claims to hold under the government. The defendant might protect himself by showing title in himself, or that the plaintiff's title had expired. In this case no title was proved, or even alleged, in the defendant; no attempt was made to prove an adverse possession, or to show that the plaintiff's interest had ceased. Heth claims to hold by patent from the United States. He conveys to Ogden. Ogden conveys to Baird. We find Baird in peaceable possession. These facts, uncontradicted, are sufficient to justify the presumption, that the possession accompanied the conveyances from Heth down to Baird, and that Heth was the first occupant. This is presuming no more for the plaintiff than is authorized by precedents. 2 Cowp. 597; 7 T. R. 2; 1 H. Bl. 447; Esp. N. P. 459. In such cases the plaintiff need not show twenty years' possession. The length of time is not material. Eight or ten years in one case, and three years in another, were decided to be sufficient to entitle the plaintiff to recover. 4 Johns. 202; 2 Johns. 22. The possession is *prima facie* evidence of the right of property. It is a fact from which, in the absence of all other testimony, the jury had a right to presume a perfect title, and is in itself a good title against all the world, except him who can show a better title. In the case before us, the plaintiff, and those under whom he claims, had peaceable and undisturbed possession, and actual occupancy of the premises, under a claim of title from the government. No person, without a paramount claim, has a right to disturb his possession, or question his title. If the defendant holds under Baird, he has no right to say that Baird has no title. If he rests on his possession alone, and has no color of title, he must yield to the plaintiff's right, acquired by prior possession: *he must be considered merely as an intruder; and against such, a prior peaceable possession is a good legal title.* 2 Johns. 22; 4 Johns. 202. From these considerations we are of the opinion that the Circuit Court erred in instructing the jury that the plaintiff must show a patent from the government to Heth.

Per Curiam. The judgment is reversed, and the verdict set aside with costs.

"The rule of law, that a plaintiff must recover on the strength of his own title, and not the weakness of his adversary's, must be limited and explained by the nature of each case as it arises. Since the rule is universal, that the plaintiff in ejectment must show the right of possession to be in himself positively—and it is immaterial to his right of recovery, whether it be out of the tenant or not, if it be in himself—it follows that a tenant is always at liberty to prove the title out of the plaintiff, although he does not prove it to exist in himself. Possible difficulties may be suggested as to the application of this principle to mere tort-feasors or forcible disseisors." [Such cases are generally pro-

vided for by statutes against forcible entry.] *Love v. Simms*, 9 Wheat. 515, 523-524.

"The rule that the plaintiff in ejectment must recover on the strength of his own title, either as being in itself good against all the world, or good against the defendant by estoppel, is too well established in the law of this state to be in the slightest degree shaken by the elaborate argument of the plaintiff's counsel. . . . As early as the year 1816, it was said by Mr. Mordecai, . . . that he did not intend to controvert the rule so long established, that the plaintiff in ejectment must recover on the strength of his own title. We do not intend to weaken the foundation of the rule by supposing it to be, at this day [1856] open to discussion." *Battle, J.*, in *Taylor v. Gooch*, 48 N. C. at p. 468.

"A plaintiff must generally show title good against the world; while a defendant can ordinarily prevent his recovery by showing a better title outstanding in any person. But it is an old and well established rule . . . that where both parties claim title under the same person, neither will be allowed to deny that such person had title. [*McCoy v. Lumber Co.*, 149 N. C. 1, 62 S. E. 699.] While a defendant in such cases may set up a title superior to him through whom both claim as the common source, provided he connects himself with it, he is not allowed, as in other cases, to show a better title than that of a plaintiff in a third person." *Avery, J.*, in *Bonds v. Smith*, 106 N. C., at p. 565, 11 S. E. 322.

For a very valuable note on this subject of the title which plaintiff must show in ejectment, see 18 L. R. A. 781-792. See "Ejectment," *Century Dig.* §§ 16-62, 94-98; *Decennial and Am. Dig. Key No. Series*, §§ 8-15, 24.

WISE v. WHEELER, 28 N. C. 196. 1845.

Rights of Landlords and Tenants and Third Persons in the Matter of Defending the Action.

[Ejectment by Den, on the demise of Wise. Verdict and judgment against plaintiff, and he appealed. Affirmed.]

When the action was commenced, Samuel J. Wheeler was in possession, and the notice was served upon him. He failed to appear, but by order of court John H. Wheeler was made defendant. John H. Wheeler put in evidence a deed made to him by Samuel J. Wheeler. The plaintiff attacked this deed for fraud and, to establish the fraud, offered the declarations of Samuel J. Wheeler made while he was in possession and shortly before the execution of the deed. This evidence was ruled out by the court, and the plaintiff excepted.]

NASH, J. . . . The declarations of Samuel J. Wheeler were properly rejected, and for the reason assigned by his Honor, that he was no party to the record. He was the tenant in possession, and the notice had been served upon him. There was, however, no obligation upon him to defend the suit. It was at his pleasure to do so or not. Upon his declining to be made the defendant, the plaintiff, upon the proper proof of the service of the notice, was entitled to a judgment by default against the casual ejector, the consequence of which proceeding would be, that the plaintiff would be subjected to the payment of the costs incurred, leaving him to recover them in an action for the mesne profits, against the defaulting tenant. If, however, the tenant in possession, be in possession as tenant to any other person, the landlord has a

right, upon making that appear to the court in the proper manner, to be made the defendant, either in place of the tenant or with him. *Fairelaim*, on demise of *Fowler v. Shamtitle*, 2 Burr. 1310; *Adams on Ejectment*, 228. It is the right of the landlord, at common law, to come in and be made a party defendant. No other person has this right; and if a party should be permitted to defend as landlord, whose title is inconsistent with that of the tenant, according to the English practice, the plaintiff may apply to a judge at his chambers, or to the court, and have the rule discharged with costs. *Adams on Eject.* 232. But if he neglect to do so, and the party continue on the record as defendant, he will not be permitted to set up such inconsistent title as a defense at the trial. *Knight v. Lady Smythe*, 4 M. & S. 347; *Adams*, 232; *Belfour and Henly's Heirs v. Davis and Nixon*, 20 N. C. 443; *Davis v. Evans*, 27 N. C. 525. But, although no one but a landlord can be made defendant, against the will and pleasure of the plaintiff, yet the latter may consent to any person coming in as defendant, and upon any title, when the tenant in possession has made default. In such case, the service of a new declaration would be admitted by the defendant. As, however, the party so made defendant was not the person actually in possession, it is not sufficient he should enter into the common rule, but he must consent to be considered in actual possession. This is rendered necessary by the rule adopted in our courts, that notwithstanding the confession of lease, entry, and ouster by the defendant in entering into the common rule, the plaintiff at the trial must *prove the defendant to have been in possession at the commencement of the action*. If the new defendant were not obliged to admit himself in possession, the plaintiff could not recover. It is to be remembered that, in form, the action of ejectment is nearly throughout a fiction, and the courts have exercised the privilege of moulding it to suit the purposes of justice. The court, therefore, ought in no case to permit a stranger to defend, without his agreeing to be considered in possession, and without the consent of the plaintiff. Originally, after the tenant was brought into court by the service of a declaration and notice, another declaration was served upon him; the latter is now dispensed with, but, as before stated, if the parties agree, another declaration may still be served upon another party, at the time; all, indeed, is by consent. The only person who is compelled to appear is *Richard Roe*. *Adams*, 357, 358. In the case now before us, we are to presume all the regular steps were taken, in order to make *John H. Wheeler* the defendant. He defended alone. The presumption is that he was admitted by consent, as it does not appear to have been opposed, and it is probable that all parties wished to try the validity of the deed of trust as soon as possible. *Samuel J. Wheeler* was no party, and his declarations were not evidence against the real defendant. They were not offered to explain his possession. . . .

Judgment affirmed.

See "Ejectment," *Century Dig.* §§ 143, 144, 203; *Decennial and Am. Dig. Key No. Series*, §§ 48, 49.

MADDREY v. LONG, 86 N. C. 383. 1882.

What Defenses Permissible to Landlords and Others Let in to Defend. Parties Let in by Consent Distinguished from Those Let in by Rule of Law. Old Practice and Code Practice.

[Action by Maddrey to recover land. Verdict and judgment against defendants, and they appealed. Reversed.]

The action was brought against Long, but, *by consent*, J. T. Crocker and R. T. Stephenson were let in to defend the action. The plaintiff put in evidence a sheriff's deed to himself, and the record of a judgment and execution against the defendant Long, under which the locus in quo had been sold and conveyed to the plaintiff. He also showed that Long was in possession.

The defendants Crocker and Stephenson offered to show judgments and executions, sale under executions and sheriff's deed to themselves for the locus in quo. Upon objection, this proposed proof was ruled out, upon the ground that Crocker and Stephenson could not avail themselves of any defense which was not open to their codefendant Long, they having been permitted to come in and defend the action. Crocker and Stephenson excepted.]

ASHE, J. There is error. The principle upon which his Honor ruled out the evidence of the defendants (Crocker and Stephenson) has no application to this case. Under the former practice it was a well settled rule that when a landlord was let in to defend an action of ejectment, he stood in the place of the tenant, and could make no defense which the tenant could not have made. *Wiggins v. Riddick*, 33 N. C. 380; *Belfour v. Davis*, 20 N. C. 443. But where a defendant is let in to defend such an action *by consent*, he is not restricted to the defense of the party in possession, upon whom the process was originally served, but any defense he can make is open to him. *Wise v. Wheeler*, 28 N. C. 196, and *Lee v. Flannagan*, 29 N. C. 471, in which case *Rufin, C. J.*, said: "We had occasion to look into this question in *Wise v. Wheeler*, and held that when the tenant in possession makes default, and another is let in *by consent* to defend, upon admission of actual possession in that person, it must be understood, that it was the object of those parties to try the title between themselves at once without the delay or expense of a new suit." These cases were decisions under the old practice.

Since the adoption of the Code it has been held in the case of *Isler v. Foy*, 66 N. C. 547, that under the provisions of the Code, ss. 61, 65, a landlord let in to defend in a civil action for the recovery of land, is not restricted to the defenses to which his tenant is confined, nor is this principle varied by the circumstance that the plaintiff is the purchaser at execution sale against such tenant, and that the latter was in possession at the date of sale and of the commencement of the action. There is no conflict between that case and *Whisenhunt v. Jones*, 78 N. C. 361. The main questions in that case turned upon the points of notice and damages—whether the want of notice to leave to the original defendants, who were tenants, could be taken advantage of by those who were allowed to come in and defend the action, and whether the dam-

ages were to be assessed to the commencement of the action, or up to the trial.

There was error in the ruling of his Honor in rejecting the evidence offered by the defendants, and they are on that account entitled to a new trial. This will therefore be certified to the court below to the end that a venire de novo may be awarded. Venire de novo.

See also *Bryant v. Kinlaw*, 90 N. C. 337. See "Ejectment," Century Dig. § 92; Decennial and Am. Dig. Key No. Series, § 23.

MILLER v. MELCHOR, 35 N. C. 439. 1852.

Ejectment. Title Involved. Damages.

[Ejectment. Doe, on demise of Miller, against Melchor. Referred to arbitrators. Award for plaintiff. Judgment against defendant, and he appealed. Affirmed.]

Among other things the award was for ten dollars to the plaintiff as the actual damages he had sustained. To this the defendant objected, and, upon his objection being overruled, he excepted.]

PEARSON, J. If the arbitrators had exceeded their authority in assessing ten dollars as damages instead of "six pence," the objection would not extend to the whole award as far as the amount is divisible. The excess could be rejected as surplusage. But the arbitrators did not exceed their authority. It was proper for them to assess the actual damages, so as to make the award final, and prevent the necessity of an action for mesne profits, which, when confined to the time laid in the demise, is a mere elongation of the action of ejectment; that action being divided, at the suggestion of the court, into two parts in order to save time and merely as a matter of convenience.

The declaration in ejectment demands damages and originally nothing else was recovered. Afterwards the court made the remedy more adequate, by adding a writ of possession, but in form it is still an action for damages only, and when, by the adoption of the fictions invented by Chief Justice Rolle, ejectment became the most convenient, cheap, easy, and speedy remedy, as well for all having an estate of freehold as for those having estates less than freehold; and when, in consequence thereof, ejectment almost universally took the place of real actions and became the mode of trying titles, it was seen that a great deal of time was unnecessarily in many cases consumed in the examination of witnesses and in the discussion of the question of damages. For, if upon the title the case was with the defendant, then the expense of witnesses in general to the amount of damages and the time consumed in their examination and the discussion incident thereto, was "labor lost;" and in cases where an inquiry as to the question of damages was made necessary by a verdict in favor of the plaintiff upon the "title," such inquiry had a tendency to distract the jury and call

off attention from the main question, and it was better for both parties to postpone it. Hence it was suggested by the court and acquiesced in by the profession, that the action might be divided, so as to let the question of title alone be passed on in the ejectment, with nominal damages, "for conformity," if title was with the plaintiff, and leave the amount of damages to be ascertained by an action for mesne profits.

This has been the universal practice, but it would not be error for the court to instruct the jury that, if they found for the plaintiff upon the title, they were at liberty to find actual damages for the time the defendant had wrongfully kept the lessor of plaintiff out of possession; and in some cases it is necessary for the jury, in the action of ejectment, to find the actual damage, as if the lessor be to pay rent for years, when the term expires pending the action; or tenant for life, or *per autre vie*, and his estate terminates pending the action. In such cases an action for mesne profits cannot be brought, because it is an action of trespass *q. c. f.*, and it is necessary to regain the possession so that, by the fiction, it can relate back to the prior possession; and as this cannot be done, the amount of damage must be assessed in the action of ejectment. It is a plain analogy, as arbitrators are required to make a final award, and no secondary action is contemplated, that when an action of ejectment is referred, the actual damages should be assessed according to the form of action and the ancient practice.
 . . . Judgment affirmed.

See "Ejectment," Century Dig. § 441; Decennial and Am. Dig. Key No. Series, § 127.

WHISSENHUNT v. JONES, 78 N. C. 361, 363. 1878.

Ejectment. Mesne Profits and Damages.

[Action to recover possession of land. Verdict and judgment against defendant, and he appealed. Affirmed.]

Among other things, the defendant insisted that damages could be given only up to the time the action was commenced, and not up to the time the action was tried. The court ruled otherwise, and he excepted. Only that portion of the opinion is inserted which bears upon this point.]

BYNUM, J. . . . The last exception is that damages could only be given to the commencement of the action, and not to the time of trial. We think otherwise. The action is for the recovery of the possession of land, and for damages for the time the defendants have wrongfully kept the plaintiff out of possession. Had this been the old action of ejectment, it has been decided that in that action, which was originally and properly an action for damages only, the actual damages could be assessed for the trespass. When afterwards the action of ejectment was divided into two actions, one to try the title and the other to recover the mesne profits after the possession had been recovered, it was still competent in the latter action, to recover damages for the entire time

the premises were occupied by the defendants. *Miller v. Melchor*, 35 N. C. 439.

The only difference between the action of trespass for the mesne profits under the old system, and the present action under the Code, is, that in the former, the writ did not lie until the possession had been actually recovered in the action of ejectment, while in the latter case the action is for both the possession and the damages for the use and occupation at the same time. But they are both alike in this, that by either, damages are recovered for the time the plaintiff was kept out of possession by the defendants. The purpose of the Code in actions of this nature, as it is in all others, is, that a complete determination shall be made of all matters in controversy growing out of the same subject of the action. Evidently this action would fall short of that consummation, if the plaintiff could recover damages only up to the commencement of the action, and should be put to another action to recover the damages sustained subsequently, but before the time of the trial. That the damages up to the time of trial are recoverable in this action, is further apparent from the provisions of the Code, secs. 217, 261 (4), 262 (a), (c). *Taylor's Landlord and Tenant*, secs. 710-712. We are therefore of opinion that the mesne profits, by way of damages, were properly assessed up to the time of trial. *Jones v. Carter*, 73 N. C. 148. . . . Affirmed.

That damages are allowed up to the time of trial, see *Jones v. Coffey*, 109 N. C. at p. 519, 14 S. E. 84, inserted at ch. 3, sec. 3, post, approving the principal case. In *Camp v. Homesley*, 33 N. C. at p. 212, *Ruffin, C. J.*, says: "As the action for mesne profits is substantially a continuation of the ejectment, for the purpose of recovering the actual damages, which were formerly nominally assessed, it follows, that whenever a person is allowed to maintain ejectment, he may have trespass against the same party by way of completing his remedy. Hence, it is settled, that after a recovery in ejectment, and entry, a tenant in common may sue his companion, who has ousted him, for the mesne profits." See "Damages," *Century Dig.* § 567; *Decennial and Am. Dig. Key No. Series*, § 225.

WHITE v. COOPER, 53 N. C. 48, 50. 1860.

Ejectment. Judgment How Far an Estoppel at Common Law.

[Trespass quare clausum fregit. Judgment against the plaintiff for costs, and he appealed. Reversed.]

The points upon which the case was carried up were not clearly stated in the case on appeal, as appears from the opening remark in that portion of the opinion which is here inserted; but to what extent a judgment in ejectment is an estoppel, is discussed by *Pearson, C. J.*, with his usual ability.]

PEARSON, C. J. . . . We are left, therefore, to infer that his honor put his decision upon the supposed effect of the judgment in the action of ejectment.

It is set out in the statement of the case: "The locus in quo was

proved to be within the description in the declaration and writ of possession; from which, by a suggestion at the bar, an implication is to be made, that it was not within the description in the grant, under which the defendant claimed;” in other words, the defendant’s title does not cover the locus in quo, and the question intended to be presented is, does the judgment in the action of ejectment operate as an estoppel and conclude the plaintiff in this action, in respect to the title. Or can the plaintiff maintain the action of trespass q. c. f., before he has regained the possession of his land by an action of ejectment and a writ of possession.

Adopting this construction of the case, which we feel at liberty to do, as we can give it no other meaning, the opinion of this court differs from that of his honor.

The judgment in ejectment is conclusive in respect to the title for the purposes of that action, and of the action of trespass q. c. f. for the mesne profits, when the latter is used merely as a continuation of the former, and the plaintiff confines his demand for damages to the time covered by the demise in the declaration in ejectment. If he goes out of it, the question of title is open—on the ground that it has only been considered by the court with a view to deciding that the lessor had such a title as enabled him to make the demise for the purpose of bringing the action of ejectment. This is well settled, and, accordingly, it is very common for the second action of ejectment to be brought. Indeed, one of the principal benefits growing out of its substitution for real actions, is the fact, that *the judgment does not operate as an estoppel in respect to the title*, but leaves it to be tried a second or a third time, so as to have it satisfactorily settled.

So it is agreed, that if the plaintiff had brought *ejectment*, he could have maintained it, as his title covers the locus in quo, and the defendant’s does not, and the judgment in the first action of ejectment could have no bearing on the second. It is also agreed, that had the plaintiff brought ejectment and recovered, he could then have maintained an action of trespass q. c. f. for mesne profits during the time for which the present action is brought. The question, therefore, is narrowed to this: Is there any ground upon which the question of title is concluded, where a defendant in ejectment, after being evicted by a writ of possession, makes an actual entry and brings trespass q. c. f., that would not apply to an action of ejectment brought by him.

We have seen that the question of title is not concluded in the second action of ejectment, for the reason that the judgment in the first action only decides, that the lessor had such a title as enabled him to make the demise for the purpose of that action. This reason applies with equal force to the action of trespass quare clausum fregit, and excludes the idea that the question of title, outside of the first action, is concluded in any other action.

Accordingly, it is settled, that if the title of the lessee does not reach back to the date of the demise, the objection is fatal; but it makes no difference whether the lease is for five, ten, or twenty years, because the court does not pass on the title beyond the ter-

mination of the action; Buller's N. P. 106; *Atkins v. Horde*, 1 Burr. 114; where Lord Mansfield says: "The recovery in ejectment is a recovery of the *possession, without prejudice to the right, as it may afterwards appear*, even between the same parties. He who enters under it, is only possessed according to his right. If he has a freehold, he is in as a freeholder. If he has no title, he is in as a trespasser. If he had no right to the possession, then he takes only a naked possession."

It may be conceded, that if the plaintiff in ejectment after judgment follows it up by an action for the mesne profits and recovers, the defendant cannot afterwards recover back such profits, although in a second action of ejectment, he has succeeded in establishing title in himself. So, it may be conceded that for the entry, under the writ of possession, the plaintiff in the first action is protected by the judgment and writ, although it turns out that the land did not belong to him. This is on the ground that the judgment in ejectment concludes the title for the purposes of that action; hence, we find many writs of error to reverse a judgment in ejectment, and it is held that the pendency of a writ of error operates as a supersedeas to the action for mesne profits; *Denford v. Ellys*, 12 Mod. 138; and it would seem, if the judgment in ejectment did not conclude the question as to mesne profits and the entry under the writ of possession, every purpose would be answered by a second action of ejectment, and there could be no motive for bringing a writ of error.

There is no intimation in the books, and no reason can be given for carrying the effect of a judgment in ejectment beyond the point here conceded. After the termination of the action and the execution of the writ of possession, if he have no title, in the words of Lord Mansfield, "he (the lessor) is as a naked trespasser," and, of course, may be sued as such, and made to pay damages to the real owner, for every act done thereafter. . . . Judgment reversed.

See *Sharon v. Tucker*, 144 U. S. 533, 541-543, 12 Sup. Ct. 720, inserted at ch. 10, sec. 6, for the relief afforded in equity against "the protracted litigation for the possession of the property which the action of ejectment at common law permitted." "That action [ejectment] being founded upon a fictitious demise, between fictitious parties, a recovery in one action constituted no bar to another similar action or to any number of such actions. A change in the date of the alleged demise was sufficient to support a new action. Thus the party in possession, though successful in every instance, might be harassed and vexed, if not ruined, by a litigation constantly renewed. To put an end to such litigation . . . courts of equity interfered and closed the controversy." Field, J., in *Sharon v. Tucker*, supra, at p. 542, 12 Sup. Ct. 722. How this relief was afforded in equity, and upon what principle equity interfered in such cases, are questions treated of in ch. 10, s. 6. See "Judgment," Century Dig. § 1651; Decennial and Am. Dig. Key No. Series, § 554.

SEC. 3. EJECTMENT UNDER THE CODE PRACTICE.

CAPERTON v. SCHMIDT, 26 Cal. 479, 85 Am. Dec. 187. 1864.

Action to Recover Real Estate Under the Code Practice. Estoppel by Judgment in Such Actions.

[In 1858 Caperton and Hays sued Schmidt for a tract of land, alleging that they were the *owners in fee* and entitled to the possession. Schmidt pleaded that he owned *in fee* an undivided 40/81 part thereof; and after a trial on the merits it was adjudged that Caperton and Hays recover the possession of 41/81 of the land then in controversy, and that Schmidt recover of them 40/81 thereof.

Thereafter Caperton sued Schmidt for the same land, alleging that he, Caperton, was the owner *in fee* and entitled to the possession. Schmidt pleaded the former judgment as an estoppel and offered in evidence the record in the former action to sustain such plea. Plaintiff, Caperton, objected; and the evidence was ruled out. Defendant excepted. Judgment against defendant, and he appealed. Reversed.]

SAWYER, J. . . . The former proceeding and judgment having been set up by way of estoppel, the question is, whether the record and judgment in the first action were admissible in evidence on the trial of the second.

It is perfectly well settled that the judgment of a court of concurrent jurisdiction directly upon the point is, as a plea, a bar; and where there has been no opportunity to plead it, and it is offered in evidence, it is admissible and conclusive between the same parties and their privies upon the same matter directly in issue in another court; and also when coming incidentally in question in another court for another purpose. The entire current of authorities in England and America establish the rule as here limited, and many extend it further: 1 Greenl. Ev. ss. 528 531; *Duchess of Kingston's Case*, 20 How. St. Tr. 355; *Landon v. Litchfield*, 11 Conn. 249; *Marsh v. Pier*, 4 Rawle, 289, 26 Am. Dec. 131; *Smith v. Whiting*, 11 Mass 446; *Stark. Ev. by Sharswood*, 333; *Patter v. Baker*, 19 N. H. 167; *Betts v. Starr*, 5 Conn. 550, 13 Am. Dec. 94; *Adams v. Barnes*, 17 Mass. 365; *Gardner v. Buckbee*, 3 Cow. 127, 15 Am. Dec. 256; 2 *Smith's Lead. Cas.* 572; *Young v. Rummell*, 2 Hill, 481, 38 Am. Dec. 594; *Lawrence v. Hunt*, 10 Wend. 85, 25 Am. Dec. 539; 8 Wend. 40.

And the rule is applicable to real as well as personal actions. "Each species of judgment from one in an action of trespass to one upon a writ of right, is equally conclusive upon its subject-matter by way of bar to future litigation for the thing thereby decided. . . . 'What, therefore,' Lord Coke says, 'that in personal actions concerning debts, goods, and effects (by way of distinction from other actions), a recovery in one action is a bar to another, is not true of personal actions alone, but is equally and universally true as to all actions whatsoever quoad their subject-matter.'" *Cutram v. Morewood*, 3 East, 357.

The controversy, then, is as to what is directly in issue in an ac-

tion to recover the possession of real estate under our system of pleading and practice.

From habit, and as a matter of convenience, we ordinarily speak of the action, in a general sense, as an action of ejectment. This is well enough, so long as we do not suffer ourselves to be misled by confounding the action to recover real estate in use in this state with the action of ejectment at common law, and as a consequence embarrass ourselves by attempting to apply the rules of law peculiar to the latter action to the former. Technically and substantially, we have no action of ejectment. The forms constitute the substance of that action at common law. True, practically, the possession of the land was recovered. But this was equally true of the writ of entry, and an assize. All these were possessory actions merely. And there would be just as much propriety in calling our action to recover the possession of land a writ of entry, or an assize, as an ejectment. The pleadings are more nearly assimilated to the pleadings in a writ of entry, or an assize, than to the pleadings in an action of ejectment. In theory, the writ of entry and the assize were actions to recover the freehold, while ejectment was an action to recover the term of the tenant—a mere chattel interest. But in our state, an action is rarely brought by a tenant, either in substance or form, to recover his term. Practically, the possession of the land, and nothing more, was recovered at common law in each of the actions named.

In regard to the two former actions, Mr. Blackstone says: "These remedies are either by writ of entry or an assize, which are actions merely possessory, serving only to regain that possession, whereof the demandant (that is, he who sues for the land) or his ancestors have been unjustly deprived by the tenant or possessor of the freehold or those under whom he claims; they decide nothing with respect to the right of property; only restoring the demandant to that situation in which he was (or by law ought to have been) before the dispossession committed. . . .

"The first of these remedies is by writ of entry, which is that which disproves the title of the tenant or possessor, by showing the unlawful means by which he entered or continues in possession." The writ requires the tenant to deliver seizin, or show cause why he will not. "This cause may be either a denial of the fact of having entered by or under such means as are suggested, or a justification of his entry by reason of title in himself, or in those under whom he claims; whereupon the possession of the land is awarded to him who produces the clearest right to possess it;" Sharswood's Blk. Com. 180, 181.

After stating the exceptions, Blackstone says: "But in general the writ of entry is the universal remedy to recover possession, when wrongfully withheld from the owner;" Sharswood's Blk. 183. Notwithstanding these actions are merely possessory, and "decide nothing with respect to the right of property" (a question which could only be determined in a writ of right), a judgment in one writ of entry was conclusive in another, or in an assize for the same land.

Says Mr. Blackstone: "As a writ of entry is a real action which disproves the title of the tenant by showing the unlawful commencement of his possession, so an assize is a real action which proves the title of the demandant merely by showing his or his ancestor's possession; and these two remedies are, in all other respects, so totally alike that a judgment or recovery in one is a bar against the other; so that when a man's possession is once established by either of these possessory actions, it can never be disturbed by the same antagonist in any other of them:" Sharsw. Blk. 184; see also *Adams v. Barnes*, 17 Mass. 365.

"Actions of ejectment have succeeded to those real actions called possessory actions; but an inconvenience was found to result from them which did not follow from real actions, to which it has been found necessary to apply a remedy. Real actions could not be brought twice for the same thing; but a person might bring as many ejectments as he pleased, which rendered the rights of parties subject to endless litigation:" Archbold's note to Sharsw. Blk. 206.

The inconclusiveness of the judgment resulting from the form of proceeding was admitted to be an inconvenience, and the necessary remedy for it, referred to by Mr. Archbold, was an injunction, which was at length granted, after two or more trials: Archbold's note to Sharsw. Blk. 206. In these real actions, then, we may say, with at least as much propriety as the respondent's counsel says of the action of ejectment, "the object is the recovery of possession; the subject-matter to be tried is the right of possession as between plaintiff and defendant; that is the extent of the issue." . . .

In several of the states, as in New York and Illinois, there are special statutes regulating actions for the recovery of real estate. In such cases, the forms of the common-law action of ejectment are generally abolished, and another form substituted; and—what would naturally be expected as a consequence of the change of the form in the action—the effect of the judgment is also modified, regulated, and prescribed. Sometimes one new trial in the same action is granted, as a matter of right, and another upon a proper showing, in the discretion of the judge. But when finally determined in that action, it is made conclusive. The statutory form of a declaration in New York does not even allege title. It only alleges a possession by plaintiff, and an ouster by defendant. Yet the judgment is made conclusive. A second trial, if any he had, must be in the same action.

But these provisions granting new trials, as a matter of absolute right, were adopted many years ago, when the old ideas as to the peculiar importance and sacredness of real estate, in comparison with personalty, still lingered in the minds of the people. At this day, and especially in the new states, little more importance is attached to real estate than to personal property of equal value. It is almost as much an article of traffic, commerce, and speculation as merchandise. No restraints are thrown around its alienation, except so far as are necessary for the protection of parties dealing in it by enabling them to trace and preserve the evidence of titles.

and judge of their validity. Since the change in the form of actions, no technical reason exists—and we can perceive no substantial reason inherent in the nature of the property—why the title to a piece of land should not be finally determined by one trial fairly conducted, in which no errors occur, that does not apply with at least equal force to an action for the recovery of a horse, a ship, or other piece of personal property of equal value; and a judgment upon title to a ship or other personal property is conclusive: *Dennison v. Hyde*, 6 Com. 516. In fact, if there is any difference, the reason is stronger for a second trial in the case of personality than of realty; because, from the fixed character of real estate, the muniments of title can be more easily preserved and traced. The evidence of title may be, and generally is, of record, open to the examination of all—always at hand, and easily produced whenever occasion requires; while the evidence of title to personality generally, to a great extent, rests in parol—is more evanescent in character, more liable to be lost, or if in existence more liable to be beyond the reach of the party at the particular time when he has occasion to produce it. Hence a party is much less likely to be able to present the full strength of his case at the time when forced into trial of the right to personal property, than upon a similar trial as to realty. Neither is there anything in the particular estate which a party may have in the property, or the character of the right sought to be enforced, that distinguishes one kind of property from the other.

One party may have the absolute right of property; the second, the right of enjoyment for a specified time; a third, a right of immediate possession; and a fourth, the actual, rightful or wrongful possession of personality as well as of realty; and there may be injuries to the rights of each of these parties, for which they have a remedy. A party may recover possession who has no right of property, as well as in the case of realty; and we can see no reason why a judgment upon a matter in regard to realty, once put in issue, litigated and determined—whether it be title, a right of present possession, or something else—should not be conclusive, as well as when it relates to personality. No principle of the common law would be violated by such a result. On the contrary, its rules require it. Nor would it be contrary to any principle of public policy.

It does not follow that a party suing to recover the possession of land *must* use the same stereotyped form of complaint, or that he *must allege title in fee, because he may do it*. He need not of necessity adopt the precise form of complaint which was in controversy and approved in *Payne v. Treadwell*, 16 Cal. 243. The form may be adapted to the estate sought to be recovered and the facts desired to be put in issue. The cause of action should be stated according to the facts. In the language of Mr. Chief Justice Field in that case (p. 245), the plaintiff may aver “that he is seized of premises, or of some estate therein, in fee, for life or for years, according to the fact;” or “when the plaintiff has been in posses-

sion of the premises for which he sues, it will be sufficient for him to allege in his complaint such possession and entry, ouster, and continued withholding by the defendant. Such allegations are proper when they correspond with the facts, but they are not essential:" *Ib.* 244. *But whatever is put in issue, and determined, is conclusive and final.*

If a party declares upon a seizin in fee, and thus puts his title in issue, and chooses to rely upon a prior possession merely, or does not choose to put in all his evidence of title, or is unable from any accident to get it in, he is in no worse position than many other parties, who for any reason fail in personal actions to get in sufficient or all their evidence. Prudent counsel, where, from any unforeseen accident they fail to make as strong a case as the facts and the evidence attainable should enable them to do, and they are not satisfied of the sufficiency of their proofs, will submit to a nonsuit, or in a proper case, with the permission of the court, withdraw a juror and begin again. If they do not, they cannot complain that the judgment against them in the action should be followed by its legitimate consequences.

In order that we may not be misapprehended, we will add that the estoppel of a verdict and judgment is necessarily limited to the rights of the parties as they exist *at the time when such verdict and judgment are rendered*, and cannot preclude either party from showing that their rights have been varied or extinguished at a *subsequent* period. No injury, therefore, can result on that ground.

In this case, the record offered in evidence, and excluded by the court, shows that in the former suit the title was distinctly put in issue and determined (the possession of an undivided half was admitted by the answer); that the undivided forty one eighty-first parts was found and adjudged to be in the plaintiffs and forty eighty-first parts in the defendant; that the same title and the same ouster were relied on in this action, - for the plaintiffs proved that the defendant's possession extended as far back as 1857, before the commencement of the former action, and no evidence of title acquired since the former suit was offered. The court therefore erred in refusing to admit the record in evidence, and the judgment must be reversed. . . .

In *Taylor v. Gooch*, 110 N. C. at p. 392, 15 S. E. 2, it is said by Clark, J., in 1892: "This is the fifth time this matter, which has been in litigation more than forty years, has been in this court. . . . This action, having begun long before the adoption of the present reformed procedure [i. e. Code of Civil Procedure], our old friends, John Doe and Richard Roe, figure as parties to the action. It is probably their last appearance upon the legal stage in this state. Originally introduced as a means of evading the excessive technicalities of the old real actions, the disappearance of the fiction marks a still more notable advance in the progress and simplification of the methods of legal procedure." See "Judgment," *Century Dig.* § 1285; *Decennial and Am. Dig. Key No. Series*, § 747.

HARKEY v. HOUSTON, 65 N. C. 137. 1871.

Ejectment. Transition from Common Law to Code Practice. Estoppel.

[Action to recover land. There is here inserted only the discussion, of Rodman, J., upon ejectment before the adoption of the Code practice, and to what extent the fundamental principles of the action survive since the adoption of the Code practice.]

RODMAN, J. The fictitious proceedings by which a claimant to the possession of land was formerly in the habit of asserting his claim, have often been the subject of ridicule and reproach by those who either did not understand, or would not appreciate, the reasons upon which they were founded. The forms in the now abolished action of ejectment, are yet too familiar to the profession to need to be recited, except in the briefest manner, in order to show the purposes which they had in view, and the difficulties they were designed to avoid. The claimant made a fictitious lease to John Doe, who was supposed to have entered on the land, and to have been ejected by Richard Roe, who was known as the casual ejector, and thereupon Doe brings suit against Roe for the trespass and ejectment, and Roe, by notice served on the tenant in possession, advises him to appear at court and defend the action. This notice was regarded as the summons or process to obtain an appearance in the action. The object of the fictions was to avoid certain inconveniences which had been found to attend the real actions, and actions *ejectione firmæ*, formerly in use. 1 Roseoe, Real Act. 1; 2 Ib. 481.

1. It often happened that by some slip or accident, one of the parties obtained a judgment not upon the merits of his case, and unless set aside by the court, which there might be no ground for doing, the judgment was a perpetual estoppel against the other party, by which he was deprived of his freehold or inheritance in the lands. To avoid this harsh result, it became necessary to have an action in which the *possession alone* could be considered as in controversy, and the judgment in which *would not finally bind* the parties and their privies. This it was at last found could be best accomplished through the device of a fictitious lease and ouster, which was accordingly introduced through Rolle, C. J., during the protectorate.

2. Where a title to land was asserted, and a judgment according to that title demanded, it was necessary to describe both the land and the title of the defendant, with a particularity which frequently exposed a just right of some sort to be lost through technicalities.

When our constitution abolished the forms of actions at law, and prescribed that there should be but once form of action (Art. IV, sec. 1), and the C. C. P. sec. 93, prescribed what the complaint should contain; by which the fictitious proceedings in ejectment were abolished; it was never contemplated to surrender the advantages which had been gained by so much labor and experience, and to return to the old real writs with all their inevitable attendants

of particularity, and consequently of technicality, or that a single accidental or partial verdict, should forever estop a party from asserting a just claim.

To preserve those advantages, we must consider that by an action in which the plaintiff demands possession of land under the Code, nothing more is put in issue than a right of entry or a right to the present possession. At least we must so consider it, *when no certain estate is alleged and claimed in the complaint and put in issue by the pleadings*; whether a judgment in an action alleging and demanding a certain estate, would be an estoppel between the parties as to the right to the estate alleged, is a question of too much nicety and importance to be the subject of observation until the case shall occur. We consider that the judgment in an action to *recover possession*, is in the nature of a judgment in the former action of ejectment; that the constitution and C. C. P. intended only to abolish the fictitious part of that action, and that the summons in the present action takes the place of the notice from the casual ejector to the tenant in possession.

The recognition of this construction of the Code seemed indispensable to any decision of the questions of practice arising in this case.

Under the former practice in ejectment, when a tenant in possession was sued, his landlord might come in and be made a party, either alone or with a tenant, in the discretion of the court. C. C. P. sec. 61, prescribes that in actions generally, all persons may be made defendants, who claim interests adverse to the plaintiff; and that, in an action to recover the possession of real estate the landlord and tenant may be joined as defendants. . . .

See "Ejectment," Century Dig. § 3; Decennial and Am. Dig. Key No. Series, § 2.

JOHNSON v. PATE, 90 N. C. 334, 336-337. 1884.

Judgment How Far an Estoppel Under the Code Practice.

[Civil action to recover real property. Judgment against defendant, and he appealed. Affirmed.]

Plaintiff alleged, inter alia, that he was entitled to recover the locus in quo by reason of an estoppel arising out of a judgment, in his favor and against the defendant, rendered in a former action between them—in which action was involved the title to the land sued for in this action. Defendant demurred, and the demurrer was overruled. The question presented was as to the effect of the former judgment as an estoppel. The date of the judgment in question is not disclosed in the reported case, but it sufficiently appears, from that portion of the opinion here inserted, that the judgment was in an action brought since the Code practice was adopted in North Carolina.]

SMITH, C. J. . . . We are next to inquire into the effect of the present record upon the title to the land as between the same contesting parties.

We are relieved from the necessity of considering the point by a

recent decision, overlooked among the references furnished by the appellant's counsel, and we quote a part of the opinion in *Davis v. Higgins*, 87 N. C. 298:

"Although some doubt was expressed upon the point by Rodman, J., in *Johnson v. Nevill*" (an erroneous citation intended for *Harkey v. Houston*, 65 N. C. 137), "an early decision made after the introduction of the new system of pleading under the Code (C. C. P.), it has been since settled that a matter put in issue and material to the result, *is conclusively determined by the verdict and judgment, where land is sought to be recovered, as it would be if the recovery of personal property were the object*. Here, both the pleadings and the issue involve the determination of the title and consequent right of possession in the plaintiff, and this is distinctly and definitely decided in the verdict."

The remark made in the opinion in *Kitchen v. Wilson*, 80 N. C. 191, assimilating that action to the former superseded action of ejectment, as to the proof required in order to a recovery of possession, had no reference whatever to the effect of a verdict finding affirmative facts in issue as *res adjudicata* between the same parties.

Recurring to the complaint in the former case, it asserts positively a title vesting in the plaintiff in these lands and a consequent right to have possession. These averments the demurrer admits, and the effect is the same as if they had been controverted and found upon issues passed upon by a jury. The judgment could only be for the recovery of possession and damages upon a verdict putting title in the plaintiff. It must be declared there is no error, and the judgment is affirmed, but the cause may be remanded for an inquiry into the plaintiff's damages if he shall so elect; and if not, final judgment will be entered here.

See further *Land Co. v. Lange*, 150 N. C. 26, 63 S. E. 164. See "Judgment," Century Dig. §§ 1047, 1051; Decennial and Am. Dig. Key No. Series, § 554.

COLGROVE v. KOONCE, 76 N. C. 363. 1877.

Letting in Parties to Defend Under the Code Practice.

[Colgrove sued Koonce for the possession of land. Upon his own motion Isler was made a party defendant, at spring term, 1873. At a subsequent term, upon motion of one of the other parties to the action, this order making Isler a party was stricken out, and Isler appealed. Affirmed.]

RODMAN, J. This is an action to recover land. During its pendency Isler moved to be made a party defendant without setting forth, so far as appears on record, any claim to the land or any reason why he should be made defendant. The motion was allowed and Isler filed an answer, in which he claimed a title para-

mount and adverse to both plaintiff and defendants. At a subsequent term the original defendants moved to supersede the order by which Isler was allowed to become a party defendant. The judge granted the motion and Isler appealed to this court. By the law prior to the Code of Civil Procedure, no person but one claiming to be the landlord of the tenant in possession (the defendant in the action of ejectment) had a right to be made a defendant without the consent of the plaintiff. *Wise v. Wheeler*, 28 N. C. 196. By C. C. P. sec. 61, the landlord may be joined as defendant; "and any person claiming title or right of possession to real estate may be made party plaintiff or defendant as the case may require."

It seems to us that this section applies only when the person applying to be made a party is connected in interest with one or the other of the original parties and *not when he claims adversely to both*. As, for example, if he claims to be a co-tenant with the plaintiff, or in privity with the defendant or a common possession with them. Section 65 says: "The court . . . *may* determine any controversy before it, when it can be done without prejudice to the rights of others, or by saving their rights; but when a complete determination of the controversy cannot be had without the presence of other parties, the court *must* cause them to be brought in. And when in an action for the recovery of real or personal property, a person not a party to the action but having an interest in the subject thereof, makes application to the court to be made a party it *may* order him to be brought in by the proper amendment." It is clear that Isler does not come within the first paragraph of this section. It is not *necessary* to pass on his claim in order to a complete determination of the controversy between the original parties.

It is equally clear that he does come within the terms of the second paragraph, and in such case it is discretionary with the court to order him to be made a party or not, according to the nature of his claim and the circumstances of the case.

Isler may now sue the present defendants or any others who may be in possession when he brings his suit.

The considerations therefore which must determine the discretion of the judge in deciding whether he will leave Isler to his separate action or make him a party to the present action, seem to be whether justice would be furthered and circuity of action prevented by making him a party; in other words, would it be convenient in the legal sense.

If he were made a party plaintiff and the plaintiff recovered, the right to the possession would still be undetermined between him and the original plaintiff. Or else it would be necessary in the course of the trial to decide upon the respective rights of the co-plaintiffs, thus having a trial within a trial and making a multiplication of issues likely to confuse a jury. This, we think, would not be convenient.

If he were made a defendant and the plaintiff should recover, his rights would be determined along with those of his co-de-

tendants. If, however, the defendants should have judgment, it would still remain to be determined whether he or the original defendants was entitled to the possession.

We are unable to perceive, therefore, how any convenience would be attained by allowing Isler to become a party to the present action. His claims will not be prejudiced by its result whatever that may be, nor are they by its pendency. These views are substantially those held in *Smitherman v. Saunders*, 70 N. C. 270.

The judge did not err in excluding Isler. Judgment affirmed.

See "Ejectment," Century Dig. §§ 145, 146; Decennial and Am. Dig. Key No. Series, §§ 50, 51.

TURNER v. LOWE, 66 N. C. 413. 1872.
Equitable Defenses Under the Code Practice.

[Action to recover possession of land. Verdict and judgment against defendant, and he appealed. Reversed.]

Plaintiff claimed that defendant was his tenant. Defendant admitted this, but set up as a counterclaim "various facts which he claimed to constitute an equitable defense. The court ruled out the evidence offered to sustain such defense." The question presented is: Can equitable defenses be set up in actions to recover real estate?]

RODMAN, J. The rule that a tenant cannot dispute his landlord's title, has not been impaired by any recent legislation or by any recent decision of this court. It holds good now wherever it formerly did.

But a tenant might always show an equitable title in himself against the legal title of his landlord, or any facts which made it inequitable in the landlord to use his legal estate to turn him out of possession.

When law and equity were administered by distinct tribunals, *the tenant was obliged to go into a court of equity for that purpose*. But now that they are administered by the same court, and without any distinction of form, the tenant can *set up in his answer* any equitable defense he may have to his landlord's claim. *Calloway v. Hamby*, 65 N. C. 631, is a case in which that was successfully done, and the defendants were held entitled to a specific performance of the plaintiff's covenant to convey the land. If such a defense cannot be set up in a Superior Court, it cannot anywhere, for we have no separate court of equity.

We have not been at liberty to consider the particular equity set up in this case. The judge refused to hear it on the ground that *no equity would avail as a defense*. In this he erred. Judgment reversed.

See *Smith v. Allen*, 1 Blackford, 22-23, inserted at ch. 3, s. 2, ante. See "Ejectment," Century Dig. § 107; Decennial and Am. Dig. Key No. Series, § 26.

DILLS v. HAMPTON, 92 N. C. 565, 571. 1885.

Tenant's Disputing Title of Landlord.

[Action for damages caused by an alleged trespass by defendant on land claimed by plaintiff. Verdict and judgment against defendant, and he appealed. Affirmed.]

The plaintiff had demised the locus in quo to Inman. Inman had assigned his term to Bumgarner. The defendant, who was overseer of the road, moved a fence on the land in order to open a road. Defendant had no authority for opening such road; but he had obtained the permission of Bumgarner to move the fence. The court instructed the jury that, if defendant had procured a license from Bumgarner to enter the land, the defendant could not deny the plaintiff's title, for that the title and possession of the tenant is the title and possession of the landlord. This instruction was pertinent to the case, because the defendant, in his defense, denied the plaintiff's title to the locus in quo and, consequently, plaintiff's right to recover for the alleged trespass. The question presented is: Can one who justifies an act done as licensee of a tenant, dispute the title of such tenant's landlord? Only such part of the opinion as bears upon this question is here inserted.]

ASHE, J. . . . There is no principle better settled than that a tenant can not dispute the title of his landlord, and it is also well settled that the doctrine of estoppel, as applicable to tenants, prevails against one who enters or takes possession under a mere license. Bigelow on Estoppel, 425. In *Johnson v. Baytup*, 3 A. & E. 188, where a "lessor of a plaintiff being in possession of a house and premises, defendant asked leave to get vegetables in the garden, and having obtained the key for that purpose, fraudulently took possession of the house and set up claim of title; held, that having entered by leave of the party in possession, she could not defend an ejectment, but was bound to deliver up the premises before she proceeded to contest the title—a mere licensee being in this respect on the same footing as a tenant." The same doctrine is maintained in this state in *Whitaker v. Cawthorne*, 14 N. C. 389, and to the same effect are *Glynn v. Grays*, 20 N. H. 114; *Wilson v. Motley*, 59 N. Y. 120; *The Hamilton and Rossville Hydraulic Co. v. The Cinn., Ham. and Drayton R. R.*, 29 Ohio St. 341.

The defendant is estopped as licensee of Bumgarner to deny his title, and Bumgarner as tenant of the plaintiff is estopped to deny his title, ergo, the defendant is estopped to deny the title of the plaintiff. So there was no error in the third instruction. . . . The judgment of the Superior Court is affirmed.

For the rule and its exception, see *Hodges v. Waters*, 1 L. R. A. (N. S.) 1181, and note; *N. L. H. P. Co. v. F. S. Co.*, 69 Atl. 883, 18 L. R. A. (N. S.) 396; *Beek v. Grain Co.*, 107 N. W. 1032, 7 L. R. A. (N. S.) 930 (and note as to subtenants); *Lafferty v. Evans*, 87 Pac. 394, 21 L. R. A. (N. S.) 363 (as to vendees to dispute title of vendor). See "Landlord and Tenant," *Century Dig.* §§ 177, 178; *Decennial and Am. Dig.* Key No. Series, § 64.

BAIN AND OTHERS v. THE STATE, 86 N. C. 49, 50. 1882.

Decree against Agent of the State.

[Action brought in the Supreme Court, under the original jurisdiction of actions against the State, to recover possession of real estate. Judgment against plaintiffs.]

The plaintiffs alleged title in themselves to one-fourth part of the lands used and occupied by "The Insane Asylum of North Carolina." The attorney general appeared for the state and moved to dismiss the action for want of jurisdiction in the court.]

RUFFIN, J. . . . In the case in hand, "The Insane Asylum of North Carolina" is a body corporate—so expressly declared to be, and invested with all the title to the lands mentioned in the complaint, which was ever acquired by the state. See Act of 1868-69, ch. 67. It is too, in express terms, endued with a capacity to sue and be sued, and is in actual possession of the premises; so that as against it, the plaintiffs can have full and adequate relief afforded them for every injury complained of, in the superior court of Wake county, where the land lies, and there is no necessity for resorting to the exceptional jurisdiction of this court, which at best is poorly provided with facilities for the trial of the facts of any cause.

As to the objection urged, that, inasmuch as the state, the real party in interest, could not be brought before the Superior Court, so neither should her agent, the asylum, be permitted to be sued there—as that would be, in effect, to sue the state, and to do indirectly what could not be done directly—we need only refer to the opinion delivered by Chief Justice MARSHALL in *Osborn v. Bank*, 6 Curtis, 251. The very point was there discussed, and it was held after much consideration that the action could be maintained against the agent, and that he be held to answer for trespasses committed in his capacity as such. . . . Dismissed.

See *Sanders v. Saxton*, 182 N. Y. 447, 1 L. R. A. (N. S.) 727, and note; *Tindal v. Wesley*, 167 U. S. 204. In *United States v. Lee*, 106 U. S. 196, 1 Sup. Ct. 240, it is held that the United States cannot be sued except in those cases provided by congress; but that this doctrine has no application to officers and agents of the United States who are sued for real estate in their possession, or held by them by virtue of their official positions. The lawfulness of the possession of such officers and agents and the right or title of the United States may be passed upon, by a court of competent jurisdiction, in an action brought against such officers and agents in possession. [This case involved the title of the government to Arlington.] In *Cunningham v. M. & B. R. R. Co.*, 109 U. S. at p. 452, 3 Sup. Ct. 297, it is said of *U. S. v. Lee*, supra, "The judgment in that case did not conclude the United States, as the opinion carefully stated, but held the officers liable as unauthorized trespassers and turned them out of their unlawful possession." In *Cunningham v. M. & B. R. R. Co.*, 109 U. S. 446, 3 Sup. Ct. 292, 609, is discussed the limits of the doctrine announced in *U. S. v. Lee*, supra. See "Courts," Century Dig. § 701; Decennial and Am. Dig. Key No. Series, § 238.

OVERCASH v. KITCHIE, 89 N. C. 384, 391. 1883.

Ejectment By and Against Co-owners.

[Action to recover land. Verdict and judgment against defendant, and he appealed. Affirmed.]

Several errors were assigned by the defendant, but the only one material to the subject under consideration is sufficiently explained in that portion of the opinion here inserted. The question here presented is: Can one of several co-owners of realty maintain ejectment for the common property against his cotenants or third persons.]

MERRIMON, J. . . . It is said, however, that the infant heirs of Singleton Brawley are tenants in common with the plaintiff. . . . and that the plaintiff cannot sue alone. This is a misapprehension of the law. One tenant in common may sue in many cases without joining his co-tenants. Each has a separate and distinct freehold, and he may sue to recover possession when he has been disseized. There are cases in which they must sue jointly, as where they make a joint demise of their common estate, reserving rent: in such case the action to recover must be joint. If, however, one of the several tenants in common bring an action to recover the possession of land of which he has been disseized, and claim the *entire* estate instead of his proper undivided share, he will not be nonsuited, but will have judgment for such share in common as he shows himself entitled to. And it has been held, that one of two joint tenants may recover the entire estate in an action of ejectment against one who has *no title*. *Bronson v. Paynter*, 20 N. C. 527; *Holdfast v. Shepard*, 28 N. C. 361; *Camp v. Homesley*, 33 N. C. 211; *Robinson v. Johnson*, 36 Vt. 74; *Chandler v. Spear*, 22 Vt. 388; *Wash. on Real Prop.* 572. There is, therefore, no ground for the fourth exception. . . . Affirmed.

See "Ejectment," *Century Dig.* § 374; *Decennial and Am. Dig. Key No. Series*, § 114.

GILCHRIST v. MIDDLETON, 107 N. C. 663, 681-685, 12 S. E. 85. 1890.

Ejectment By and Against Co-owners.

[Action to try title to land and to recover possession thereof. Verdict and judgment against defendant, and he appealed. Affirmed.]

The complaint set up title in the plaintiff and demanded judgment for possession of the whole of the locus in quo. Defendant's answer made a general denial. The court charged the jury, *inter alia*, that, as defendant had shown title in himself to three-fifths of the land, they could not find that plaintiff was entitled to recover more than two-fifths; but if they believed certain testimony, etc., they could render a verdict in favor of plaintiff for two-fifths of the land. The verdict being that plaintiff owned, etc., two-fifths of the land, it was "adjudged that the plaintiff recover of the defendant two-fifths of the land described in the complaint, and \$76.80 damages, and the costs of this action." The plaintiff did not allege or prove that he had made any demand upon the

defendant, prior to bringing this action, to be let into possession with defendant as to two undivided fifths of the land. The defendant did not offer to let plaintiff into possession as to any part of the land; but set up an unqualified denial of plaintiff's claim of the whole of the land—the answer denied that plaintiff had any rights in the land. The question involved is: If a plaintiff sues for the possession of land, claiming title to, and the right of possession of, the *whole*, can he recover *anything* upon proof that he owns, etc., not the whole, but only an *undivided interest* or share—the defendant owning the residue?]

AVERY, J. . . . It is a well-settled rule of law that a tenant in common cannot maintain an action against his cotenant for the possession, or title and possession, of their undivided land, unless an actual ouster is proved or admitted by the pleadings. *Halford v. Tetherow*, 2 Jones (N. C.), 393. It is conceded that, in order to prove an actual ouster by conduct in pais, it must be shown that the tenant in possession, in refusing the lawful demand of his cotenant, or otherwise, asserted a dominion over the common property irreconcilable with the recognition of the rights of the latter. Hence, it has been held (1) that the sole reception of the profits of land by one tenant in common is not an ouster, and will raise no presumption of an ouster against his fellows, until he has enjoyed the exclusive profits of such rents for 20 years; and the grantee of a tenant in common, though he may hold possession under a deed purporting to convey the whole, stands in this respect precisely in the position of his grantor. *Linker v. Benson*, 67 N. C. 150; *Caldwell v. Neely*, 81 N. C. 114; *Page v. Branch*, 97 N. C. 97, 1 S. E. Rep. 625. (2) That where a tenant in common of a tract of land demands of his cotenant, who is in possession of it, the whole tract, instead of asking to be let into possession to the extent of his interest, the refusal to comply with such a demand is not an ouster. *Meredith v. Andres*, 7 Ired. 5. (3) That, so long as the relation of tenant in common of land exists between two persons, an action of trespass will not lie in favor of one against the other for asserting dominion over the common property. *McPherson v. Seguire*, 3 Dev. 153. In stating the foregoing well-established principles, we have given a summary of the points settled by all the authorities cited and relied upon by the defendant to sustain the position that the plaintiff, upon the admitted facts, or upon the proof and the pleadings, cannot recover, because there is no sufficient evidence of an ouster, and that the judge below should have so instructed the jury. It seems in this case that neither party pursued the proper or advisable course in the attempt to assert his rights. The plaintiff, if he did not intend to incur any risks, ought to have made a formal demand to be put into possession as to two undivided fifths of the land, with the defendant, and on refusal or failure, within a reasonable time on the part of the latter, to comply with such demand, he would have had the unquestioned right to maintain an action for possession. When the plaintiff brought suit claiming the whole, and without giving any previous notice, the defendant could have answered that he was holding possession as a tenant in common for the benefit of both

himself and the plaintiff, and had always been ready and willing to let in his cotenant to the extent of his interest, which was two-fifths, and to account for any rents received, if the plaintiff had made demand to be so let in, and for an account of profits. *Johnston v. Pate*, 83 N. C. 110. Upon the finding or admission that the interests of the parties were as averred in the answer, the defendant would have been entitled to judgment for costs. *Sedg. & W. Tr. Title Land*, §§ 283, 284. But the blunder of the plaintiff was cured when the defendant set up an unqualified denial of the claim of sole seisin on the part of the plaintiff. *Allen v. Salinger*, 103 N. C. 17, 8 S. E. Rep. 913; *Id.*, 105 N. C. 333, 10 S. E. Rep. 1020. If defendant deliberately waives his right, and loses his opportunity to admit by answer or disclaimer the true interest of the plaintiff, and then attempts to deny the ouster, he cannot complain that he loses the benefit of the relation of cotenant by his previous denial of its existence. It has been generally, if not universally, held by the courts in this country that a denial of a plaintiff's title or right of entry, or an averment that the defendant held adversely against all persons, or the claim of exclusive possession with a plea of "not guilty," was an admission of actual ouster. *Harrison v. Taylor*, 33 Mo. 211; *Siglar v. Van Riper*, 10 Wend. 414; *Miller v. Myles*, 46 Cal. 535; *Greer v. Tripp*, 56 Cal. 209; *Noble v. McFarland*, 51 Ill. 226; *McCallum v. Boswell*, 15 U. C. Q. B. 343; *Scott v. McLeod*, 14 U. C. Q. B. 574. In *Clason v. Rankin*, 1 Duer. 337, Chief Justice OAKLEY laid down the rule that "a denial in the defendant's answer of all right, title, and interest in the plaintiff is an admission that his own possession is adverse, and may therefore be treated as a confession of ouster, superseding the necessity of proof upon the trial." It is true that Judge PEARSON, in *Halford v. Tetherow*, 2 Jones (N. C.), 396, after laying down the rule that "one tenant in common cannot sue his fellow, unless there is an actual ouster, either proven or admitted by the pleading," declares that putting in the plea of "not guilty" in ejectment, without entering into the consent rule, was not an admission of "an actual ouster," and in this respect differed from the supreme court of Illinois. But, conceding that the principle stated in that case was correct, this court, in *Allen v. Salinger*, followed the rulings of the courts of New York, that, under the new procedure, where the title is not in issue, a general denial of the allegations of the title and especially of the right to immediate possession, is unquestionably tantamount to the confession of ouster in the fictitious action of ejectment; so that the pleadings in this case place the plaintiff and defendant in precisely the same position as the parties in *Halford v. Tetherow* would have occupied towards each other if the fact had been set out in the record that they had entered into the consent rule which Judge PEARSON declared would have been an admission of ouster in the pleadings. It is not reasonable to suppose that the defendant, when it has been settled that the answer is to be construed as an admission of ouster, will any longer insist that it was erroneous to render judgment that the plaintiff

be let into possession as to two undivided fifths, or to instruct the jury that if they found that, by continuous adverse possession, he had acquired title to that proportion of the whole, they would find a wrongful possession on the part of the defendant to the same extent, and assess the damages two-fifths of the value of the whole of the land. If defendant's possession was adverse, the only question that arises out of that admission is whether there shall be a judgment against him for the sole and exclusive right to the land in dispute, and for the whole of the rents, or for the undivided fractional interest of which the jury find him the rightful owner. One tenant in common of land may sue alone, and recover the entire interest in the common property against another claiming adversely to his cotenants, as well as to himself, though he actually prove title to only an undivided interest. This he is allowed to do in order to protect the rights of his cotenants against trespassers and disseisors. But where it appears in the establishment of the titles, or is admitted, as in this case, that a defendant, who has confessed ouster by denying the plaintiff's title, is in reality a tenant in common with the latter, it is the duty of the court to instruct the jury, by a specific finding, to ascertain and determine the undivided interest of the plaintiff. This course obviates the danger of concluding the defendant by a general finding that the plaintiff is the owner. The principle enunciated in *Allen v. Salinger*, 103 N. C. 14, 8 S. E. Rep. 913, and approved in *Lenoir v. Mining Co.*, 106 N. C. 473, 11 S. E. Rep. 516, brought into perfect harmony the rulings of this court in *Overcash v. Kitchie*, 89 N. C. 384, and in *Yancey v. Greenlee*, 90 N. C. 317, by showing how one tenant in common might sue a trespasser, who is infringing upon the rights of himself and his cotenants, and recover the entire land, or sue his cotenant, who simply refuses to recognize his right in his answer, and recover such interest as he may establish title for. There is no error, and the judgment must be affirmed.

See "Ejectment," Century Dig. §§ 373, 374; Decennial and Am. Dig. Key No. Series, §§ 114, 115.

FRITSCHÉ v. FRITSCHÉ, 77 Wis. 270, 45 N. W. 1089. 1890.

Ejectment for an Easement.

[Ejectment for a private way. Judgment against defendant, and he appealed. Reversed. The facts appear in the opinion.]

LYON, J. This is an action of ejectment brought to recover a private right of way claimed by the plaintiff on certain lands of the defendant. The right thus claimed was established by the judgment of this court affirming the judgment of the circuit court in an action at law brought by the plaintiff against defendant for obstructing such right of way. The opinion in that action is filed herewith. See ante, 1088. After the judgment of the circuit

court for the plaintiff was entered in that action, affirming the existence of such right of way, the defendant again obstructed the same at the same point, and thereupon this action of ejectment was brought to recover such right or easement. The circuit court held that the judgment in the former action is *res adjudicata* of plaintiff's right, and thereupon gave judgment herein in his favor, from which the defendant appeals. The ruling was doubtless correct, and the judgment would also be correct if ejectment could be maintained to recover a mere easement. But it is well settled, both on principle and by authority, that the action cannot be maintained for such purpose. It was so held in *City of Racine v. Crotsenberg*, 61 Wis. 481, 21 N. W. Rep. 520. The subject is there quite fully considered, and it is unnecessary to repeat the discussion here. The remedy of the plaintiff is by action at law for damages, or, if the wrong be persisted in, by a suit in equity for an injunction. The judgment must be reversed, and the cause will be remanded, with directions to the circuit court to dismiss the complaint.

For ejectment for a public easement, see *Canton Co. v. Baltimore*, 66 Atl. 679, 11 L. R. A. (N. S.) 129, and note. See "Ejectment," Century Dig. § 25; Decennial and Am. Dig. Key No. Series, § 9.

TENN. AND COOSA R. R. CO. v. E. ALA. R. R. CO., 75 Ala. 479, 51 Am. Rep. 475. 1883.

Ejectment for the Roadbed of a Railroad.

[Ejectment to recover the track and roadbed of a railroad. Judgment against plaintiff. Plaintiff appealed. Reversed.]

Action to recover "real estate" described as the track or roadbed of the plaintiff from Gunter's landing to Gadsden, etc., together with the right of way, grading, trestles, etc.]

STONE, J. . . . It is objected that plaintiff has not sufficient property in the realty to maintain ejectment; that plaintiff has only an easement, and no title to the soil; and that ejectment will not lie for the recovery of an easement.

It is true that ejectment will not lie, as a general rule, for an easement, or to be let into the use and occupation of a servitude. The reason is that the party complaining has only a right in common with the public, or with some other person or persons, to the use or occupation claimed. The right is a qualified, limited one, and in ordinary cases, is not disturbed by another's similar occupation. It is but a privilege to go on the lands of another for a specified, limited purpose, and has no element of exclusiveness in it. A right of way, or of common, may be given as illustrations of this principle. 3 Wash. Ease. (3 ed.) 260, 270; *Child v. Chappell*, 9 N. Y. 246; *Morgan v. Boyes*, 65 Me. 124; *Rees v. Lawless*, 12 Am. Dec. 295. There are cases which go beyond this doctrine. *Wood v. Truckee Turnpike Co.*, 24 Cal. 474; *Union*

Canal Co. v. Young, 30 Am. Dec. 212; 2 Wait, Act. and Def. 747; 2 Redf. Ry. 553.

Lands claimed and condemned as roadbed and right of way of a railroad stand in a different category from that of ordinary easements. Over them is acquired, not the right of use to be enjoyed in common with the public, or with other persons. The right and use are exclusive, and no one else has any right of way thereon. *M. & O. R. R. Co. v. Williams*, 53 Ala. 595; *M. & M. Ry. Co. v. Blakely*, 59 Ala. 471; *Tanner v. L. & N. R. Co.*, 60 Ala. 621; *S. & N. R. Co. v. Pilgreen*, 62 Ala. 305; *Cook v. Cent. R. Co. & Banking Co.*, 67 Ala. 533; *R. & G. R. Co. v. Davis*, 19 N. C. 451; *Jackson v. R. & B. R. Co.*, 25 Vt. 150; *T. & B. R. Co. v. Potter*, 42 Vt. 265.

Ejectment was originally classed as a possessory action. Hence it was that at common law any number of actions could be maintained, by laying the demise at a later date. One recovery was only conclusive as to one and the same demise. A right to the immediate possession, in form legal as distinguished from equitable, would always maintain the action, and it will yet. Prior possession is sufficient against any one afterward found in possession, unless the latter can show a paramount title, or a possession continuous, peaceable and adverse, of sufficient duration to toll the entry. *Tyler, Eject.* 70, 165; *Anderson v. Melear*, 56 Ala. 621. A lessee or termor, during the continuance of a valid lease, may maintain the action against the lessor, although the owner of the entire fee, less the term. So the title of a railroad corporation to the possession of the soil covered by the roadbed and right of way, will after condemnation dominate all adverse claim of possession, even by the owner of the fee. "Although the right which a railroad company acquires to land taken under their charter is said to be merely an easement, yet the nature of their business, their obligations to the community and the public safety require that the possession of the land so taken should be absolute and exclusive against the adjacent landowner, so far as to secure fully every purpose for which the railroad is made and used." *Conn. & Pass. River R. Co. v. Holton*, 32 Vt. 43. "One who has the exclusive right to mine coal upon a tract of land has the right of possession as against the owner of the soil, so far as it is necessary to carry on his mining operations." *Turner v. Reynolds*, 23 Penn. St. 199, 206. "The right of municipal corporations, or public authorities vested with no higher estate than a public easement, or right by dedication, to invoke the remedy of ejectment, for the possession of streets, public squares, town commons, church and market grounds, is upheld in many cases." *Sedg. & Wait Trial of Title to Lands*, sec. 271. See also *Jackson v. May*, 16 Johns. 184; *Winona v. Huff*, 11 Minn. 119; *Cinn. v. White*, 6 Pet. 431; *Dummer v. Jersey City*, 40 Am. Dec. 213; *Hoboken Land Co. v. Mayor*, 36 N. J. L. 540; *Doe v. Booth*, 2 Bos. & Pul. 219; 3 Wait, Act. & Def. 6, 7. In the following cases will be found a curious discussion, tending strongly to show that the roadbed and superstructure—in fact, everything attached

to the soil on which a railroad is built—are considered realty. *Randall v. Elwell*, 52 N. Y. 521, 11 Am. Rep. 747; *Hoyle v. P. & M. R. Co.*, 54 N. Y. 314, 13 Am. Rep. 595. And there is certainly much reason for the opinion. The roadbed and right of way are as immovable as the soil itself, the superstructure is attached to the soil, and the corporation has the exclusive right to the possession of it. In *Cent. Pac. R. Co. v. Benity*, 5 Sawyer, 118, Fed. Cas. No. 2551, the precise question we are considering was presented, and the court, Circuit Justice SAWYER participating, decided the action of ejectment would lie. So we hold it will lie in this case. . . . Judgment reversed.

See "Ejectment," Century Dig. § 25; Decennial and Am. Dig. Key No. Series, § 9; "Railroads," Century Dig. § 129; Decennial and Am. Dig. Key No. Series, § 55.

McCOMBS v. WALLACE, 66 N. C. 481. 1872.

Summary Proceedings in Ejectment.

[Summary proceedings in ejectment before a justice of the peace. Appeal to the Superior Court. Judgment there against defendant, and he appealed. Reversed.]

Plaintiff purchased the locus in quo at a sale by a trustee, to whom defendant had conveyed it in trust for creditors, etc., and brought a proceeding before a justice of the peace to evict the defendant. The deed of trust stipulated that the defendant should "retain possession of said premises until the same shall be sold by" the trustee.]

RODMAN, J. The question in this case is not whether the defendant is tenant of the plaintiff, in *any* sense of that word: but whether he is *such* a tenant as is embraced within the Landlord and Tenant Act, 1868–69, ch. 156, p. 355.

Sec. 19 of that act says: "Any tenant or lessee of any house or land, and the assigns, undertenants, or legal representatives of such tenants, who shall hold over, and continue in the possession of the demised premises, or any part thereof, without permission of the landlord, and after demand made for its surrender, may be removed from such premises in the manner hereinafter prescribed, in either of the following cases: 1. Whenever a tenant in possession of real estate holds over after his term has expired. 2. When the tenant or lessee, or other person under him, has done or omitted any act, by which, according to the stipulations of the lease, his estate has ceased."

A justice has jurisdiction only in the cases described in this section. The act then prescribes the proceedings before the justice.

Upon a careful consideration of this act we think it was intended only to apply to a case in which the tenant entered into possession under some contract, either actual or implied, with the supposed landlord, or with some person under whom the supposed

landlord claimed in privity, or when the tenant himself was in privity with some person who had so entered.

This construction would exclude two classes of cases, which we think were not intended to be embraced in the act, viz: Vendees entering into possession under a contract of purchase, and vendors continuing in possession under circumstances like the present. Such persons are certainly tenants at will or sufferance for many purposes, and they are frequently so called. *Jones v. Hill*, 64 N. C. 198. But they seem to be excluded as well by the words of the section above cited, as by the general scope and spirit of the act. The words of the section clearly require that the entry should be under a demise of some sort, although there is no reason for saying that it must be for any definite term, it may well be at will.

In this case the possession of the defendant was not acquired from either the trustee or the plaintiff; there was nothing which can be called a demise; his possession arose out of his own title, and continued until the sale, by virtue of the reservation in the trust. His term has not expired; he had no term, for that implies a term derived from some other person. The reservation was perhaps void, for a term of years cannot be reserved by the grantor of an estate in fee. In that case the defendant would be a vendor continuing to hold the possession after his sale, which would also effectually exclude the idea of a demise. The case of such a tenant is not within the mischief which the act was intended to remedy. Judgment reversed.

If a tenant hold over, for ever so short a time, the landlord has the election to hold him as tenant for another year and for another year's rent, or to eject him. At one time it was held that nothing would exempt a tenant from the additional year's tenancy; but it is now held that if the tenant's removal be rendered impossible by inevitable accident or the act of God—as by such sickness of a member of his family as would render a removal dangerous to life—he will be exempted from liability for another year's holding and rent. *Herter v. Mullen*, 159 N. Y. 28; see also 13 L. R. A. 598, 13 Ib. (N. S.) 398, and note. If a tenant abandon the demised premises, the landlord may elect: (1) To terminate the contract of lease and recover the rent due up to the time of the abandonment; (2) To suffer the premises to remain vacant and sue for the rent of the whole term; (3) To notify the tenant of his refusal to accept a surrender of the premises, and sublet the premises for the unexpired term to reduce the tenant's liability on the contract—holding the tenant liable for the difference. 13 L. R. A. (N. S.) 398, and note, citing *Scheelky v. Koch*, 119 N. C. 80, 25 S. E. 713. See "Landlord and Tenant," *Century Dig.* §§ 1273, 1295; *Decennial and Am. Dig. Key No. Series*, §§ 296, 301.

McDONALD v. INGRAM, 124 N. C. 272, 32 S. E. 677. 1899.

Summary Proceedings in Ejectment.

[Summary proceeding in ejectment before a justice of the peace. Appeal to the superior court. Verdict and judgment against the plaintiff, and he appealed.]

Plaintiff claimed that the defendant was his tenant holding over after the term had expired. The defendant denied the tenancy and set up as a defense that she was the equitable owner of the premises. The judge of the superior court ruled that the title to real estate was involved and dismissed the case for want of jurisdiction in the justice's court.

The only equitable title that the defendant claimed, was an oral agreement by plaintiff to sell the locus in quo to her—she having previously conveyed it to the plaintiff and remained in possession. According to plaintiff's evidence, the defendant remained in possession as his tenant. According to defendant's evidence, she remained in possession under the oral agreement of repurchase above mentioned. "But the evidence introduced utterly fails to show that there was ever any contract on the part of the plaintiff to sell her back this property. It plainly appears that he offered to sell it back to the defendant for what it had cost him; but that she did not accept the offer." The matter quoted is taken from that portion of the opinion which is omitted.]

FURCHES, J. . . . The jurisdiction of a justice of the peace in actions for possession is entirely statutory, and is limited to landlords and tenants. If title is involved, he cannot proceed with the trial, for want of jurisdiction. But the plea of ownership by the defendant will not oust the jurisdiction of the court, but it will proceed with the trial until it is made to appear from the evidence that the question of title is involved. The only question the court can try, under the statute, in this proceeding is, "Was the defendant the tenant of plaintiff, and does she hold over after the expiration of the tenancy?" It seems that justices of the peace, as between landlords and tenants, have concurrent jurisdiction with the superior courts; and, as justices of the peace have no jurisdiction to declare or to enforce an equity, that in such cases, as they have justice's jurisdiction, they stand very much as they would have stood in actions of ejectment at law, before the joinder of jurisdictions of law and equity in the same court. And if we were to give the statute and the proceedings thereunder this interpretation, it would seem that, to oust the jurisdiction, the title so pleaded by the defendant should arise after the tenancy alleged by plaintiff had commenced. This view seems to be sustained as to legal titles, but not as to equitable titles, in *Davis v. Davis*, 83 N. C. 71, and *Parker v. Allen*, 84 N. C. 466. Why there should be a difference between legal and equitable titles (if there is) does not plainly appear. But it is held in *Parker v. Allen*, *supra*, that, if there is evidence tending to establish an equitable title in the defendant, and the court finds from such evidence this contention in favor of the defendant, and dismisses the action for want of jurisdiction, his action is final, as this court has no right to review the court below upon findings of fact. But, if there is no evidence to support the findings of the court below, it then becomes a question of law, and this court has the right to review and reverse the judgment appealed from. . . . As there is no evidence tending to establish an equitable title in defendant, there was error in dismissing the action. And there must be a new trial, when the matter will be submitted to a jury upon proper issues as to whether the defendant is, or was when

this action commenced, the tenant of the plaintiff, and whether that tenancy had terminated. New trial.

In *Credle v. Gibbs*, 65 N. C. 192, the statute regulating summary proceedings in ejectment is declared to be constitutional, although jurisdiction is conferred upon a justice of the peace—the court holding that the *title to real estate* is not involved in this proceeding. See *Greer v. Wilbar*, 72 N. C. 592, and *Hauser v. Morrison*, 146 N. C. 248, 59 S. E. 693, which hold, that if it be shown that the defendant is a mortgagor or a vendee under a valid contract to convey, he cannot be evicted under these proceedings; such proceedings being restricted to the cases expressly set out in the statute, Revisal, sec. 2001. "Contrivances" by mortgagees to bring mortgagors within the remedy afforded by the statute are of no avail. See caustic remarks of Pearson, C. J., in *Greer v. Wilbar*, 72 N. C. 592. See "Justices of the Peace," Century Dig. §§ 90, 91; Decennial and Am. Dig. Key No. Series, § 36.

DOE v. MACE, 7 Blackford, 2, 3. 1843.

Ejectment by Mortgagee against Mortgagor. Notice to Quit.

[Ejectment. Doe, on the demise of Brown and others, against Mace and others. Verdict and judgment against plaintiffs, and they appealed. Reversed.]

The plaintiffs were the heirs and personal representatives of a deceased mortgagee. The defendants were the mortgagor and those holding under him. The court instructed the jury that plaintiffs could not recover without proving notice to quit, or a demand of possession, before bringing the action.]

SULLIVAN, J. . . . The question is, whether a mortgagee can dispossess the mortgagor and those holding under him, *without a demand of possession or notice to quit*? We have decided at the present term, in the case of *Doe d. Shute v. Grimes et al.*, that the mortgagee is entitled at law to the immediate possession of the mortgaged premises, unless there be an agreement between the parties that the mortgagor shall remain in possession. Formerly, a mortgagor in possession was regarded in the light of a *tenant at will* to the mortgagee. *Powsley v. Blackman*, Cro. Jac. 659, upon which was predicated the opinion that a notice to quit was necessary before he could be dispossessed. That view is now exploded, and it is generally acknowledged at this day that no such relation exists between them. He is not entitled to the emblements, nor does he hold by paying rent; he is in possession by the sufferance merely of the mortgagee, and is therefore not entitled to notice to quit before ejectment may be brought against him. The English authorities, since the days of *Ld. Mansfield*, are uniform to this point. *Keech v. Hall*, Doug. 21; *Moss v. Gallimore*, 1b. 279; *Birch v. Wright*, 1 T. R. 378; *Doe d. Fisher v. Giles et al.*, 5 Bing. 421; *Doe d. Roby v. Maisey*, 8 B. & C. 767. In the United States there is some contrariety in the decisions, but the weight of them is in accordance with the English authorities.

With regard to the underlessees of the mortgagor, the law is,

that they are liable, also, to be ejected without notice, provided they have been let into possession by the mortgagor *subsequently* to the mortgage, and without the privity of the mortgagee. But if the tenancies were created *prior* to the mortgage, the situation of the mortgagee is the same as that of the mortgagor before the mortgage was made. *Keech v. Hall*, *supra*; *Thunder d. Weaver v. Belcher*, 3 East, 449; *Doc d. Sheppard v. Allen*, 3 Taunt. 78. There was evidence which tended to show, that the underlessees held by virtue of a lease from the mortgagor, made since the date of the mortgage. The testimony was not conclusive to the point, but the jury might have fairly inferred, from the testimony adduced, that the lessees did so hold. Judgment reversed.

In some states the English rule prevails, and the mortgagee may bring ejectment against the mortgagor; while in others this rule has been changed by statute, the mortgage being made only a lien or security for the debt, and the mortgagee cannot bring ejectment. 10 Am. & Eng. Enc. L. 505, 506; 1 Jones on Mortgages, ss. 17-59. For the respective rights of mortgagor and mortgagee, and purchasers at foreclosure sale, to emblements, etc., on mortgaged premises, see Jones on Mortgages, ss. 697, 1658. *Teal v. Walker*, 111 U. S. 242, 4 Sup. Ct. 420. For a summary of the law in North Carolina on the respective rights of mortgagor and mortgagee, and their assigns, to the possession of the mortgaged land and the emblements thereof, see Mordecai's Law Lectures, 531-541; see also *Killebrew v. Hines*, 104 N. C. 182, 10 S. E. 159, 251; *Hinton v. Walston*, 115 N. C. 7, 20 S. E. 164. See also *Credle v. Ayer*, 126 N. C. 11, 35 S. E. 128, inserted post, ch. 3, sec. 18. See "Mortgages," Century Dig. §§ 484, 485; Decennial and Am. Dig. Key No. Series, § 213.

CONDRY v. CHESHIRE, 88 N. C. 375. 1883.

Ejectment by Owner of Equitable Title.

[Action to recover possession of land. Verdict and judgment against defendant, and he appealed. Affirmed.]

By the will of John McLelland the locus in quo was devised to R. H. Parks for the sole and separate use of Mary Condry. Mary Condry brought this action to recover the land. Parks, the trustee, being dead, his heirs and executors were made defendants. Cheshire claimed title under a sale made by order of court in a proceeding to which Mary Condry was not a party. Cheshire contended that as the *legal title* to the locus in quo was in the heirs of Parks, the trustee, the plaintiff should be nonsuited; but the judge ruled to the contrary.]

ASHB. J. The first ground of appeal taken by the defendants is without foundation. It has been decided by this court and is now to be considered a settled law of the state, that a plaintiff in an action to recover real property may recover upon an equitable title, even, as in this case, where the legal estate is in his trustee. *Murray v. Blackledge*, 71 N. C. 492; *Farmer v. Daniel*, 82 N. C. 152.

"That the owner of the perfect *equitable* title may maintain ejectment, or other possessory action, under our system of procedure, may be regarded as settled beyond controversy. *Taylor v. Eatman*, 92 N. C. 601; *Condry v. Cheshire*, 88 N. C. 375." *Skinner v. Terry*, 134 N. C. at p. 309, 46 S. E. 547. See "Ejectment," Century Dig. § 56; Decennial and Am. Dig. Key No. Series, § 13.

FARMER v. DANIEL, 82 N. C. 152, 158-159. 1880.

Equitable Title as a Defense.

Action to recover possession of land, heard upon a case agreed. Judgment against plaintiffs, and they appealed. Affirmed.

Plaintiffs claimed as heirs at law of a former owner. Defendant set up title under a judicial sale made in proceedings to which the plaintiffs in this action were parties. It was shown that the sale was made and reported to the court, the price paid, and an order made for the execution of the deed to the purchaser; but the deed was never in fact made, or, if made, it could not be found. The defendant connected himself, by mesne conveyances, with the purchaser at the judicial sale. The question presented is: Can an equitable title be set up as a defense in an action to recover real estate?]

DILLARD, J. Seeing that the defendant, by assignment from the original purchaser, has such a perfect equitable right to have a deed passing the title, if he has not already one, it remains to inquire whether such an equity can be set up so as to defeat the action of the plaintiffs. *Formerly*, if no title had passed to the purchaser by an actual deed, or by the operation of the decree *per se* under the act of assembly in such case made and provided, the plaintiffs would have been entitled *in a court of law* to recover, and the defendant would have been forced to go into a court of equity by an independent suit or by motion in the original cause and have the recovery enjoined. *But now*, under our new system of courts, such circuitry is avoided and the *defendant is entitled to set up his equitable title as a defense to the plaintiff's legal title*—which they claim to have—and in the superior court the defendant is entitled to the same relief as formerly he was compelled to seek in the courts of equity. This right of defendant to set up his equitable right, and the sufficiency thereof to defeat the legal title of the plaintiffs, if such they have, is adjudged and established by several decisions of this court, to some of which we will refer.

In the case of *Stith v. Lookabill*, 76 N. C. 465, the plaintiff, Stith, claimed as purchaser under an execution against one Cammon holding in trust for certain persons, and the defendant defended as tenant to one Sturges who was the owner by assignment of the equitable interests of the cestuis que trust and the court held that although the sheriff's deed passed the legal title to Stith, he was not entitled to recover against the owner of the equitable estate in possession. In *Ten Broeck v. Orchard*, 74 N. C. 409, it was held that in an action to recover land on the *legal title*, the defendant might set up an *equitable claim* in defense of the action. And to the same effect are the cases of *Turner v. Lowe*, 66 N. C. 413, and *Bank v. Glenn*, 68 N. C. 35.

It is urged by the plaintiffs that however sufficient in general the right in equity to have the legal title may be, to bar the action of the holder of the legal title, yet such an assertion of equitable defense cannot avail the defendant *in this case* for several reasons: 1. Because such equitable right is not set up in the an-

swer. . . . Neither of these objections to the sufficiency of the equitable title as a defense against the plaintiffs' recovery is in our opinion tenable.

As to the first objection: The plaintiffs in their complaint put their case on the averment of a right of possession in themselves and the defendant denies a right of possession in the plaintiffs and avers a right of possession in himself, and upon the issue thus made, the parties treated the issue as embracing an equitable defense. Accordingly in the case agreed, they set forth facts constituting such defense and leave the legal inference therefrom to be made by the court. In such case we will treat the defense set up in the case agreed as authorized by and within the scope of the pleadings just as the parties considered it. *McRae v. Battle*, 69 N. C. 98. . . . Affirmed.

See "Ejectment," Century Dig. § 107; Decennial and Am. Dig. Key No. Series, § 26.

JONES v. COFFEY, 109 N. C. 515, 519, 14 S. E. 84. 1891.

Ejectment. Mesne Profits and Damages.

[Action to recover possession of land and damages for its detention. Verdict and judgment against defendant, and he appealed. Reversed.]

The action was commenced March 18, 1889, and tried in June, 1891. On the question of damages the judge charged that the plaintiff could recover a fair rental value for the land and for any spoil or injury done to the land during the adverse occupation thereof by the defendant, "and as far back as the beginning of the plaintiff's title, on January 12, 1882,—provided defendant had occupied and possessed the land from the commencement of such title in 1882, and from such time down to the time of the trial." Defendant excepted. Only so much of the case and opinion is here inserted as bears upon the question of the damages recoverable in such actions.]

AVERY, J. . . . Our statutes—sections 267 (subd. 5), 474, 475, of the Code—provide that a plaintiff who prevails in an action involving the title or right to the possession of land may recover also in the same action the clear annual value of the land, and damages for waste or injury to the premises up to the time of trial; but the defendant is not liable for rents accruing or waste or other injury committed for any period previous to three years before suit was brought, except when the defendant prefers a claim for improvements. *Sherrill v. Connor*, 107 N. C. 630, 12 S. E. Rep. 588; *Reed v. Exum*, 84 N. C. 430; *Whissenhunt v. Jones*, 78 N. C. 361. We think that there was error in the instruction given to the jury that they might allow as damages the fair rental value and for any spoil as far back as January 12, 1882, although the summons was not issued till 1889. But it is not necessary or proper that the verdict should be disturbed as to the other issues. The defendant has not shown that the jury were misled to his prejudice in passing upon them. A new trial

will be awarded, therefore, only as to the issue involving the damages. New trial as to issue of damages.

See *Whissenhunt v. Jones*, 78 N. C. 361, inserted at ch. 3, sec. 2, ante. "Under the *former practice* in actions of ejectment, damages were recoverable only up to the time *the action was begun*; but under the *present system* they are recoverable *up to the trial*. *Pearson v. Carr*, 97 N. C. 194, 1 S. E. 216; *Arrington v. Arrington*, 114 N. C. at p. 120, 19 S. E. 278; 19 Am. & Eng. Enc. L. (1st ed.) 537; *Sutherland on Damages*, sec. 848." *Credle v. Ayers*, 126 N. C. at p. 16, 35 S. E. 128, inserted at ch. 3, sec. 18, post. See "Ejectment," *Century Dig.* §§ 449-451; *Decennial and Am. Dig.* Key No. Series, § 132.

SEC. 4. BETTERMENTS.

WHARTON v. MOORE et al., 84 N. C. 479, 482-484. 1881.

The Doctrine of Betterments Discussed.

[Civil action tried upon a case agreed. Judgment against defendants, and they appealed. Affirmed.]

The defendants purchased city lots from a mortgagor, and built houses on such lots before they had any actual notice of the mortgage. Afterwards the houses and lots were sold under a decree to foreclose the mortgage, and the proceeds were held subject to the ruling of the court as to the claims of the defendants for the value of the betterments put on the lots by them. The lots were worth \$250 each in their unimproved state. The betterments put on by the defendants added five hundred dollars to the value of each lot. The rental value of the lots before being built on was not more than the taxes. The defendants claimed that they were entitled to the value of their betterments to the extent that the lots were enhanced in value thereby. The plaintiff, who sued to foreclose the mortgage, claimed the entire proceeds, and the judge ruled with him. Defendants excepted.]

ASHE, J. . . . This right to betterments is a doctrine that has gradually grown up in the practice of the courts of equity, and while it has been adopted in many states, it is not recognized in others. But it may now be considered as an established principle of equity, that whenever a plaintiff *seeks the aid of a court of equity* to enforce his title against an innocent person, who has made improvements on land, without notice of a superior title, believing himself to be the absolute owner, aid will be given to him (the plaintiff), only upon the terms that he shall make due compensation to such innocent person to the extent of the enhanced value of the premises, by reason of the meliorations or improvements, upon the principle that he who seeks equity must do equity. *Story's Eq. Juris.* s. 799; 2 *Greenl. Ev.* s. 549. But it was only in these cases where the right has been set up by way of *defense* that the courts have lent their aid. It had not been given to a party *seeking affirmative relief*, before the case of *Bright v. Boyd*, 1 *Story Rep., Fed. Cas. No.* 1,875, where Judge STORY held, that a plaintiff, after a recovery at law against him of a tract of land by reason of illegality in the proceedings of an

administrator to sell, under which he had purchased, could recover by bill in equity the value of the lasting improvements put by him on the land. The case of *Matthews v. Davis*, 6 Humphrey, 324, and *Henry v. Pollard*, 4 Humphrey (Tenn.), 362, soon followed and were to the same effect, relying upon Judge STORY's decision as authority. But these cases pressed the doctrine further than we have found it carried in any other state except this. In the case of *Albea v. Griffin*, 22 N. C. 9, which was a bill filed by the vendee for a specific performance of a contract for the sale of land, and the defense was the Act of 1819 avoiding parol contracts for the sale of land, Judge GASTON, giving the opinion of the court, says: "Although payment of the purchase money, taking possession, and making improvements, will not entitle the vendee to a specific execution of a parol agreement for the sale of land, yet he has in equity a right to an account of the purchase money and the value of his improvements, deducting therefrom the annual value during his possession."

This court in several cases has recognized the doctrine of betterments to the extent of the *enhanced value of the land*, in cases where the contract for the sale of land has been rescinded, or the title has failed by reason of the contract's not being in writing. *Wetherell v. Gorman*, 74 N. C. 603; *Hill v. Brower*, 76 N. C. 124; *Smith v. Stewart*, 83 N. C. 406.

But we have been unable to find any case in which the doctrine has been held to apply to *mortgagors*. In our Act of 1871-72, providing a remedy to recover betterments for innocent defendants against whom a recovery may be had in an action in the nature of ejectment, it is expressly declared in the act that its provisions shall not apply to any suit brought by a mortgagee against a mortgagor to recover the mortgaged premises. It is very probable the legislature in making the exception had in view the generally admitted principle that the right to betterments is not conceded to mortgagors, for the current of authorities is to the effect that it has no application to them. In 2 Washburn on Real Prop., it is laid down that, "if the mortgagor or *any one standing in his place* enhances the value of the premises by improvements, they become additional security for the debt, and he can only claim the surplus, if any, upon such sale being made, after satisfying the debt."

In *Martin v. Beatty*, 54 Ill. Rep. 100, it is held that money expended in improvements upon *mortgaged* premises by the mortgagor or his grantee, subsequent to the mortgage, cannot be given a lien prior to that of the mortgagee. And in *Rice v. Dewey*, 54 Barb. (N. Y.), 455, it was decided that "where lands sold and conveyed by mortgage are charged with the mortgage debt, improvements that constitute a part of the realty, irrespective of the question by whom they are made, are equally subject to the lien of the mortgagee as the land upon which they are made."

In Massachusetts it is held that the owner of an equity of redemption is not entitled, as against the mortgagee, to be allowed for improvements made upon the premises. *Childs v. Dolan*, Al-

len's Rep. 319. To the same effect are *Union Water Co. v. Murphy*, 22 Cal. 621; *McCumber v. Gilman*, 15 Ill. 381, and 1 Jones on Mortgages, s. 147.

There is no error. Let this be certified to the superior court of Wake county that proceedings may be had there in accordance with this opinion.

See ch. 9, sec. 3, *Ball v. Piddock*, 21 N. J. Eq. 311. See Revisal, secs. 652-666. In *Railroad v. McCaskill*, 98 N. C. at mid. p. 537, it is said, with reference to betterments: "The court expressly told the jury that they should not estimate the value of the improvements by the actual cost in making the same, but by the *enhanced value they gave the premises*. This instruction conforms to the rule prescribed by the statute, recognized and settled in *Wetherell v. Gorman*, 74 N. C. 603; *Daniel v. Crumpler*, 75 N. C. 184; *Smith v. Stewart*, 83 N. C. 406." See *Frederick v. Frederick*, 102 S. W. 858, 13 L. R. A. (N. S.) 514, for betterments by life tenant; *Gibson v. Field*, 98 Pac. 1112, 20 L. R. A. (N. S.) 378, bringing wild lands into cultivation. See "Mortgages," Century Dig. § 722; Decennial and Am. Dig. Key No. Series, § 274; "Improvements," Cent. Dig. §§ 4-15; Decennial and Am. Dig. Key No. Series, § 4.

SEC. 5. SLANDER OF TITLE.

TASBURGH v. DAY, Cro. Jac. 484. 1620.

Essentials to the Action. Actual Damage.

[Action on the Case. The declaration charged, in substance, that plaintiff was seized of the advowson of Sandcroft and intended to sell it for the payment of his debts; that the defendant, knowing of this and intending to slander plaintiff's title to the advowson and to hinder his sale thereof, "spake of the plaintiff these scandalous words: 'True it is that Sir John Tasburgh was the true and undoubted patron of Sandcroft, but now he hath lost that patronage and presentation, by being a simonist and a recusant—both which I will prove him to be;' by reason of which words plaintiff was slandered in his good name and hindered in the sale of the advowson."]

[Per Curiam.] The defendant pleaded not guilty; and it was found for the plaintiff, and damages assessed to one hundred pounds.

It was moved in arrest of judgment, that this action lies not; for he doth not show that he had any prejudice by the slandering of his title; nor doth he show that there was any communication to sell it to any, nor that any who intended to buy it was thereby hindered in his buying; and without some special cause shown the action lies not; and for the words touching his person, they are not actionable, for they do not touch him in his office of justice of peace, nor is there any damage to him by the speaking of which the common law takes any cognizance. The court were all of opinion that the action lay not, and therefore it was adjudged for the defendant.

See "Libel and Slander," Century Dig. § 389; Decennial and Am. Dig. Key No. Series, § 135.

KENDALL v. STONE, 5 N. Y. 14. 1851.

Actual Damage as a Result of the Slander. Essentials to the Declaration.

[Action on the Case for slander of title. Judgment against defendant, and he appealed. Reversed.]

The declaration alleged that by reason of the slanderous utterances of defendant, A. H. Wheeler was deterred from purchasing the land of the plaintiff. The loss of the sale to Wheeler was the only special damage alleged. The proof was that Wheeler had entered into a binding contract to buy the land, but when he heard what the defendant said about the title, he became dissatisfied and requested to be released from his contract, which request the plaintiff granted, and the contract with Wheeler was rescinded by the mutual consent of the parties thereto.]

GARDINER, J. The cause of action in this case is denominated slander of title, by a figure of speech, in which the title to land is personified, and made subject to many of the rules applicable to personal slander, when the words in themselves are not actionable. To maintain the action the words must not only be false, but they must be uttered maliciously—(Smith v. Spooner, 3 Taun. 254; Pater v. Baker, 3 Man. Gr. and Scott, 868)—and be followed, as a natural and legal consequence, by a pecuniary damage to the plaintiff, which must be specially alleged in the declaration, and substantially proved on the trial. Beach v. Ranney, 2 Hill, 314; 6 Hill, 524.

The declaration in this case alleges, in the only count to which the evidence applies, that, by means of the grievances, divers good citizens, and especially one Asa H. Wheeler, were deterred from purchasing the lands in question, and the plaintiff was prevented from disposing of the same, and thereby deprived of the advantages to be derived from the sale thereof, etc. The loss of a sale to Wheeler is therefore the only special damage incurred by the plaintiff, alleged in the declaration, and established by the evidence.

The superior court placed the recovery on this ground, and it is obviously the only one on which it can be sustained.

Before the words were spoken, the plaintiff and Wheeler had entered into an agreement in writing, for the sale of the lot in question, which was executed by the vendor and accepted by the vendee, who upon its delivery paid two hundred and fifty dollars towards the purchase money. *The agreement was obligatory upon both parties.* Either could have enforced a specific performance in equity, and thereby attained the precise result contemplated by the contract. Under these circumstances, the representations charged were made by the defendant. The effect of them was not to prevent a sale of the land, for that had been secured by the existing contract. Wheeler was induced by the misrepresentation to desire a relinquishment of the agreement. This was assented to by the plaintiff, the agreement was rescinded, and the note of the vendor received for the amount of the money advanced by the purchaser. This suit was then instituted, and special damages claimed of the defendant, substantially for the nonfulfillment of

the contract which had been surrendered by the consent and agreement of the plaintiff. This is a brief statement of the proceeding.

"The court charged that it was pretty manifest, from the testimony of Wheeler, that the plaintiff had sustained damages; that the former would have taken the title if it had not been for the words spoken by the defendant." To this there was an exception, and the question is, whether the special damage alleged by the plaintiff, which is the gist of the action, was established by this evidence.

It has been doubted, whether in any case where there is a subsisting contract and its performance is prevented by the representations of a third person, an action would lie in behalf of the person with whom the contract was made. The cases are collected in *Moody v. Baker*, 5 Cowen, 351. The judges in that case were divided in opinion, but Justice Woodworth, who delivered the opinion of the court, conceded, that the action would not lie, where the contract was for the payment of money; and the principle of the concession extends to every case where a breach of the contract is susceptible of a fixed and definite compensation in money, or where it may, according to the usual practice of the courts, be specifically enforced against the delinquent party.

A misrepresentation which should induce a party to violate a contract for the sale and delivery of goods, or stock, would no more be the subject of an action, than one which should cause the refusal to pay a promissory note. *Morris v. Langdale*, 2 Bos. & Pul. 284; *Vicars v. Wilcox*, 8 East, 1. There is no difference in principle between a contract for the delivery of merchandise, and for the sale of land, except, that in the latter case, the remedy of a specific performance is more complete than a pecuniary compensation.

My own opinion would be, that no action could be sustained in such a case, upon the ground taken in *Vicars v. Wilcox*, *supra*,—that the damage must be the legal, and not the illegal consequence of the words spoken. This principle was recognized in *Butler v. Kent*, 19 J. R. 228, and in *Beach v. Ranney*, 2 Hill, 309, that in an action for words not actionable per se, the damage must be "the natural and immediate consequence of the speaking of the words." See also *Crain v. Petrie*, 6 Hill, 524; *Moody v. Baker*, *supra*.

In this case, the words charged were not the immediate cause of the nonfulfillment of the contract, in any conceivable view that can be taken. But if I am wrong in this, there is no case that holds, that where the special damage consists in the violation of a contract, the plaintiff may discharge the obligation, and then recover damages in an action of tort for its nonperformance. The right claimed to be affected by the slander, originated in and subsisted by virtue of the contract; when that was discharged, it fell with it. The vendor and vendee elected to consider the agreement as null from the beginning. When the suit was instituted, therefore, there could be no injury, for there was no right to be affected. Yet under these circumstances, the plaintiff has been

permitted to recover a thousand dollars by way of damages, because Wheeler wished to be discharged from a purchase of a lot, the stipulated value of which was nine hundred dollars, and was discharged by the vendee accordingly.

In *Bird v. Randall*, 3 Burr. 1345, the action was for enticing a servant from the employment of the plaintiff. The servant was bound to the master for five years, under a penalty of one hundred pounds. The plaintiff sued the servant, and recovered judgment, which was paid after the suit against the defendant was at issue and noticed for trial. It was held that the defendant was discharged. The recovery against the servant by him, and payment, put an end to the contract, as Lord MANSFIELD remarks, and, in his reasoning, he puts a satisfaction upon the same ground as a release or discharge of the contract. The judgment must be reversed.

See "Libel and Slander," Century Dig. §§ 389, 390; Decennial and Am. Dig. Key No. Series, §§ 131, 135.

SMITH v. SPOONER, 3 Taunton, 246, 255. 1810.

Malice.

[Action on the Case for slander of title. Verdict against defendant with liberty to move for a nonsuit. Rule nisi to set aside the verdict and enter a nonsuit. The nonsuit was ordered.]

The declaration alleged that plaintiff, being owner of a term of years, offered it for sale at auction; that defendant was present at the sale and announced that plaintiff could give no title to the term; that plaintiff had suffered damages thereby. Defendant pleaded the general issue. Defendant insisted that plaintiff should be nonsuited because there was no proof of express malice on the part of the defendant.]

LAWRENCE, J. . . . An action can only be maintained where the words are spoken maliciously. It is not necessary to plead specially; it is for the plaintiff to prove malice, which is the gist of the action, and is a part of the declaration important to be proved by the plaintiff. The specially pleading a justification would admit the facts stated in the declaration, and amongst others the malice. Now as to the facts, what is this case? A man thinking he has a right to recover possession of a term for some misconduct of his tenant, and hearing the term is to be sold, goes to the auction, and says the vendor cannot make a title; now does not he act herein as an honest man? What would have been said, if he had lain by, and permitted another to purchase it, before he disclosed his claim? The rule, therefore, must be made absolute for a nonsuit.

For a valuable collection of authorities on the subject of slander of title see 13 L. R. A. 757, notes and briefs. See also *Carden v. McConnell*, 116 N. C. 875, 23 S. E. 923, and 8 C., 120 N. C. 461, 27 S. E. 469. The headnote to the last case is: "An action for slander of title cannot be

maintained unless the plaintiff shows the falsity of the words published or spoken; the malicious intent with which they were uttered; and a pecuniary loss or injury to himself." In *Paul v. Halierty*, 63 Penn. St. 46, 3 Am. Rep. 518, it is held that a malicious statement as to the quality and value of land, which statement causes the owner to lose a sale of the land, is actionable. The court say: "A statement, however malicious, that land is without timber, when notoriously well timbered, could never be the subject of damages. But very different would be the case of those occult qualities or internal values which science and experience may be able to detect. . . . The representation in this case was, that an experienced iron manufacturer was of opinion that the iron ore on the land was but a "pocket" or nest that would suddenly run out. . . . This was a most successful mode of depreciating the value of the land as mineral land, and if this was false and malicious, as well as injurious to the plaintiff, why shall he not be indemnified?" See "Libel and Slander," Century Dig. § 390; Decennial and Am. Dig. Key No. Series, § 131.

SEC. 6. REMOVAL OF CLOUD UPON TITLE, AND QUIETING TITLE.

WEHRMAN v. CONKLIN, 155 U. S. 314, 321-323, 15 Sup. Ct. 129. 1894.

Jurisdiction in Equity and under Modern Statutes.

[This was a bill in equity brought by the appellees, Conklin and wife, to enjoin the plaintiff, Wehrman, from prosecuting an action of ejectment against the appellees. The case was brought in the Circuit Court of the United States for the Northern District of Iowa. Defendant demurred for want of jurisdiction and want of equity in the bill. The demurrer was overruled. Answer filed. Decree against Wehrman in which his claims to the locus in quo "were adjudged to be invalid and groundless and the complainants decreed to be the true and lawful owners of the land, and their title to be quieted against the claims of the defendant, who was perpetually enjoined from further proceedings at law. From this decree defendant appealed to this court. The opinion of the court below is found in 38 Fed. Rep. 874, and upon final hearing in 43 Fed. Rep. 12." Among other things, the bill alleged that Wehrman's title and interest in the locus in quo had been sold in 1862, under attachment proceedings, and purchased by Carlos S. Greeley, who held possession and paid the taxes for twenty years, and then sold to Conklin who had been in possession ever since; that Wehrman for more than twenty-seven years took no steps to assert his title, nor did he give notice of any claim until the commencement of his action at law, to restrain the prosecution of which this suit is, in part, brought; and that a certain conveyance under which Wehrman claimed title was a cloud upon Conklin's title. The prayer was, that the action of ejectment, brought by Wehrman, be stayed and that he be enjoined from further proceedings at law.]

Mr. Justice BROWN: This is a bill in equity, not only to stay an action in ejectment at law, but to remove a cloud cast upon the Conklin's title to the lands in question, created by a deed from Adolph Wehrman to Frederick Wehrman, appellant and defendant in the bill, and to quiet their own title thereto.

1. Defendant's principal contention is that equity has no jurisdiction of the case, for the reason that the contest concerns the legal title only, and that plaintiffs have a plain, adequate, and

complete remedy at law. . . . The general principles of equity jurisprudence as administered both in this country and in England, permit a bill to quiet title to be filed only by a party in possession against a defendant who has been ineffectually seeking to establish a legal title by repeated actions of ejectment, and as a prerequisite to such bill it was necessary that the title of the plaintiff should have been established by at least one successful trial at law. Pom. Eq. Jur. §§ 253, 1394, 1396. At common law a party might by successive fictitious demises bring as many actions of ejectment as he chose, and a bill to quiet title was only permitted for the purpose of preventing the party in possession being annoyed by repeated and vexatious actions. The jurisdiction was, in fact, only another exercise of the familiar power of a court of equity to prevent a multiplicity of suits by bills of peace. A statement of the underlying principles of such bills is found in the opinion of this court in *Holland v. Challen*, 110 U. S. 15, 19, 3 Sup. Ct. 495, 497, in which it is said: "To entitle the plaintiff to relief in such cases, the concurrence of three particulars was essential: He must have been in possession of the property; he must have been disturbed in its possession by repeated actions at law; and he must have established his right by successive judgments in his favor. Upon these facts appearing, the court would interpose and grant a perpetual injunction to quiet the possession of the plaintiff against any further litigation from the same source. It was only in this way that adequate relief could be afforded against vexatious litigation and the irreparable mischief which it entailed."

This method of adjusting titles by bill in equity proved so convenient that in many of the states statutes have been passed extending the jurisdiction of a court of equity to all cases where a party in possession, and sometimes out of possession, seeks to clear up his title and remove any cloud caused by an outstanding deed or lien which he claims to be invalid, and the existence of which is a threat against his peaceable occupation of the land, and an obstacle to its sale. The inability of a court of law to afford relief was a strong argument in favor of extending the jurisdiction of a court of equity to this class of cases.

The statute of Iowa, upon which this bill is based, is an example of this legislation, and provides (Code, § 3273) that "an action to determine and quiet title to real property may be brought by any one having, or claiming an interest therein, whether in or out of possession of the same, against any person claiming title thereto, though not in possession."

It will be observed that this statute enlarges the jurisdiction of courts of equity in the following particulars:

(1) It does not require that plaintiff should have been annoyed or threatened by repeated actions of ejectment.

(2) It dispenses with the necessity of his title having been previously established at law.

(3) The bill may be filed by a party having an equitable as

well as a legal title. *Grisson v. Moore*, 106 Ind. 296, 6 N. E. 629; *Stanley v. Holliday* (Ind. Sup.), 30 N. E. 634; *Echols v. Hubbard* (Ala.), 7 South. 817.

(4) In some states it is not even necessary that plaintiff should be in possession of the land at the time of filing the bill.

These statutes have generally been held to be within the constitutional power of the legislature.

See Pom. Eq. Jurisp. vol. 6, §§ 724-743; *Tracy v. Wheeler*, 107 N. W. 68, 6 L. R. A. (N. S.) 516, and note; *Miller v. Coxe*, 133 N. C. 758 (to cancel a mortgage barred by the statute of limitations); *Ala. Coal Co. v. Gulf Coal Co.*, 40 So. 397, 7 L. R. A. (N. S.) 712, and note (by owner of mineral interest); *Heppenstall v. Leng*, 66 Atl. 991, 12 L. R. A. (N. S.) 652, and note (vendor may maintain after making contract to sell); *Whitehouse v. Jones*, 55 S. E. 730, 12 L. R. A. (N. S.) 49-81, and note covering the whole subject—including the practice in equity and under modern statutes. See "Quieting Title," *Century Dig.* §§ 36-43, 54, 55; *Decennial and Am. Dig. Key No. Series*, §§ 9-12, 22, 23.

BUSBEE v. MACY, 85 N. C. 329. 1881.

What is Such a Cloud as Will Confer Jurisdiction?

[Controversy without action under C. C. P. s. 315 (Revisal, ss. 803-805). Judgment against defendant, and he appealed. The avowed purpose of the controversy was, to remove an alleged cloud upon plaintiff's title to certain real estate.]

RUFFIN, J. A question of jurisdiction meets us at the very outset of this case. The plaintiff alleges that the deed under which the defendants claim and against which he seeks relief, is absolutely void for uncertainty upon its face. Ought then a court of equity to take cognizance of the cause and undertake to quiet plaintiff's fears, when upon his own showing they are utterly groundless and idle?

The courts of equity in the exercise of what is called "preventive or protective justice," have been long accustomed to relieve against deeds or other instruments, which it is feared may be used vexatiously and injuriously at some future day, when the evidence to impeach them may be lost, and against such as may presently operate as clouds upon the title of others, and cause their true interests to be suspected.

But to justify the interposition of the court for any such purpose, the difficulty complained of must appear to exist, and the cloud sought to be removed, present, at least, some semblance of validity. Otherwise the court will not interpose, since to do so, would be to engage in the vain effort of giving relief to one who cannot possibly be injured. Accordingly we find it said in 1 Story's Eq. Jur. s. 700, a, that when the illegality of the instrument complained of appears upon its face, so that its nullity can

admit of no doubt, it is the established rule of the court not to use its authority to order its cancellation, for in such a case there can be no danger that the lapse of time may deprive the party of his full means of defense, nor can it in any just sense be said that such a paper can cast a cloud upon his title or diminish its security. To the same effect are the decisions of courts in the following cases: *Scott v. Onderdonk*, 14 N. Y. 9; *Cox v. Clift*, 2 Comstock (N. Y.), 118; *Pierrott v. Elliott*, 6 Peters, 95; *Gamble v. Loop*, 14 Wis. 466; *Head v. James*, 13 Wis. 641; and *Farnham v. Campbell*, 34 N. Y. 480.

These cases all go upon the idea that the court will not engage in a work of supererogation, by declaring that to be a void deed, which upon its face is no deed, and of no greater consequence than a blank piece of paper.

So it is in this case. The plaintiff's own allegations furnish a complete answer to his demand for relief, for if they be true, he has a perfect defense, manifested by the very deed under which his adversaries claim the land, and as lasting in its nature as that deed itself; and a decree of this court, declaring that deed to be void, can render it no more inoperative than it now is, according to the statement made in the complaint.

We are of the opinion, therefore, that the plaintiff's action must be dismissed, and accordingly do so adjudge. But as the defendants seem to insist upon the validity of the deed, lest we may mislead them, or prejudice the plaintiff, we declare our judgment to be founded solely upon a consideration of the complaint, and not of the cause upon its merits. Action dismissed.

See Pell's Revisal, s. 1589, which is the Act of 1893, generally known as "the Jacob Battle Act," as amended by the Act of 1903. In *Rumbo v. Manufacturing Co.*, 129 N. C. at p. 10, 39 S. E. 582, it is said: "It was because the general assembly thought the equitable doctrines—as laid down in *Busbee v. Macy*, 85 N. C. 329, and *Busbee v. Lewis*, *Ibid.* 332, and like cases—inconvenient or unjust, that the Act of 1893 was passed." The amendment of 1903, now incorporated in sec. 1589 of the Revisal of 1905, was intended to meet the ruling of the court, in *McLean v. Shaw*, 125 N. C. 491, 34 S. E. 634, that a judgment lien is not included in the terms "estate" and "interest" used in the act of 1893. See *McArthur v. Griffith*, 147 N. C. at p. 549, 61 S. E. 521, where it is said by Walker, J.: "The widow and heirs of J. P. Hannah had the right to bring the action to remove the cloud from their title." 7 Cyc. 255, 256, and 6 Cyc. 319, 320, and notes. Equity interferes to remove clouds upon title, because they embarrass the owner of the property clouded and tend to impede his free sale and disposition of it. *Byne v. Vivian*, 5 Vesey, 604; *Ward v. Dewey*, 16 N. Y. 531; *Bissell v. Kellogg*, 60 Barbour, 629. A cloud upon title is in itself a title or incumbrance, apparently valid, but in fact invalid. It is something which, nothing else being shown, constitutes an incumbrance upon it or a defect in it.—something that shows *prima facie* the right of a third party either to the whole or to some interest in it, or to a lien upon it. 2 Cooley on Taxation (3 ed.), 1448; *Detroit v. Martin*, 34 Mich. 170. When the claim, which is a lien if in force, appears to be valid on the face of the record, and the defect or invalidity can only be made to appear by extrinsic evidence, particularly if the proof of it depends upon oral testimony, it generally presents a case invoking the aid of a court of equity to remove it as a cloud

upon the title. *Crooke v. Andrews*, 40 N. Y. 547; *Sauvay v. Hunger*, 42 Ind. 44; 2 Story Eq. Jur. (13 ed.), ss. 698-700. If, on the other hand, the title be void on its face—if it be a nullity, a mere *felo de se*, when produced—so that an action upon it will fall of its own weight, as has been said, then the title of the party is not considered as necessarily clouded thereby. *Busbee v. Macy*, 85 N. C. 329; *Busbee v. Lewis*, 85 N. C. 332; *Browning v. Lavender*, 104 N. C. 69, 10 S. E. 77; *Thompson v. Etowah Iron Co.*, 91 Ga. 538, 17 S. E. 663; *Lick v. Ray*, 43 Cal. 83. This equity is also enforced for the reason that the proof of the party upon which he relies to show the invalidity of the incumbrance may be lost by lapse of time. *Browning v. Lavendar*, *supra*. The widow and heirs of J. P. Hannah properly brought their action to have the note and mortgage cancelled, so as to remove the cloud from their title. *Byerly v. Humphrey*, 95 N. C. 151; *Murray v. Hazell*, 99 N. C. 168, 5 S. E. 428. The doctrine relating to cloud upon title is founded upon true principles of equity jurisprudence, which is not merely remedial, but is also preventive of injustice. If an instrument ought not to be used or enforced, it is against conscience for the party holding the same to retain it, since he can only do so with some sinister or wrongful design. If it is a negotiable instrument, it may be used for a fraudulent or improper purpose. If it is a deed purporting to convey lands, which creates an apparent encumbrance, its existence in an uncancelled state necessarily is calculated to throw a cloud over the title. 2 Story, Eq. Jur. (13 ed.) s. 700, and notes."

That a nonresident may be lawfully brought into court by service of process by publication in proceedings to quiet title to lands within the state in which such proceedings are prosecuted, see *Vick v. Flournoy*, 147 N. C. at p. 215, 60 S. E. 978, quoting from *Boswell's Lessee v. Otis*, 9 How. 336, 348. See also *Sharon v. Tucker*, 144 U. S. 533, 12 Sup. Ct. 720, inserted at ch. 10, sec. 6, post. See "Quieting Title," *Century Dig.* § 20; *Decennial and Am. Dig. Key No. Series* § 7.

SEC. 7. CONFUSION OF BOUNDARIES AND PROCESSIONING.

HOUGH v. MARTIN, 22 N. C. 379, 383, 384. 1839.

Equity Jurisdiction Over Questions of Boundary.

[Bill in equity praying that the rights of the complainant in certain lands devised to him and others "might be settled and ascertained and his lands admeasured and laid off to him by metes and bounds, and for general relief." Defendants demurred. Demurrer sustained, and plaintiff appealed. Affirmed.]

The bill alleged the making of a will by James Martin and set out a copy thereof, and further alleged that the description in the will of the several tracts of land devised thereby was so obscure that the plaintiff was unable to fix upon the residue devised to him; that one of the defendants, taking advantage of such obscurity, had taken possession of land that of right belonged to plaintiff under the will; that plaintiff had brought ejectment for such land, but had failed in his action because of his inability to locate his claim under the will, and that he would never be able to locate his claim without the aid of the court of equity, &c. Only so much of the opinion as bears upon the subject of confusion of boundaries is inserted.]

RUFFIN, C. J. . . . The obscurity of the will furnishes no sufficient reason for applying to equity; for if the obscurity be

not so great as to render the disposition altogether unintelligible. it will be valid at law, as far as it can be understood; and if it sound to folly, so far as not to amount to a designation of any corpus, it necessarily follows that no court can help it, but that it must be ineffectual. For this reason, the bill cannot assume the aspect of one for ascertaining confused boundaries; for although the court of equity has exercised the jurisdiction of settling boundaries of legal estates, yet it has been cautiously exercised, and in only a few instances, and in none in which the boundaries were not once certain, and had been rendered uncertain by the default of the defendant, or those under whom he claimed. In the case before us, the gravamen is not that a single landmark had been altered, or been permitted to perish by the act or neglect of the other parties; but that the testator was in-explicit and obscure in the language of his will.

If, however, that objection did not exist, the present case is not within the principles upon which the jurisdiction of ascertaining boundaries has hitherto proceeded. In all the cases, there was either an agreement that the land of the several parties should be distinguished, as in *Norris v. Le Nevo*, 3 Atk. 31; or some relation between the parties, which made it the duty of one of them to preserve the landmarks, and therefore the boundaries became confused by the neglect or fraud of the party charged with that duty—as a tenant. *The Duke of Leeds v. The Earl of Strafford*, 4 Ves. 180; *Atty. Gen. v. Fullerton*, 2 Ves. & Bea. 264; *Willis v. Parkinson*, 1 Swanst. 9. It is not enough that the boundary is controverted, or that it has become confused, although it was once plain; but the confusion must have arisen from the misconduct of the defendant, who is therefore equitably obliged to aid in its re-establishment. *Miller v. Warmington*, 1 Jac. & Walk. 492. Between independent proprietors, equity does not interpose, where there is no agreement, fraud or neglect, and require either of them, against his will, to have his legal rights determined in any but the established legal method. *Atkins v. Hatton*, 2 Anstr. 386; *Speer v. Crowter*, 2 Mer. 417. . . . Decree affirmed.

Where one had an easement of a mill race through another's land, and the owner of the servient estate destroyed the race, it was held to be within the jurisdiction of a court of equity to appoint commissioners to re-locate the race—the grant of the easement being a general one and containing no exact location of the line along which the mill race was to run. It being suggested that, as the owner of the easement held under an executed contract, his remedy at law was complete, the court said: "The remedy at law is clearly inadequate, and the case falls under a well settled head of equity jurisdiction, i. e., 'confusion of boundaries.' It is defined by Adams, p. 238: 'Where boundaries have been confused by the misconduct of the defendant, or by those under whom he claims, the court will issue a commission to ascertain the boundaries; it will, at the same time, decree an account of rents and profits.' There will be a decree declaring the right of the plaintiff and directing a commission to go upon the land and mark off a race in the site of the old one," etc. *Merriman v. Russell*, 55 N. C. at mid p. 474. See "Boundaries," Century Dig. § 139; Decennial and Am. Dig. Key No. Series § 26.

PORTIER v. DURHAM, 90 N. C. 55, 57. 1884.

Processioning Land. Introductory.

SMITH, C. J. It was remarked by Gaston, J., delivering the opinion of the court in *Carpenter v. Whitworth*, 25 N. C. 204, that the "practice of processioning lands, though recognized in our statute for more than a century, has for many years been so generally disused, that few of the profession or of the bench can claim to be familiar with the law respecting it." The same observation will bear repetition after the lapse of forty years, since but little aid can be derived from the few subsequent cases to be found in the reports in the interpretation of its provisions. Inasmuch as great strictness is required in following its directions in order to obtain practical and effectual results, the procedure prescribed by the statute has almost become obsolete. . . .

See "Boundaries," Century Dig. § 252; Decennial and Am. Dig. Key No. Series § 51.

PARKER v. TAYLOR, 133 N. C. 103, 45 S. E. 473. 1903.

Practice Under "Processioning Act." Res Judicata.

[Action for trespass in cutting timber. Upon an intimation of the judge that he could not recover, the plaintiff took a nonsuit and appealed.

The complaint alleged that the defendant had cut timber beyond a certain line. A dividing line between the parties had been determined in a special proceeding formerly had between plaintiff and defendant's grantors. The defendant pleaded the record and judgment in that proceeding as an estoppel. The plaintiff admitted that, according to the line as located by the judgment pleaded, the locus in quo was on the defendant's side thereof. Upon this admission the court intimated that plaintiff could not recover in this action. The special proceeding referred to was one under the "Processioning Act," and the judgment of the clerk in that proceeding "determined the location" of the line in question.]

CLARK, C. J. When the occupants of adjoining tracts differ as to the location of the boundary line between them, but in no wise question the title of each other to their respective tracts, it would be an evident hardship to drive one of them to an action of ejectment in the superior court, and to establish a chain of title which the other does not dispute. There should be in such cases some cheaper and more speedy proceeding to establish the boundary line between them. The old "Processioning Act," originally passed in 1723 (chapter 48, Code 1883), having proved defective for that purpose, the General Assembly repealed it, and enacted in its stead chapter 22, p. 44, Laws 1893, which provides that "the owner of land, any of whose boundary lines are in dispute, may establish said line or lines by special proceeding" in the county where the land or any part thereof is situated. The act provides for the method of procedure, and that if answer is filed

denying the location of the boundary, a survey shall be ordered, and, after hearing the cause, the clerk may give "judgment determining the location" of said boundary line, with right to either party to appeal to the superior court at term for a trial by a jury *de novo* of the issue. This last provision cured the objection urged against the former statute. *Britt v. Benton*, 79 N. C. 177. In a special proceeding for partition, if the plea of sole seisin is set up, the issue of title is transferred to the court at term for trial, and the action becomes substantially an action of ejectment. *Purvis v. Wilson*, 50 N. C. 22, 69 Am. Dec. 773; *Alexander v. Gibson*, 118 N. C. 796, 24 S. E. 748, 54 Am. St. Rep. 757; *Huneycutt v. Brooks*, 116 N. C. 788, 21 S. E. 558; *Bullock v. Bullock*, 131 N. C. 29, 42 S. E. 458. In this special proceeding to determine boundary, whether if the defendant by his answer raises an issue of title, the cause should in the same manner be transmitted to the court at term, thenceforward to be proceeded in as if originally brought to determine the issue of title, as in an action of ejectment (*In re Anderson*, 132 N. C. at p. 247, 43 S. E. 649; *Roseman v. Roseman*, 127 N. C. 494, 37 S. E. 518), is not a matter before us. But when the answer raises only an issue of boundary, the judgment of the clerk is a final determination of that issue, unless appealed from, in which case the verdict of the jury and judgment would be final as to the boundary. The statute provides that "occupation of land shall constitute sufficient ownership for the purposes of this act." The sole purpose is to locate the boundary between adjoining proprietors, who do not question each other's title to their respective tracts; for if an issue as to title is raised by the answer, the cause would be transferred, as already said, to the court at term.

There was no error. The line was located by a judgment to which the plaintiff and those under whom these defendants claim were parties. The plaintiff, who was defendant in the former action, did not therein raise any issue as to title, and have it tried, as he might have done, and the adjudication as to this being the true boundary is *res judicata*. The judgment of the clerk "determining the location" of the line is authorized by the statute, and is conclusive of that fact upon parties and privies to said action. *Williams v. Hughes*, 124 N. C. 3, 32 S. E. 325; *Midgett v. Midgett*, 129 N. C. 21, 39 S. E. 722. No error.

For the practice under the Code, secs. 1924-1931, see *Forney v. Williamson*, 98 N. C. 329, 4 S. E. 482. In that case it is said by Merrimon, J.: "Such proceedings have always been cautiously watched and strictly construed by the courts, indeed they have been seldom sustained." For the present "Processioning Act" of North Carolina, see Revisal, secs. 325, 326; and *Woody v. Fountain*, 143 N. C. 66, 55 S. E. 425, and *Green v. Williams*, 144 N. C. 60, 56 S. E. 549, interpreting the same.

"The special proceeding for 'processioning' is and will remain a cheap and speedy method of settling a boundary where only the boundary is in question, and should be encouraged. When an issue of title is raised by the answer, instead of throwing the costs upon the plaintiff and forcing him to bring a new action to term time, the case being already in the superior court before the clerk, the statute converts it into an action to quiet title and transfers it to the term of court for trial, to the economy

of time and expense." *Woody v. Fountain*, 143 N. C. at p. 71, 55 S. E. 425. See "Boundaries," *Century Dig.* §§ 208, 262, 263; *Decennial and Am. Dig. Key No. Series*, §§ 43, 52.

SEC. 8. REMEDIES RELATING TO THINGS SEVERED FROM THE REALTY.

BROTHERS v. HURDLE, 32 N. C. 490. 1849.

Fructus Industriales Produced by Disseizor.

{Trove for a quantity of corn, fodder, peas, and beans. Verdict and judgment against defendant, and he appealed. Affirmed.

The defendant admitted the conversion, but undertook to justify by showing, that prior to such conversion he had been put in possession of the land on which the converted articles were produced, under a judgment in his favor and against the plaintiff; that the crops in question were of the growth of 1846 and that the judgment was rendered in the fall of 1846, in an action of ejectment wherein the demise was laid in 1845. It was proven that, at the time the defendant was placed in possession of the land, the corn and some of the peas and beans were still unsevered; while the fodder and some of the peas and beans had been previously severed, though they were then stored in a crib on the land. The judge instructed the jury that the plaintiff was entitled to recover the value of the fodder, etc., which had been severed before defendant took possession of the land.

PEARSON, J. There is no error in the instructions. The corn, etc., which was attached to the land at the time the defendant was put in possession, passed with it and belonged to him. But the fodder, etc., which had been severed, although on the premises, did not pass with the land; for it had ceased to be a part thereof, and the defendant had no right to take it. His remedy was an action, not for the specific articles, but for damages, by way of mesne profits. If the defendant had the right to take the specific articles, he would for the same reason be entitled to recover their value in trover against the plaintiff, or any one, to whom he might have sold them. The amount of which would be, when one, who has been evicted, regains possession, he may maintain trover against every one who has bought a bushel of corn or a load of wood from the trespasser, at any time while he was in possession. This, especially in a country where there are no markets overt, would be inconvenient, and no person could safely buy of one, whose title admitted of question. The mere statement of the proposition shocks our notions of common sense and calls for an overpowering weight of authority to sustain it. There is no authority for it in our reports, the invariable practice having been to bring trespass for mesne profits and for damages, if there has been any destruction or injury to the freehold.

Trove for the specific articles, either against a trespasser or a third person, has never been attempted. Upon examination, it is found, that there is no authority for it anywhere.

Our attention has been called to a passage in the New York edition, 1846, of *Adams on Ejectment*, p. 347, where it is said:

"Crops will pass to the lessor, although severed at the time the writ of possession is executed, provided, the severance was after the date of the demise." This is an interpolation, and is not in any of the former editions. *Uppon v. Witherick*, 3 Bing. 51, is cited. We have examined that case—it does not sustain the position. . . . The only other case cited, which has any bearing, is *Morgan v. Varick*, 8 Wendell, 587. That was an action of trespass for mesne profits and de bonis asportatis. The plaintiff having been let into possession after a recovery in ejectment, brought the action against the defendant in ejectment, for mesne profits and for damages for removing certain boilers of a steam engine, which had been used in a corn mill on the premises. The judge below held, that the plaintiff could recover mesne profits, but was not entitled to recover damages for removing the boilers. SAVAGE, C. J., delivers the opinion of the court. It is not at all satisfactory upon the point of the case. The stress of the argument is spent upon a collateral question. . . . After the long discussion . . . this conclusion is announced; but it is a mere assertion, and is not supported either by argument or authority.

In this case the articles sued for were annual products; and my Lord Coke suggests a distinction between such things as corn, etc., which come by the act and operation of the party; "for, if he had not sowed the land, no corn would have been there," and such things as come by the act of God, as trees, etc. We do not, however, put the case upon this distinction. *The true distinction* is, where a tenant, or one having a particular estate, wrongfully severs a tree or other thing from the freehold, it becomes personal property and immediately belongs to the landowner or remainderman, who may punish the tenant for waste and may take the thing; or may presently bring trover against the tenant or any third person, who has converted it. For, as there is no possession *adverse to him*, the thing when severed immediately belongs to him as a chattel. Besides, he would otherwise be without remedy as he could not bring trespass *quare clausum fregit*, the tenant being rightfully in possession.

*But when one, who is in the adverse possession, gathers the crop in the course of husbandry, or severs a tree or other thing from the land, the thing severed becomes a chattel, but it does not become the property of the owner of the land; for his title is divested—he is out of possession and has no right to the immediate possession of the thing, nor can he bring any action until he regains possession. Then, by the jus postliminii or fiction of relation, he is considered as having been in possession all the time for the purpose of bringing trespass *quare clausum fregit* with a *continuando* from day to day, in which he recovers the value of the mesne profits and damages for the injury done to his freehold by the severance of any part of it, or for any injury consequent to the breach of his close. This action can be maintained against any one who has been in possession for the time he held it, but the owner of the land cannot sue for the thing severed in trover or*

detinue as a chattel; for it is not his chattel—it did not become so at the time it was severed, and the title to it as a chattel cannot pass to him afterwards, when he regains possession, by force of the *jus postliminii*. The fiction is made to enable him to recover for breaking his close and the injuries consequent thereto, but it is not made for the purpose of vesting a right to chattels.

The action of trespass *quare clausum fregit* for the mesne profits is a continuation of the action of ejectment. Hence, the judgment in ejectment is conclusive as to title. Originally, the plaintiff in ejectment recovered actual damages. It was only for the sake of convenience, that the courts adopted the practice of trying the title only in the ejectment with sixpence damages, and then ascertaining the actual damages in a new action for the mesne profits and damages. But if this novel application of the action of trover or trespass *de bonis asportatis* for a thing severed and made a chattel, while there was an adverse possession, be introduced, it would be difficult to find any authority for holding, that a recovery in ejectment by John Doe is conclusive of the lessor's title in an action by him for the purpose of proving his title to a chattel.

It was said for the defendant, that the plaintiff ought not to recover, because he could get the value of the fodder, etc., by way of diminution of damages in an action by him (the defendant) for the mesne profits. This idea is of the first impression. We prefer to keep rights distinct, and allow each party, when his rights are invaded, his appropriate action. Judgment affirmed.

See *White v. Fox*, 125 N. C. at pp. 548, 549, 34 S. E. 645, where the principal case is fully approved and several other cases are cited sustaining the doctrine. See also *Ray v. Gardner*, 82 N. C. 454, for a clear-cut application of these principles. See also 12 L. R. A. (N. S.) 194, 23 Ib. 531, and notes. See "Ejectment," Century Dig. § 436; Decennial and Am. Dig. Key No. Series, § 124.

POTTER v. MARDRE, 74 N. C. 36. 1876.

Trees Severed and Converted Into a Boat or the Like.

[Action of trespass and for damages for entering upon land and carrying off a canoe. Verdict and judgment against plaintiff, and he appealed. Reversed.]

Plaintiff was a life tenant, and the defendants were reversioners. Plaintiff made a canoe from trees cut from the locus in quo. Defendants entered upon the land and carried off the canoe. Plaintiff cut down two trees on the land, partly for the purpose of making shingles to repair a house on the land, and partly to make the canoe in question. The canoe was for use in fishing. The judge charged that plaintiff had no right to use timber on the land for building the canoe, and that the defendants, as reversioners, were entitled to the trees and to the canoe made therefrom.]

RODMAN, J. 1. The plaintiff had a right to cut trees for the necessary repairs of the farm buildings, but none to cut trees for building a boat to be used for fishing. When the trees were felled,

the property in them vested at once in the reversioners, who could have maintained trover, or, by our statute, replevin, for the timber; and could have recovered for so much as the plaintiff could not show that he had applied, or was about to apply, to a lawful purpose, such as the repair of the buildings, etc. These propositions were resolved in *Bowles' case*, 11 Rep. 79, and have been recognized as law ever since.

2. It does not follow, however, that the reversioner could maintain trover or replevin for the canoe which was made from the trees.

It is not necessary to decide this question at this time; but it is proper to do so, because, as under our opinion, there must be a new trial, and the plaintiff, on the present state of facts is entitled to recover, the question as to the measure of damages will then necessarily arise. On the question stated, there is a discord between the authorities that cannot be reconciled. The most important of them will be found in 2 Kent, Com. 361; *Sedgwick on Dam.* 483, and in the very recent case of *Heard v. James*, 49 Miss. 236. It is unnecessary further to refer to them. We are not aware of any decision in this state directly in point.

It seems to be generally agreed that if the person who bestows his labor on the property of another, thereby changes it into another species of article, as if corn be made into whiskey, or silver coin into a cup, or timber into a house, the property is changed, and the owner of the original material cannot recover the article in its altered condition, but must content himself with the value of the article in the shape in which it was taken from him. In the civil law it is said that the property [title] is changed whenever the species is so far changed that it cannot be reduced to its former rude materials—examples of which are when timber is made into a bench, or chest, or ship. The common law differed from this, and it was held that so long as the owner of the original materials could identify them, he could follow them into the manufactured article—as if leather be made into shoes, or cloth into a coat, or a tree be squared into timber.

In some of the decided cases much weight seems to be given to the fact whether the manufacturer was a conscious and wilful trespasser, or took possession of the raw material in good faith and under an honest mistake as to the title.

Sometimes the decision as to the measure of damages is made to turn on the form of the action, as whether in trespass for entering on plaintiff's land and cutting and carrying away timber, which defendant afterwards manufactured; or in trover for the conversion of the manufactured article, or in replevin for its possession in specie, as in the case cited from Mississippi.

We think that most of the American cases hold that when the alteration of the timber taken by a trespasser has gone no farther than its change into boards, or shingles, or staves, the owner of the timber may follow his property into the manufactured article, and recover its value in that shape. But we have found no case where the change of species was greater than that. Such we think was

the current of American decisions prior to 1851, when the case of *Bennett v. Thompson*, 35 N. C. 146, which will hereafter be noticed, was decided.

In this conflict of opinions, which when united we are accustomed to consider authority, we can only adopt that rule which seems most reasonable. In our opinion the equitable rule is that stated from the civil law. The property is changed by a change made in its species or substantial form, if made by one who was acting in good faith and under an honest belief that the title was in him.

This doctrine is not based on the idea that a trespasser, although he may act under an honest but mistaken belief in his own title, can lawfully transfer the property in timber from the owner to himself by changing it into some more valuable species: but on the idea that the trespasser by so doing destroys the original article, as if he had burned it, and is responsible to the owner as if he had burned it; and on the idea that the principle adopted is more likely to do justice to the parties concerned than any other.

By this rule the owner of the original material will recover the value of his material which is the extent of his loss, with such additions as a jury may think proper to make if the taking or conversion was wilful, or attended by circumstances of aggravation. Whereas, if the owner of the materials could always follow them, however much their value might have been enhanced by the labor of the manufacturer it would lead to results unjust and even absurd. For example, if the owner of the trees can recover the staves made from them, why not the casks made from the staves; and if in replevin he can recover the planks, why not the ship built with the planks, etc.

This principle of equity is supported by the analogy of the rule established in this state by the decisions, which hold that a vendee of land by a parol contract of sale who takes possession and makes improvements, and is afterwards ejected by the vendor, may recover the value of his improvements. *Albee v. Griffin*, 22 N. C. 9. So if one who has purchased land from another not having title, enters and improves, believing his title good, and is ejected by the rightful owner, he is entitled to compensation.

In both these cases, one who is morally innocent has confused his property with that of another, and he is held entitled to separate it in the only way it can be done, viz: by being allowed the value of his improvements in the raw material. The case of *Bennett v. Thompson*, *ubi supra*, was an action of trespass for entering on plaintiff's land and felling timber which was afterwards converted into boards and shingles. This court held that the measure of damages was the value of the trees when felled, and not the value of the manufactured article. This case does not profess to go upon the form of the action. There is no reason except technical ones, why greater damages should be allowed in trover than trespass. The injury is the same whatever may be the form of action, and it would seem to have been the opinion of the court, that the

plaintiff could not follow the material in its manufactured condition.

Upon the principle stated, we are of opinion that although the defendant might have maintained trover for the conversion of the trees, he had no property in the canoe, and was not entitled to maintain replevin or its substitute, process of claim and delivery, for it. Our opinion on this point, however, will only affect the question of damages on a future trial. . . .

4. We concur with the judge below, that there was no evidence to warrant the jury in giving vindictive damages. The damages to which the plaintiff is entitled are the injury to his land, which seems to have been only nominal, and the value of the canoe, from which the defendant is entitled to deduct or recoup, by way of counterclaim, the value of the timber which was manufactured into the canoe, just after it was felled and converted into a chattel. Judgment reversed.

See *Dorsey v. Moore*, 100 N. C. 41, 6 S. E. 270; 54 N. W. 596, 19 L. R. A. 653, and notes; 1 Cyc. 222 et seq. See "Replevin," Century Dig. § 17; Decennial and Am. Dig. Key No. Series, § 4.

PEIRCE v. GODDARD, 22 Pickering (Mass.), 559. 1839.

House Removed from One Man's Land and Affixed to the Land of Another.

[Trover. The writ contained two counts, one for the conversion of a dwelling house; the other for the conversion of the materials of a dwelling house. Case submitted to the court upon an agreed statement of facts. Plaintiff nonsuited. The facts appear in the beginning of the opinion.]

WILDE, J. This action is submitted on an agreed statement of facts, by which it appears, that one Davenport, being the owner of a lot of land with a dwelling house thereon, mortgaged the same to the plaintiff; that afterwards he took down the house, and with the materials partly, and partly with new materials, built a new house on another lot of his at some distance; and that after the new house was completed he, for a valuable consideration, sold the last mentioned lot and house to the defendant.

There are two counts in the declaration, one, for the conversion of the newly erected house, and the other, for the conversion of the materials with which it was built, belonging to the old house.

The plaintiff's counsel insist, that the old house was the property of the plaintiff, and that Davenport had no right to take it down, and could not, therefore, acquire any property in the materials by such a wrongful act; that the new house, being built with the materials from the old house in part, became the property of the plaintiff, although new materials were added, by right of accession; and that Davenport, having no property in the house, as against the plaintiff, could convey no title to it to the defendant.

That Davenport is responsible for taking down and removing the old house, cannot admit of a doubt; but it does not follow, that the property in the new house vested in the plaintiff.

The rules of law, by which the right of property may be acquired by accession or adjunction, were principally derived from the civil law; but have been long sanctioned by the courts of England and of this country as established principles of law.

The general rule is, that the owner of property, whether the property be movable or immovable, has the right to that which is united to it by accession or adjunction. But by the law of England as well as by the civil law, a trespasser, who wilfully takes the property of another, can acquire no right in it on the principle of accession, but the owner may reclaim it, whatever alteration of form it may have undergone, unless it be changed into a different species and be incapable of being restored to its former state; and even then the trespasser, by the civil law, could acquire no right by the accession, unless the materials had been taken away in ignorance of their being the property of another. 2 Kent, Com. 362; *Betts v. Lee*, 5 Johns. 348. But there are exceptions to the general rule.

It is laid down by Molloy as a settled principle of law, that if a man cuts down the trees of another, or takes timber or plank prepared for the erecting or repairing of a dwelling house, nay, though some of them are for shipping, and builds a ship, the property follows not the owners but the builders. *Mol. de Jure Mar.* lib. 2, c. 1, s. 7.

Another similar exception is laid down by Chancellor Kent in his Commentaries, which is directly in point in the present case. If, he says, A builds a house on his own land with the materials of another, the property in the land vests the property in the building by right of accession, and the owner of the land would only be obliged to answer to the owner of the materials for the value of them. 2 Kent, Com. 360, 361. This principle is fully sustained by the authorities. In Bro. tit. Property, pl. 23, it is said, that if timber be taken and made into a house, it cannot be reclaimed by the owner: for the nature of it is changed, and it has become a part of the freehold. In *Moore*, 20, it was held, that if a man takes trees of another and makes them into boards, still the owner may retake them, but that if a house be made with the timber it is otherwise. . . .

In the present case it cannot be questioned, that the newly erected dwelling house was a part of the freehold, and was the property of Davenport. The materials used in its construction ceased to be personal property, and the owner's property in them was divested as effectually as though they had been destroyed. It is clear, therefore, that the plaintiff could not maintain an action even against Davenport, for the conversion of the new house. And it is equally clear, that he cannot maintain the present action for the conversion of the materials taken from the old house. The taking down of that house and using the materials in the construc-

tion of the new building, was the tortious act of Davenport, for which he alone is responsible. Plaintiff nonsuit.

See ch. 4, sec. 3, b; ch. 7, sec. 1. Trespass on the case lies for removing timber, etc., from mortgaged land to the injury of the mortgagee. *Van Pelt v. McGraw*, 4 N. Y. 110, inserted at ch. 4, sec. 3, b. See "Trover and Conversion," Century Dig. § 13; Decennial and Am. Dig. Key No. Series, § 2; "Fixtures," Century Dig. § 69; Decennial and Am. Dig. Key No. Series, § 5.

MICH. MUT. LIFE INS. CO. v. CRONK, 93 Mich. 49, 52 N. W. 1035. 1892.

House Removed from One Man's Land and Fixed to Land of Another.

[Replevin for a house. Verdict and judgment against defendant, and he appealed. Affirmed.]

Cronk contracted in writing to purchase a parcel of land from W. L. Jenks, and, by the terms of the contract, agreed not to commit or suffer any waste of the land. Cronk built a house on the land and lived in it two years. Jenks assigned the contract with Cronk to the plaintiff insurance company. Cronk removed the house from the lot on which it was built to another lot, across the street, owned by him; and it was occupied by him and his family as a homestead, at the time this action was commenced. The plaintiff brought this action of replevin to recover the house. Cronk's wife was not made a party to the action.]

MONTGOMERY, J. . . . Two questions only are presented in appellant's brief. It is first claimed that replevin will not lie, because the house had become a fixture upon the land to which it was moved, and was therefore real estate; second, that, as the house was occupied as a homestead by the defendant and his family, the wife was a necessary party. We think that when this house was erected upon the land held under contract it became a part of the realty, and as such the property of the owner of the land, subject only to the rights of the purchaser therein. *Kingsley v. McFarland* (Me.), 19 Atl. 442; *Milton v. Colby*, 5 Mete. (Mass.) 78; *Iron Co. v. Black*, 70 Me. 473; *Tyler, Fixt.* 78. It being severed from the land, it became personal property, and replevin would lie unless it became affixed to the realty by the tortious act of the defendant in removing it and placing it upon other lands. But we think no such legal effect can be given to the defendant's wrong. The house was moved upon land of a third party. There was no privity of title between the ownership of the house and the ownership of the land to which it was removed. The cases cited by defendant of *Morrison v. Berry*, 42 Mich. 389, 4 N. W. 731, and *Wagar v. Briscoe*, 38 Mich. 587, do not apply. The house remaining personal property in the wrongful possession of defendant, it follows that no homestead right, which consists in an interest in lands, attached.

The judgment is affirmed, with costs. The other justices concurred.

Where a building is personalty as between the parties claiming to own it, and it is not actually attached to the soil, replevin will lie for its re-

covery. *Fitzgerald v. Anderson*, 81 Wis. 341, 51 N. W. 554. See ch. 7, sec. 1. See "Fixtures," Century Dig. § 66; Decennial and Am. Dig. Key No. Series, § 31; "Replevin," Century Dig. § 22; Decennial and Am. Dig. Key No. Series, § 4.

EISENHAUER v. QUINN, 36 Mont. 368, 93 Pac. 38, 14 L. R. A. (N. S.) 435. 1907.

Claim and Delivery for a House Permanently Attached to Land.

[Action by Eisenhauer to restrain Quinn, the sheriff, from removing a house under execution issued in an action of claim and delivery. Gerarci, the plaintiff in the action of claim and delivery, intervened. Judgment against Quinn and Gerarci granting the injunction, and appeal by them. Reversed.]

Gerarci purchased a house "separate from the ground upon which it stood, and he immediately started to remove it to another location." While the house was in transit it was wrongfully seized by one Smith who attached it by a *stone foundation* partly upon ground owned by one Cannon and partly on his own ground. "In July, 1902, Gerarci commenced an action of claim and delivery against Smith and others to recover possession of the house or its value." While this action was pending, Eisenhauer bought from Smith and Cannon the ground upon which the house then stood—Smith assuming to sell him the house also. In 1904 Gerarci recovered judgment in his action of claim and delivery for the house or its value. Immediately upon such recovery Gerarci had execution issued and placed in the hands of the sheriff, Quinn. When the sheriff undertook to seize and remove the house, Eisenhauer brought this action for an injunction. Only so much of the opinion as bears upon the right to recover possession of the house in specie, is here inserted.]

HOLLOWAY, J. . . . These questions only need to be determined: (1) Where Smith tortiously attaches Gerarci's house, which was then a chattel, to land belonging to Smith and Cannon, by placing it upon a stone foundation, does the house, thereby become a part of the real estate, as between Gerarci and Eisenhauer, so that, by deed of land with its appurtenances and improvements, Smith and Cannon could convey to Eisenhauer a title to the house sufficient to defeat Gerarci's claim to the house itself? (2) Is the defense that he was a bona fide purchaser for value, without notice, available to Eisenhauer as against Gerarci, the holder of the legal title to the house in question? (3) Is the defense of an estoppel available to Eisenhauer? And (4) does the complaint state facts sufficient to entitle plaintiff to an injunction?

1. Upon the first proposition, many decisions are cited by counsel for the respective parties, all bearing somewhat upon the general proposition, but, with a single exception, presenting facts so different from those in the case now under consideration that they do not render any aid in reaching a solution of the question before us. The exception noted is the case of *Shoemaker v. Simpson*, 16 Kan. 43, which is somewhat analogous to the case before us. *Shoemaker, Miller & Co.* owned certain bars of railroad iron, or rails, near Wyandotte, Kansas. *Simpson* owned certain city lots in Lawrence. The Kansas Pacific Railway Co. wrongfully took *Shoemaker, Miller & Co.*'s rails, hauled them to Lawrence, and with

them and cross-ties laid a track over Simpson's lots for the purpose of hauling sand. The rails were taken without the knowledge or consent of Shoemaker, Miller & Co., and placed on Simpson's land without his consent. Shoemaker, Miller & Co. brought an action of replevin against Simpson to recover the rails. Simpson defended upon the theory that, when the rails were fixed to the cross-ties imbedded in his land, they thereby became a part of his real estate. The trial court found for the defendant, but, on appeal, the judgment was reversed, the supreme court saying, among other things: "We know of no way by which an innocent person can be permanently and legally deprived of his property against his will by the wrongs and trespasses of others, so long as it remains within the power of such innocent person to reclaim his property without committing any serious or substantial injury to the person or property of any other person." And again: "But we do not think that any innocent person can be deprived of the title to his personal property against his consent by having it attached without his consent to the real estate of another by a third person, where such personal property can be removed without any great inconvenience, and without any substantial injury to the real estate." The question, When does a chattel become a part of realty so that it passes as a part of such realty? is one most difficult of solution. It depends upon such a variety of considerations that every case must necessarily depend upon its own state of facts. There is no universal test whereby the character of what is claimed to be a fixture can be determined in the abstract. But one of the elementary rules of the law of fixtures is that a chattel, to become an irremovable fixture, must have been annexed to the realty by the owner of the fixture, or with his consent. *Bronson, Fixtures*, 73; 13 Am. & Eng. Enc. Law (2d ed.), 604; *Adams v. Lee*, 31 Mich. 440; *Cochran v. Flint*, 57 N. H. 514; *Lansing Iron & Engine Works v. Wilbur*, 111 Mich. 413, 69 N. W. 669; *General Electric Co. v. Transit Equipment Co.*, 57 N. J. Eq. 460, 42 Atl. 101. With the exception of property taken by judicial process, no one can be deprived of property to which he has the legal title without his consent, unless he has estopped himself to assert his title. And where A attaches B's chattels to A's realty wrongfully, and without the knowledge or consent of B, B may maintain replevin, or claim and delivery, to recover the same, if the chattels can be identified. *Bronson, Fixtures*, 351; 13 Am. & Eng. Enc. Law (2d ed.) 681; *McDaniel v. Lipp*, 41 Neb. 713, 60 N. W. 81. There is no question but what the property in this instance was sufficiently identified by Gerarei, even though certain changes had been made in it after it left his possession. Under the facts disclosed by this record, then, we hold that Gerarei did not lose title to his property by reason of the tortious acts of Smith; and this is true whether Eisenhower had knowledge of Gerarei's claim at the time he purchased the property or not.

2. But particular stress is laid by respondent upon the proposition that he was an innocent purchaser for value, without notice of Gerarei's claim. This contention, however, cannot prevail.

Gerardi had the legal title to the house. Smith had not any title at all. It is a general rule in this country that, in the absence of statute, the defense of purchase for value and without notice is not available against the holder of the legal title. *Gaines v. New Orleans*, 6 Wall. 642, 18 Law. Ed. 950; *Stout v. Hyatt*, 13 Kan. 232; 23 Am. & Eng. Enc. Law (2d ed.), 482, and cases cited; 24 *Ibid.* 1169; 19 Cyc. 1052. But such a defense may be interposed as against the holder of an equitable title. 19 Cyc. *supra*. . . . Judgment reversed.

See the note to the principal case in 14 L. R. A. (N. S.) 435, and the note to *Scott v. Elliott*, 61 N. C. 104, inserted at ch. 7, sec. 1, post. See Decennial and Am. Dig. Key No. Series, vol. 3, "Estoppel," § 110; "Execution," § 172; "Fixtures," §§ 3, 21, 35.

TURNER v. MEBANE, 110 N. C. 413, 14 S. E. 974. 1892.

House Removed from One Man's Land to Another's Land, But Not Affixed Thereto.

CLARK, J. The defendant mortgagor moved the house from the mortgaged premises across the road to another tract, also belonging to him, but not covered by the mortgage. This certainly could not impair the mortgage lien upon the house. If it could in these days, when house-moving machinery has been so greatly perfected, there would be a serious impairment of the security of all mortgages on improved real estate. The court decreed a sale of the house in its new situs, under the mortgage, with leave to the purchaser to remove or roll the building off again. We can perceive no grounds, legal or equitable, upon which the defendant can object to this. The plaintiff does not ask for more, and the rights of third parties are not involved. It does not appear that the building was attached to the freehold, and it is unnecessary to discuss the effect of such attachment in this case, if any. No error.

See "Mortgages," Century Dig. § 302; Decennial and Am. Dig. Key No. Series, § 148.

STEVENS v. SMATHERS, 124 N. C. 571, 32 S. E. 959. 1899.

House Torn Down and Removed from One Man's Land, and Rebuilt on Another's Land.

[Action for the value of a house removed from land. Verdict and judgment against defendant, and he appealed. Affirmed.]

Action by mortgagee to recover the value of a house torn down and removed from the mortgaged land and rebuilt on defendant's land. Defendant had notice of the facts connected with the placing of the house on his land. There was a balance due on the mortgage when this action was brought. Judgment against the defendant for the value of the house as fixed by the verdict. There was a greater sum due on the mortgage than the value of the house.]

CLARK, J. The plaintiff had a mortgage on a house and lot, to secure a debt due by J. Wilky Shook. The latter tore down the house, removed it and re-erected it upon the land of the defendant, Smathers. The jury found that the house when torn down was worth \$150, and that the mortgaged property was impaired that much in value by its removal. The court charged the jury (there being evidence to sustain the charge) that if the removal of the house to the land of defendant Smathers, was with his knowledge and assent, and he knew before it was rebuilt on his land that it had been taken from the land covered by the plaintiff's mortgage, his acquiescence therein made Smathers responsible for the value of the building. In this there was no error. *Horton v. Hensley*, 23 N. C. 163. We were treated to an argument whether the lien of plaintiff's mortgage was not destroyed by tearing down the house and rebuilding it upon Smathers' land. But this is not a case where the lien is sought to be enforced against the removed building—as in *Turner v. Mebane*, 110 N. C. 413, 14 S. E. 974, where the house was bodily rolled across the road upon another tract. Here no lien is sought to be enforced against the building, but the mortgage asks a personal judgment against Smathers, who acquiesced in the removed building being rebuilt upon his own land with knowledge that it had been taken from premises covered by plaintiff's mortgage. The court upon the verdict properly rendered judgment against Shook for the balance due on the mortgage debt, and against Smathers for \$150, the value of the removed house, and by whose removal the plaintiff's security had been impaired to that amount, payment of said \$150 to be credited on the mortgage debt. No error.

See "Mortgages," Century Dig. § 553; Decennial and Am. Dig. Key No. Series, § 207.

SEC. 9. WASTE.

STEVENS v. ROSE, 69 Mich. 259, 269, 270, 37 N. W. 205. 1888.

Waste in Law. Equitable Waste. Ancient and Modern Remedies.

LONG, J. . . . The action of waste under the old English practice was a remedy given for injury to lands, houses, woods, etc., by a tenant thereof for life or years, to the injury or prejudice of the heir, or of him in the reversion or remainder. It was either voluntary or permissive,—the one by actual design; the other arising from mere negligence, and want of sufficient care. The action was partly founded upon the common law, and partly founded upon the statute of Gloucester, and was a mixed action; real so far as it recovered the realty injured, and personal so far as it covered the damages for the injury. Originally, and under the old practice, the action was brought for both of these specific purposes, and, if waste was proved on the trial, the plaintiff recovered, not only the premises injured, but also the damages he had sustained by reason of the injury. The action for this double purpose,

having fallen into disuse, was finally abolished in England by the statute of 3 & 4 William IV. c. 27. In this country, although adopted in some of the states, it has been but little used; having been, in practice, virtually superseded by the action on the case, in the nature of waste for the recovery of damages, merely, or by bill in equity. In our own state this action on the case is authorized by chapter 271, How. St., above cited. These provisions of our statute on this subject are in accordance with the legal practice which has been adopted, and long since fully established, in England and in this country. [Equitable Waste.] Tenants for life, not made unimpeachable for waste by the person granting the estate, are liable for both commissive and permissive waste. The real intention, however, of the clause, "without impeachment for waste," is to enable the tenant to do many things, such as cutting wood, opening new mines, etc., which would otherwise at the common law amount to waste; but these words do not operate as a license to the tenant to destroy the estate, or to commit malicious waste, such as cutting down fruit-bearing trees, or trees which serve for shade or ornament. If he is tenant "without impeachment for waste," he has the same right to cut timber, work mines, etc., for his own use, as the owner of the inheritance; but those words do not justify him in demolishing the buildings, or doing that which operates as destructive or malicious waste. *Wood, Landl. & Ten.* p. 711, § 426; *Leeds v. Anherst*, 14 Sim. 357; *Aston v. Aston*, 1 Ves. Sr. 265; *Vane v. Lord Barnard*, 2 Vern. 738. The words are not to be treated as importing a license to destroy or injure the estate, but to do all reasonable acts, consistent with the preservation of the estate, which otherwise might in law be waste.

Estrepement.—"Estrepement is an old French word, signifying the same as waste or extirpation; and the writ of estrepement lay at the common law, after judgment obtained in any action real, and before possession was delivered by the sheriff, to stop any waste which the vanquished party might be tempted to commit in lands, which were determined to be no longer his. But as in some cases the demandant may be justly apprehensive, that the tenant may make waste or estrepement pending the suit, well knowing the weakness of his title, therefore the statute of Gloucester gave another writ of estrepement pendente placito, commanding the sheriff firmly to inhibit the tenant ne faciat vastum vel estrepementum pendente placito dicto indiscusso. And, by virtue of either of these writs the sheriff may resist them that do, or offer to do, waste; and if otherwise he cannot prevent them, he may lawfully imprison the wasters, or make a warrant to others to imprison them; or, if necessity require, he may take the posse comitatus to his assistance. So odious in the sight of the law is waste and destruction." 3 Blk. Com. *225. The old writ of waste being obsolete, the writs of estrepement have passed away also. Injunctions and restraining orders now supply the place of estrepement. See *Miller v. Washburn*, 38 N. C. at p. 166, inserted in ch. 11, s. 5, post.

See "Waste," *Century Dig.* §§ 16-18; *Decennial and Am. Dig.* Key No. Series, § 15.

SOUTHERLAND v. JONES, 51 N. C. 321, 323. 1859.

Ancient Action of Waste. Writ and Declaration. Strict Rules of Practice.

[Action of waste. Verdict for plaintiff. Verdict set aside and judgment of nonsuit against plaintiff, and he appealed. Affirmed.]

The writ in this case was as follows:

"State of North Carolina. To the sheriff of Duplin county—Greeting: You are hereby commanded to take the bodies of Robert D. Jones and Mary Jones, his wife, if to be found in your bailiwick, tenants of the following described tract of land, situate in the county of Duplin, viz., beginning at etc. (description), and them safely keep, so that you have them, etc., then and there to answer David J. Southerland and his wife, Caroline (and others, naming them), in whom the right of the aforesaid lands, of which the aforesaid Robert D. Jones and wife, Mary, are tenants for life, by virtue of a certain devise to said Mary, remainder in fee to the said Caroline, etc., contained in the last will and testament of Thomas Sheppard, of a plea wherefore, seeing that the said Robert D. Jones and wife, Mary, have committed waste of the aforesaid lands and tenements, the said David J. Southerland and wife, etc., shall not have judgment, as well for the damages for the said waste, so committed, as the recovery of the lands and tenements so wasted, according to the force and effect of the statute, wherein it is provided that in all cases of waste, an action shall lie at the instance of him, in whom the right is, against all persons committing the same, as well tenants for term of life, as tenants for term of years, as guardian. Witness, etc." The declaration was in conformity with the writ.

The declaration alleged that the defendants were tenants for life and plaintiffs were owners of the remainder in fee after the expiration of such life estate; but the proof was that the plaintiffs owned a reversion in fee after such life estate. The judge below held this to be a fatal variance.]

BATTLE, J. . . . The question remains, whether the misdescription of the title of the plaintiffs, in the action of waste, is fatal to their right of recovery. Upon that question we concur with his Honor, as we find that his opinion is well sustained by authority.

The action of waste has become nearly obsolete, both in England and in this state, and is almost entirely superseded by the action on the case in the nature of waste. The reason of this is, that the latter form of action is much more convenient, and applicable to a much greater number of circumstances than the former, as is shown in the recent case of Dupre v. Dupre, 49 N. C. 387, and by the authorities therein referred to. The old writ of waste may, however, still be used, as it is certainly in force in this state; Brown v. Blick, 7 N. C. 511; 1 Rev. Stat. ch. 119; Rev. Code, ch. 116. When brought, it must be governed by the rules established for it in England, whence we obtained it.

In Serjeant Williams' note 2, to 2 Saunders, Rep. 235, it is distinctly stated that "The declaration in waste must show how the plaintiff is entitled to the inheritance," in illustration of which, he gives several instances. If it be necessary to state the plaintiff's title correctly, it follows, that it must be proved as laid. In the present case, the title of the plaintiffs is set forth in their declaration, as a devise of a *remainder* in fee, while their proof shows it to be the descent of a *reversion* in fee, subject to a power of sale. The variance is fatal. Judgment affirmed.

See "Pleading," Century Dig. § 1321; Decennial and Am. Dig. Key No. Series, § 393; "Waste," Century Dig. § 32; Decennial and Am. Dig. Key No. Series, § 26.

DUPREE v. DUPREE, 49 N. C. 387, 390. 1857.

Action of Waste and Modern Action of Trespass on the Case in the Nature of Waste Distinguished. Privity.

[Trespass on the Case in the nature of waste. Verdict and judgment against the defendant, and she appealed. Affirmed.]

Plaintiff owned the reversion after defendant's dower. The defendant committed waste; but before this action was brought, she conveyed her dower right to the plaintiff. Defendant's counsel argued that plaintiff could not recover for the waste; because of his purchase of the life estate after the waste was committed. The judge ruled otherwise. Only that part of the opinion which bears upon this point is inserted here.]

BATTLE, J . . . The second objection is founded upon the idea that there must exist a particular estate, and a reversion *at the time when the action is brought*, as well as when the waste was committed. In support of this, the counsel for the defendant relies upon the authority of Co. Lit. 53b, where it is said: "Note, after waste done, there is a special regard to be had to the continuance of the reversion in the same state that it was at the time of the waste done; for, if after the waste, he granteth it over, though he taketh back the whole estate again, yet is the waste dispunishable; so if he grant the reversion to the use of himself and his wife, and of his heirs, yet the waste is dispunishable, and so of the like; because the estate of the reversion continueth not, but is altered, and consequently the action of waste for waste done before (which consists in privity) is gone." The counsel referred also to the case of Bacon v. Smith, 41 E. C. L. Rep. 571, where Patteson, Judge, in remarking upon this passage, said "it had immediate reference to the old form of action, but the rule equally applies to an action on the case in the nature of waste." It is unnecessary for us to inquire whether if the plaintiff, in the present case, had granted away his reversion, he could have maintained his action. If he could not, it would not be for the want of privity, simply because privity is not now necessary to the action on the case in the nature of waste. Instead of being confined, as the old action of waste was, to the owner of the inheritance against his immediate tenant for life, or years, it may be brought by a person in remainder or reversion for life, or years, as well as in fee, or in tail, and against a stranger as well as against a tenant. 2 Saund. Rep. 252, note 7; Williams v. Lanier, 44 N. C. 30; Dozier v. Gregory, 46 N. C. 100. It may be brought also in the tenuit against a tenant, after the term for life, or years, has expired. Kinlyside v. Thornton, 2 Bl. Rep. 1111. Privity, then, not being essential to the maintenance of the action, we are not aware of any principle which forbids a suit by a remainderman or reversioner after the purchase by him of a particular estate, for waste done before.

The counsel contends that the right to damages is incident to the

tenure, and that when the plaintiff has, by his own act, put an end to the tenure, the incident must be extinguished with it. But we have seen that the right to damages for the waste does not depend on the tenure, and, of course, the inference that it must cease with it, cannot be legitimately drawn. There is no error in the judgment, and it must be affirmed.

That an "action on the case in the nature of waste" could be maintained even against a stranger by a remainderman or reversioner, see *Williams v. Lanier*, 44 N. C. at p. 31, quoted in a note to *Dills v. Hampton*, 92 N. C. 565, inserted at sec. 12 post. See "Waste," Century Dig. § 19; Decennial and Am. Dig. Key No. Series § 11.

GORDON v. LOWTHER, 75 N. C. 193. 1876.

Who Can Sue for Waste. Contingent Remainderman, etc.

[Action to recover damages for waste, and to enjoin future waste. Demurrer overruled and judgment against defendant, from which he appealed. Affirmed.]

The question presented is: What remedy, if any, has the owner of an *executory or contingent interest*, for waste? The facts appear in the opinion. The ground of demurrer was, that it appeared upon the complaint that plaintiff did not have an "immediate estate of inheritance" in the locus in quo, and, therefore, could not maintain this action.]

SETTLE, J. The testator "lends" to his daughter, Martha (now Mrs. Lowther), certain lands described in his statement [testament?], and adds: "Should my said daughter have no child or children to live to be twenty-one years old, my will and desire is that my grandson, John Gordon, son of George B. Gordon, shall have it after her death; if she should have child or children to arrive at the above age, my desire is, that they shall have it after her death." This makes the defendant, Martha Lowther, a tenant for life, with a *contingent remainder in fee* to such child or children as she may have, who live to the age of twenty-one years, with an *executory devise* over to the plaintiff in the event that no child of Martha Lowther lives to the age of twenty-one years.

The allegations of the complaint are that the defendants, at various times from 1863 to 1875, have sold timber trees from the land and have torn down buildings, and have allowed the farm to go to ruin, thereby *committing voluntary and allowing permissive waste*, and that the defendants are now, at the time of commencing this action, still committing waste by selling timber trees from the land, and that the injury to the estate of inheritance is equal to the value of the life estate. And therefore plaintiff brings this action:

First, to restrain waste; second, to recover damages for the waste already committed. The defendants demur.

While owners of *executory bequests* and other *contingent interests cannot recover damages for waste already committed*, they are entitled to have their interests protected from *threatened waste or destruction by injunctive relief*. This is clear both upon principle

and authority. *Braswell v. Morehead*, 45 N. C. 26; *Douthit v. Bodenhamer*, 57 N. C. 444; *Watson v. Watson*, 56 N. C. 400.

Inasmuch as Mary Lowther is now fifty-two years old, has been married twelve years and has never had a child, and admits by the demurrer the waste charged in the complaint, this would seem to be a very proper case for such relief. The judgment of the superior court is affirmed.

See "Waste," *Century Dig.* § 23; *Decennial and Am. Dig. Key No. Series*, § 12.

MORRISON v. MORRISON, 122 N. C. 598, 29 S. E. 901. 1898.

Remedies of Cotenants Against Each Other for Waste.

[Civil action to restrain waste, heard upon defendant's motion to dissolve a restraining order theretofore issued. Motion allowed, and plaintiff appealed. Reversed. The facts appear in the beginning of the opinion. The question presented is: What remedy, if any, has one cotenant against another for waste?]

FAIRCLOTH, C. J. This is an action to restrain the defendants from committing waste on the land described in the pleadings. The plaintiffs claim as remaindermen in said property. The defendant claims as a tenant for life under a will, and as the owner in fee of 1-48 interest by descent from one of the common ancestors. The court held that the defendant was a tenant in common with the plaintiffs, to the extent of said interest by descent, and could not be enjoined as prayed for by his cotenants, and dissolved the restraining order, from which plaintiffs appealed. Other questions relating to the law of waste and the rights of parties therein were discussed; but the holding of his honor, as above stated, disposes of this appeal. It is quite useless to enter into the field of learning on this subject at common law in England, or as it was applied by our ancestors to the conditions which they found in this country. Those considerations evoked much learning, and led to many intricate and embarrassing distinctions. One of the settled rules was that one tenant in common could not sue his cotenant, except for partition; and our legislature, feeling the practical difficulties at an early date, enacted that one tenant in common might maintain an action for waste against his cotenant or joint tenant. *Rev. St. c. 119*; *Code*, § 627. The right to sue for the waste includes the right to restrain its commission. The same question, upon a similar state of facts, was presented in *Hinson v. Hinson*, 120 N. C. 400, 27 S. E. 80, and the right to sue was sustained. This conclusion allows the parties to try the case upon its merits, if they so desire. His honor's ruling was erroneous. Error.

See "Tenancy in Common," *Century Dig.* § 69; *Decennial and Am. Dig. Key No. Series* § 26.

JESUS COLLEGE v. BLOOM, Ambler, 54. 1745.

Jurisdiction in Equity in Matters of Waste.

[This bill was brought by the Master and Fellows of Jesus College, in Oxford, for an account of timber cut on the premises by them let to the defendant, and for an account of some stones which he had carried off the land.]

LORD CHANCELLOR [HARDWICKE]. This is the most extraordinary bill that ever was brought in this court, and I hope never to see one of the like nature again.

On this bill there arise two questions: 1st, Whether bills are to be maintained in this court merely for timber cut down after the term is gone out of the tenant by assignment? or 2nd, Whether such bills can only be brought for an account of such waste done, without at the same time praying for an injunction? And I am of opinion that they cannot. Waste is a loss for which there is a proper remedy by action. In a court of law the party is not necessitated to bring an action of waste, but he may bring trover; those are the remedies, and therefore there is no ground of equity to come into this court, for the satisfaction of damages is not the proper ground for this court to admit of bills of this sort, but the staying of waste; because the court presumes, when a man has done waste he may commit the same again, and therefore will suffer the lessor or reversioner, when he brings his bill for an injunction to stay waste, to pray at the same time an account of the waste done; for though a court of law may give damages, yet it cannot prevent further waste; and it is upon this ground, to prevent multiplicity of suits, that this court will decree an account of waste done at the same time with an injunction: just like the case of a bill brought for discovery of assets, an account may be prayed at the same time: and though originally the bill was only brought for a discovery of assets, yet, to prevent multiplicity of suits, the court will direct an account to be taken.

If the court were to allow of these sort of bills, it would create infinite vexation: there is not one precedent to warrant it. The cases cited do not come up to the present. *Whitfield v. Bewick*, 3 Wms. 267. It does not appear in that case, that an injunction to stay waste generally was not prayed; if it was, that brings it within the common case. As to the case of the *Bishop of Winchester v. Knight*, 1 Wms. 406, I am at a loss to know upon what grounds the court went. The book says, because it was a demand against an executor: but I doubt greatly as to this, for it is far from being a general rule of this court to entertain a bill against an executor for a tort committed by his testator. The more probable reason for decreeing an account in that case seem to be, because it was the case of mines, and the court always distinguishes between digging of mines and cutting of timber, because the digging of mines is a sort of trade; and there are many cases where this court will relieve and decree an account of ore taken, when in any other tort or

wrong it has refused relief. If this be the reason of the determination in that case, as I really think it is, it stands quite different from the present: I am therefore of the opinion, upon this first head, that this bill brought by Jesus College, to have satisfaction for timber cut down after an assignment of a lease, when the proper remedy is at law, ought to be dismissed. . . .

The principal case is approved by Chancellor Kent, in *Watson v. Hunter*, 5 Johns Ch. 169, where it is said that the carrying away of timber already cut will not be restrained in equity except in extraordinary cases, such as the insolvency of the person committing the waste, etc. See "Waste," Century Dig. §§ 16, 38-42; Decennial and Am. Dig. Key No. Series, §§ 15, 17.

OBRIEN v. OBRIEN, Ambler, 107. 1751.

Equitable Waste. Remedy in Equity.

[Certain realty was conveyed to trustees to the use of Henry Obrien for life, *without impeachment of waste*, remainder to Donatus Obrien for life, etc. Henry Obrien, the first tenant for life, conveyed his life estate to Sir Edward Obrien, who threatened to cut down all the trees and timber growing on the locus in quo. Thereupon Donatus Obrien, the tenant for life in remainder, filed this bill in chancery, praying an injunction to stay waste—stating, among other things:]

"That a great part of the timber trees growing on the said estates were standing and growing in a walled-in park called Blatherwicke Park, and stood near the capital seat of the family, and other houses upon the estate, and either served for the shelter thereof, or were set in rows, walks, vistles, avenues, or clumps, and were great ornaments thereto; great part whereof were of a late growth, being planted about twenty-five years before, and many thousands of them were young saplings, greatly beneficial to the estate, but of very small value if cut down, not being worth above 2s. 6d. apiece, one with another."

Upon an affidavit of the above facts, Mr. Solicitor General, Mr. Wilbraham, and Mr. Waller, this day moved, that an injunction might be awarded to stop the defendants from committing any waste or spoil of the premises.

His Lordship ordered that an injunction should be awarded to stay the defendants, etc., from cutting down any timber trees, or other trees growing on the said estate which were planted or growing there for ornament or shelter of the mansion house, of that grew in vistles, planted walks, or lines for the ornament of the park, part of the premises in question; and also from cutting down any saplings growing on any other part of the estate in question, not proper to be felled, until answer, and other order to the contrary.

See "Waste," Century Dig. §§ 38-42; Decennial and Am. Dig. Key No. Series, § 17.

VANE v. LORD BARNARD, 2 Vernon, 738. 1716.

Equitable Waste. Mandatory Injunction.

The defendant on the marriage of the plaintiff, his eldest son, with the daughter of Morgan Randyll, and 10,000 pounds portion, settled, inter alia, Raby Castle on himself for life, *without impeachment of waste*, remainder to his son for life, and to his first and other sons in tail male.

[In August, 1714] The defendant, the Lord Barnard, having taken some displeasure against his son, got two hundred workmen together, and of a sudden, in a few days, stript the castle of the lead, iron, glass-doors, and boards, etc., to the value of 3,000 pounds.

The court upon filing the bill, granted an injunction to stay committing of waste, in pulling down the castle; and now, upon the hearing of the cause, decreed, not only the injunction to continue, but that the castle should be repaired, and put into the same condition it was in, in August, 1714, and for that purpose a commission was to issue to ascertain what ought to be repaired, and a master to see it done at the expense and charge of the defendant, the Lord Barnard; and decreed the plaintiff his costs.

In *Turner v. Wright*, 2 DeGex, Fish. and Jones (Eng. Ch.), 234, Finch's Cases, 391, it is said: "Tenant in fee simple subject to an *executory devise over*, of a mansion house surrounded by timber for shelter and ornament, cannot say that the property is his own, so that, out of spite to the devisee over, he may blow up the mansion house with gunpowder and make a bonfire of the timber. The famous Raby Castle case, *Vane v. Lord Barnard*, shows that such things may not be done by *tenant for life sans waste*, and *tenant in fee with an executory devise over*, actuated by malice, would not have greater liberty to destroy. . . . *Equitable waste is that which a prudent man would not do in the management of his own property.*"

"In the case of *Gordon v. Lowther*, 75 N. C. 193 [inserted supra in this section] the court said in effect, that while persons holding a vested estate for life, coupled with contingent interests, are *not liable in an action of waste*, they and their tenants may be restrained from further *despoiling and injuring the inheritance*, where it appears that they have been removing from the land timber trees not cut down in the course of prudent husbandry." *Farabow v. Green*, 108 N. C. mid. p. 343, 12 S. E. 1005. See also *Stevens v. Rose*, 69 Mich. 259, 37 N. W. 205, inserted, supra, in this section.

In *In re Lennon*, 166 U. S. at p. 556, 17 Sup. Ct. 661, it is said that a mandatory injunction is "clearly not beyond the power of a court of equity, which is not always limited to the *restraint* of a contemplated or threatened action; but may even require *affirmative action* where the circumstances of the case demand it. *Robinson v. Ld. Byron*, 1 Bro. C. C. 588; *Hersey v. Smith*, 1 Kay & Johns. 389; *Beadel v. Perry*, L. R. 3 Eq. 465; *Whitecar v. Michenor*, 37 N. J. Eq. 6; *Broome v. Telephone Co.*, 42 N. J. Eq. 141."

See "Waste," Century Dig. § 6; Decennial and Am. Dig. Key No. Series, § 4.

SEC. 10. FORCIBLE ENTRY AND DETAINER.

BOXLEY AND OTHERS v. COLLINS, 4 Blackford, 320, 321. 1837.

Unlawful Detainer.

[Proceedings by Collins against Boxley and others for Forcible Detainer of real estate, carried by appeal from a justice's court to the circuit court. In the latter court there was a verdict and judgment against Boxley and others, and they appealed. Reversed.]

The verdict was: "We, the jurors, etc., find that [the locus in quo] . . . was in the lawful and rightful possession of Collins; and that Boxley and others . . . being lawfully upon the same, did *unlawfully detain the possession* from said Collins, and still continue unlawfully to detain the possession from him. Wherefore the jury . . . find that said Collins ought to have restitution thereof without delay."]

BLACKFORD, J. . . . This verdict is defective, because it does not state that the possession of the premises was detained *by force*. The mere unlawful detainer of lands, furnishes no ground for a prosecution under the statute against forcible entries and detainers. This summary and extraordinary proceeding to obtain possession of real estate, by the interference of justices of the peace, is founded *upon statute*, both in England and in this country, and is only authorized where the entry or detainer is, in its nature, *forcible and violent*. In ordinary cases—those of entries or detainers peaceable but unlawful—the injured party is left to the action of ejectment, etc. A distinguished writer uses the following language on the subject: "To constitute a forcible entry, or a forcible detainer, mere force in law, as it is technically termed, being a simple trespass, is not sufficient: there must be some actual violence, or some proceeding, as a large assembly of persons, calculated to create alarm, if not terror, in ordinary minds, though it is not necessary that there should be any assault or battery." 2 Chit. Gen. Prac. 234. . . .

See "Forcible Entry and Detainer," Century Dig. §§ 24, 159; Decennial and Am. Dig. Key No. Series §§ 5, 36.

PULLEN v. BONEY, 4 N. J. L. 145, 150–152. 1818.

Forcible Detainer Distinguished from Forcible Entry and Detainer.

[Proceedings by Sarah Boney against Elijah Pullen, in Forcible Entry and Detainer. Verdict and judgment against Pullen, who carried the case to the supreme court by writ of error. Affirmed.]

After the plaintiff, Boney, had closed her evidence, Pullen moved to nonsuit her upon the ground that it appeared that he, Pullen, was put into peaceable possession of the locus in quo by Boney, under a valid lease made by her to him. Motion refused. Pullen requested the court to charge the jury that the plaintiff, Boney, must show force in the original entry by Pullen in order to sustain the charge of forcible entry and detainer; but that proof of force in keeping possession after a peaceable entry would not establish a forcible detainer. This charge the court refused to give. In this was no error, according to the decision of the supreme court; but a part of the dissenting opinion as to this point is inserted, because of the clearly drawn distinction between the offenses of Forcible Entry and Detainer and a simple Forcible Detainer.]

SOUTHWARD, J. (dissenting). . . . The two offenses of "forcible entry and detainer" and "forcible detainer" are, by our statute, and have always been, distinct offenses, and I take the distinction to consist in the lawfulness or unlawfulness of the entry. Whenever the entry is unlawful, whether forcible or not, and the subsequent conduct is forcible and tortious, the offense committed is forcible entry and detainer. But wherever the original entry is lawful, and the subsequent holding forcible and tortious, then the offense is an unlawful detainer only. By our own statute it is declared: "That if any person shall enter upon or into any lands, etc., and detain or hold the same with force or strong hand or with weapons, etc., or by entering peaceably and then turning, by force or frightening by threats or other circumstances of terror, the party out of possession, in such case every person so offending shall be guilty of a forcible entry and detainer, within the meaning of this act." It is here to be remarked that in the commencement of this section the character of the entry is not at all described, but the offense is designated by the subsequent conduct, and by the latter clause of the section the entry may be peaceable. But in both cases the entry must be unlawful; and though not peaceable and not exhibiting absolute or direct force, yet the subsequent conduct gives character to that entry and makes it forcible. It is a very common principle that in many ordinary actions of trespass the coming into the possessions of another was quiet and not tortious, considered in itself. Yet the acts committed after the coming in, being unlawful, had relation back to the first entry and made that a trespass, which would well sustain the suit. So here it is not the absolute force, but the unlawfulness of the entry, which constitutes the offense under this section. Dalt. c. 126; 1 Hawk. 145; Co. Litt. 257. The words "entering peaceably" and "turning the party out of possession" confirm strongly the idea that the character of the forcible entry is derived, not from the manner of the first entry, but the subsequent conduct of the party.

But there are cases where the entry is not only peaceable but lawful, where the party had legal right to enter and yet the detention is of the same tortious and forcible character which constitutes the offense under the second section. A detainer may be forcible whether the entry were forcible or not. Hawk. c. 64. Hence, in the third section of our act we are told, "that no person who shall lawfully or peaceably enter upon or into any lands, etc., shall hold or keep the same unlawfully and with force, etc., and it is hereby declared that whatever words or circumstances, conduct or action, will make an entry forcible under this act shall also make a detainer forcible." It is manifest that the two offenses are here considered and described as distinct and separate, and the latter is distinguished from the former by the lawfulness of the entry upon the lands, etc.

This distinction between the two offenses exists not only in the words of the statute and the language of the elementary books but in the acts and decisions of the courts. In forcible entry and detainer the jury are to find all or none, and not the detainer without

the forcible entry. 1 Vent. 25. At common law there might be an indictment for a forcible entry, but it must, on the face of it, show sufficient force. 3 Burr. 1702, 1732; 8 Term Rep. 357. An indictment for a *forcible detainer only* ought to show that the *entry was peaceable*. Cro. Jac. 151.

If, then, these be distinct offenses, a man guilty of one cannot be convicted of the other without a violation of correct legal proceeding. The complaint ought to show of which the defendant is accused, and the verdict of the jury ought to correspond with the complaint.

In the instances now under consideration the defendant, if guilty, was only so of a *forcible detainer*. He entered *peaceably and lawfully* into the possession of the premises, by express agreement of the plaintiff, by written lease. He could not be guilty of a *forcible entry*, yet he has been convicted of one. He was guilty, if guilty at all, of a forcible detainer, yet he has been convicted of a different offense. In this I think there was such error as to require a reversal. . . .

See "Forcible Entry and Detainer," Century Dig. §§ 5-23; Decennial and Am. Dig. Key No. Series §§ 4, 5.

BARON SNIGGE v. SHIRTON, Cro. Jac. 199. 1610.

Forcible Detainer by Tenant by Sufferance.

This was a proceeding in the Star Chamber. Shirton being tenant for years, Baron Snigge purchased the reversion, and he paid to him rent for fifteen years. Before the end of the term, one Chambers came to Shirton, and persuaded him that Alexander Staples had title to the land, and advised him to take a lease from him; whereupon he [Shirton] took a lease of him for ten years, rendering seventy pounds per annum, and the land was worth one hundred and forty pounds per annum: and [Staples] willed him to hold the possession against all persons: and he [Shirton] at the end of his first term, kept the possession with drum, guns, and halberds, etc. (The drum was only to give notice if any came to enter, but nobody offered to enter.) He [Shirton] was censured for this, being a riot and forcible detainer, although none other offered to enter.

For it was held, that the possession of the termor was the possession of the lessor; and when at *the end of the term, he kept it against him to whom he had so long paid his rent, it was a forcible detainer*. And whereas the statute 31 Eliz. c. 11, is, that where one hath had possession for three years quietly, he might hold the possession with force, that is to be intended where the estate is continued.

And for this offense Shirton was fined five hundred pounds; and Chambers, for counselling and stirring up that title, was fined three hundred pounds; and all the servants in the house, which

kept it with weapons, were fined ten pounds apiece. But Alexander Staples was not censured; for he made the lease only, but did not command him to keep the possession with force.

It is fortunate that Shirton did not also use a ugab and a boomerang on this occasion. If he had, he would probably have found himself to be "Shirtoff" at the cart's tail before the Star Chamber got through with him.

BARTON v. OSBORN, 6 Blackford, 145. 1842.

What Constitutes a Forcible Detainer. Tenant by Sufferance.

[Proceedings by Osborn against Barton for a Forcible Detainer. Judgment against defendant, Barton, for costs. Barton carried the case to the supreme court by writ of error. Reversed.]

The complaint alleged that Osborn purchased of Barton a certain parcel of land—describing it—and that Barton was to give possession thereof to Osborn on December 25; but that "Barton held and still holds the possession by force and strong hand, wrongfully and unjustly." Barton moved to dismiss the proceedings on the ground that the complaint was not sufficient. Motion overruled and judgment entered against Barton. The judgment was for costs only, because Barton vacated the premises while the proceeding was pending. The evidence, if any, as to the force used by Barton in detaining the premises, is not given in the case as reported.]

BLACKFORD, J. . . . The judgment of the circuit court for the plaintiff, on the merits, is evidently wrong, as there is not the slightest proof that the least force to detain the premises had ever been used by the defendant. The suit could not be sustained without proof that the detainer was not only unlawful but that it was by *force and violence*. *Boxley v. Collins*, 4 Black. 320.

We think, however, that the motion to dismiss the suit on account of the insufficiency of the complaint, was rightly overruled. The complaint shows that the plaintiff bought the land of the defendant; that the latter, by agreement with the plaintiff, continued in possession until a certain day, and held over after that day by *force and strong hand*. The defendant, under these circumstances, stood in the situation of a tenant for years, forcibly holding possession after the expiration of his term. And it is decided that if a tenant for years, after his term is expired, hold by force against the lessor, it is a forcible detainer, the possession of the termor being that of the lessor. *Snigge v. Shirton*, Cro. Jac. 199. It was also held that a mortgagor, after forfeiture of the mortgage, may be guilty of a forcible detainer by maintaining possession by force, 3 Chit. Crim. Law, 1121; 2 Chit. Gen. Pra. 238. These are strong authorities in favor of the validity of the complaint filed in this cause. It may be remarked, too, that the English law requires the defendant's entry to be considered as unlawful. *The King v. Oakley*, 4 Barn. & Adol. 307; which is not the case under our statute. Rev. Stat. 1838, p. 307. Judgment reversed.

For further discussion of Forcible Entry and Detainer, see *Wilson v. Campbell*, 88 Pac. 548, 8 L. R. A. (N. S.) 426; *Whitney v. Brown*, 90 Pac. 277, 11 L. R. A. (N. S.) 468; *Howe v. Frith*, 95 Pac. 603, 17 L. R. A.

(N. S.) 672, and note; 3 Wait's Act. & Def. 395; 13 Am. & Eng. Enc. L. 741, 743, 19 Cyc. 1112 et seq.; Moseller v. Deaver, 106 N. C. 491 (inserted at ch. 2, s. 3, ante), 11 S. E. 529, 8 L. R. A. 537, and note; Pell's Revisal, secs. 3670, 3685, 3688. See "Forcible Entry and Detainer," Century Dig. §§ 23, 24, Decennial and Am. Dig. Key No. Series, § 5.

SEC. 11. NUISANCE.

POWELL v. B. & G. FURNITURE CO., 34 W. Va. 804, 12 L. R. A. 53, 12 S. E. 1085. 1891.

Nuisance Defined. Public and Private. Remedies at Law and in Equity.

[Suit in equity to enjoin an alleged nuisance. Decree against defendant, and he appealed. Reversed.]

Bill in equity by plaintiff to perpetually enjoin the defendant from the use of a furniture factory as a nuisance to the plaintiff in the enjoyment of his dwelling. Demurrer. Demurrer overruled. Answer. Reply. Decree, on Aug. 12, 1890, perpetually enjoining the use of the factory, engines, etc., in such manner as to produce loud, disagreeable, etc., noises that would interfere with the ordinary use, physical comfort, etc., of the plaintiff, his family, and other occupants of his house, lot and premises.

The bill was filed in 1888. In 1889 the plaintiff sued the defendant in trespass on the case for damages claimed by reason of the same nuisance sought to be enjoined by the bill in equity, which action at law was still pending when the decree in the equity case was rendered.]

HOLT, J. . . . History of common-law nuisance: The common-law doctrine of nuisance is as old as the common law itself. Our oldest law-writers treat of the subject. See citations from Glanvill and Bracton in Bigelow, Lead. Cas. Torts, 462.

Its foundation: It is founded on what we call the absolute rights of liberty and property. Each man has the right to that which he has made his own, and without control or diminution, save by the laws of the land. If each has it, all have it; so that it follows from this that each one must so use his property and rights as not to injure those of others. Each has his right for himself, and owes a corresponding duty to the other.

Definition: Some definitions are too broad to be useful; some too narrow to be true. The violation of this duty is the best general description of a nuisance.

Common nuisance: A common nuisance affects the people at large, and is an offense against the state, but an action may be brought in his own name by any one who suffers damage peculiar in kind or degree beyond what is common to him and to others.

Private nuisance: A private nuisance affects one or more as private citizens, and not as a part of the public, and is ground for a civil suit only.

Subject-matter: Generally it affects the use or enjoyment of real property, and, as we see by the old definitions, was confined to this; but modern law takes a wider range. It is closely related to the law of servitudes.

The old common-law remedies by action. These were two:

(1) *Quod permittat prosternere*. This was in the nature of a writ of right, and therefore subject to great delays. It commanded the defendant to permit the plaintiff to abate the nuisance, or show cause against the same; and plaintiff could have judgment to abate the nuisance, and for damages against the defendant. (2) An assize of nuisance, in which the sheriff was commanded to summon a jury to view the premises, and, if they found for the plaintiff, he had judgment to have the nuisance abated, and for damages. It is to be noticed that the jury were to view the premises. Both had long been out of use in Blackstone's day; with us they were never in use, as far as I know. The assize of nuisance lay only against the wrongdoer himself, but not against the alienee of the tenement wherein the nuisance was situated. This was the immediate reason for making that equitable provision in St. Westm. 2, 13 Edw. I. c. 24. This was in the year 1285 (3 Bl. Comm. pp. 216, 222), and has been the occasion of our modern changes in common-law pleading. We see that in the assize of nuisance the jury were to view the premises; this may be done now in the case at law, at the request of either party. Section 30, c. 116, p. 760, Code W. Va.

Modern remedies. The right to abate: This is treated of by Bracton, who wrote 628 years ago, and the remedy survives to the present time; but a party should not be advised to take the law into his own hands except in a case of great urgency, for he does so at his own risk, and a great hazard, should he be in the wrong, or go too far.

Things to be considered in determining what is a nuisance: Every man, as we have seen, has the exclusive dominion and the right to the full and exclusive enjoyment of his own property, to do with it as he pleases. His neighbor has the same right over his own property. Hence it follows, as the duty of each to so use his own as not to injure that of the other, each one's duty qualifies his own right, and creates a corresponding right in the other.

Harm without legal injury: But this duty must be taken with qualifications, for, in the nature of things and of society, it is not reasonable that every annoyance should constitute an injury such as the law will remedy or prevent. One may therefore make a reasonable use of his right, though it may create some annoyance or inconvenience to his neighbor. But, even in such case, an annoyance lawful in itself may become unlawful when done maliciously.

Useful or necessary trades: So, also, public policy and general convenience require that on this head something more shall be conceded to useful and beneficial work than to useless and idle amusements, but where this line of difference is to be drawn can only be determined by the facts of each particular case.

Homes and factories: According to our settled notions and habits, there are convenient places,—one for the home, one for the factory; but, as often happens, the two must be so near each other as to cause some inconvenience. The law cannot take notice of such inconvenience, if slight or reasonable, all things considered, but applies the common-sense doctrine that the parties

must give and take, live and let live; for here extreme rights are not enforceable rights, — at any rate, not by injunction. See Bish. Non-Cont. Law, § 418, and cases cited.

Convenient place: But the term "convenient place" does not mean the one best for the profit and convenience of the owner of the offensive factory, but the one where it shall cause no actionable injury to others. One nuisance does not justify another; still it may be taken as one of the surrounding circumstances to be considered in determining whether or not the other be a nuisance.

Idiosyncracies of the person annoyed: In fixing the standard by which to measure what shall be deemed a nuisance in the given case, the nature of the man offended, as well as the nature of the thing offending, must be considered. Daniel Boone, Kentucky's famous pioneer, represented the county of Kanawha in the Virginia legislature about 100 years ago, and soon after left the county, in part, it is said, because the throng of incomers had become annoying. Some families, it is said, think of re-establishing their old homes on lower Broadway. Leaving these matters for local history, past and to come, to look after, we know that our people, in a steadily increasing ratio, are crowding into the centers of population, seeking the conveniences, comforts, and amenities of town life, notwithstanding its noise and bustle and other annoyances. For such standard it will not do to take the man who, by reason of his sensitive nature, inborn or acquired, or by reason of his habits or mode of living, is supersensitive to the annoyance complained of; nor, on the other hand, are we to take one who, by nature or habit, is abnormally insensible to such things. The idiosyncracies or peculiar habits or modes of living of neither class furnish the proper test; and this, not because the oversensitive man or man in ill health has less right, but because it is impossible in practice for the law to extend to him exceptional immunity or protection. Therefore we must take as our standard the normal man; the one of ordinary sensibility; of ordinary habits of living: the plain, well-to-do people, who make up the great mass of our busy world. If this should lead to hardship in particular cases, such as sickness, practical convenience makes it impossible to have any other criterion. In such cases we must appeal to the humanity and good-will of our neighbor, rather than to any supposed enforceable right of our own.

So far the subject has been discussed on grounds common to a suit at law for damages, and a suit in equity to forbid, abate or restrain. But these remedies differ not less in the mode of relief than in effectiveness and in other important particulars. In the suit at law for damages, if the case is made out, damages, according to the injury proven, are awarded as matter of right, and not of discretion. But often this is only a half-way remedy, leading sometimes to endless litigation and to irreparable mischief. So that the remedy by injunction is sometimes the only one at all effective or complete, forbidding, preventing, stopping, abating the nuisance, exercising such restraint, and no more, as the

exigencies of the particular case demand. And now, since the power of man over the elements and forces of nature have become and are becoming so great and so far-reaching, this remedy grows in frequency and indispensability. Yet by reason in part of its very completeness and effectiveness, it is exercised, especially in cases like this, with great caution, and only after the fact of nuisance has been put beyond all ground for fair questioning. For although a court of equity in such cases follows precedent, and goes by rule, as far as it can, yet it follows its own rules,—and among them is the one that to abate or restrain in case of nuisance is not a matter of strict right, but of orderly and reasonable discretion, according to the right of the particular case,—and hence will refuse relief, and send the party to a court of law, when damages would be a fairer approximation to common justice, because to silence a useful and costly factory is often a matter of serious moment to the state and town, as well as to the owner. The matter here complained of as a nuisance is the noise of a furniture factory at the corner of Sixth and Ann streets, causing personal annoyance to plaintiff and his family at his home opposite, across Ann street, 80 feet from the factory, and thus indirectly impairing the value of his property. In such cases the question is, in its very nature, one of degree, and the evidence by which to determine it is matter of opinion, based on experience and observation of the thing itself. The rule to guide us in such cases is that the noise must be such as materially to interfere with and impair the ordinary comfort of existence on the part of ordinary people. *Snyder v. Cabell*, 29 W. Va. 48, 1 S. E. Rep. 241; *Baltimore & P. R. Co. v. Fifth Baptist Church*, 108 U. S. 317, 2 Sup. Ct. Rep. 719. See, also, *Smelting Co. v. Tipping*, 11 H. L. Cas. 642; *Walter v. Selfe*, 4 De Gex & S. 315; *Crumpp v. Lambert*, L. R. 3 Eq. 409; *Gaunt v. Fynney*, L. R. 8 Ch. 8; and the recent cases, *Bohan v. Gas-Light Co.* (N. Y.), 25 N. E. Rep. 246; and on public nuisance, *People v. Lead-Works* (Mich.), 46 N. W. Rep. 735; *Wiley v. Elwood* (Ill.), 25 N. E. Rep. 570; and notes in 9 *Lawy. Rep. Ann.*, Jan. 13, 1891, p. 711 (*Bohan v. Gas-Light Co.*) . . . [The evidence covered six hundred pages, and was very voluminous and contradictory. The court did not go into the evidence, but say it was a proper case for the chancellor to direct an issue to be tried by a jury; and as there was an action at law already pending between the parties, involving this very issue of nuisance or no nuisance, the court reversed the decree in equity and remanded the cause to abide the determination of the issue in the action at law.]

Private nuisance as affected by legislative authority, 1 L. R. A. (N. S.) 49, and notes 20 *Ib.* 1059, and note. See "Nuisance," *Century Dig.* §§ 56, 57; *Decennial and Am. Dig.* Key No. Series, § 23.

DISTRICT ATTORNEY v. L. & B. R. R. CO., 16 Gray, 242, 245. 1860.

Public Nuisance. Information by Attorney-General.

[Information in equity, by the district attorney on the relation of the officials of the town of Saugus, to restrain the laying of a railroad track within the limits of the town. The case was reserved for the decision of the whole court. The information was dismissed without prejudice.

Only that part of the case is inserted which relates to the practice of proceeding against nuisances by information of the attorney-general or other prosecuting officer.

The information alleged that the defendant was about to lay a track in the town, and that the digging up of the street, etc., in laying the track, and the track itself when constructed, would be a public nuisance.]

BULLOW, C. J. The authority of the attorney-general, or other law officer empowered to represent the government, to file an information in equity to restrain and prevent a public nuisance seems to be well established in England. It may be done by him, either ex officio, or upon the relation of persons who have an interest in the subject matter of the bill and whose private rights may be protected by the decree which is sought mainly on the ground of a public injury. 1 Dan. Ch. Prac. 11; 3 Dan. Ch. Prac. 1858; 2 Story, Eq. Jur. ss. 921, 926; *Kerrison v. Sparrow*, Coop. 305; *Attorney-Gen. v. Johnson*, 2 Wils. Ch. 87; *Atty.-Gen. v. Forbes*, 2 Myl. & Cr. 129, 133. Although in some of the earlier cases this jurisdiction was sparingly exercised, yet in recent practice it seems to have been more frequently resorted to as affording a convenient and speedy remedy. Nor are we able to see that any serious objection exists to this method of reaching and restraining a public nuisance. By it a nuisance which is threatened or in progress can be arrested, which cannot be done by proceedings at law; an injunction is more complete in its operation, because it prevents future acts as well as restrains present nuisances; and it affords a more prompt and immediate relief than could be obtained by other process. It is therefore a salutary power if exercised with discretion and confined within reasonable limits. Those limits are well defined. A court of equity will not interfere by injunction to restrain a public nuisance unless the existence of the nuisance is clearly established upon full and satisfactory evidence. If the proof is conflicting and the injury to the public uncertain or doubtful, the court will withhold its interposition. *Rison v. Hobart*, Coop. temp. Brougham, 333, and 3 Myl. & K. 169; *Atty.-Gen. v. Sheffield Gas Consumers' Co.*, 3 De Gex, Macn. & Goid, 639; 2 Story, Eq. Jur. s. 924 a. . . .

See "Nuisance," Century Dig. § 195; Decennial and Am. Dig. Key No Series § 82.

ATTORNEY-GENERAL ex rel. CITIZENS of RALEIGH v. HUNTER,
16 N. C. 12. 1826.

Public Nuisance. Bill in Equity by Attorney-General. Practice.

[Bill in equity filed by the attorney-general upon the relation of sundry citizens of Raleigh, for a perpetual injunction of an alleged public nuisance. Injunction ordered. Case tried in supreme court.]

The bill charged that the defendant's milldam near the city of Raleigh 'had rendered the inhabitants unhealthy, and prayed a perpetual injunction.' The defendant denied that the millpond had any pernicious effect upon the health of the inhabitants, and pleaded that he had been indicted for maintaining a nuisance because of the millpond in question, which indictment was still pending.]

HENDERSON, J. We are satisfied beyond a reasonable doubt, that the flowing back of the water as contemplated by the defendant, according to his own admissions, will create a public nuisance, and that of the worst kind, being one destructive to the health and comfort of the citizens of Raleigh. And we are called on to send the question of nuisance or no nuisance to a court of law; for what? To inform our consciences? They are already informed. And were a jury to find that it was not a nuisance, in a case of this kind, we should feel ourselves bound to disregard their verdict; for a jury would require the most satisfactory evidence of the fact, at least they would require a preponderance of evidence, to convict; with us, under all the circumstances of the case, a probability is sufficient. In the first place, the injury is irreparable, the place, the seat of government, where its officers are compelled to reside. These things make a difference between this case and that of a common nuisance. It is true it is a question of the most delicate kind, an interference with private rights, from which all departments of government should abstain, except in cases of necessity. It is, however, a sound political maxim, and one sanctioned by the courts of justice of this country, that individual interests must yield to that of the many; and this is something like the interest of the many, for every individual is, in some way or other, interested in the welfare of the capital. We refer to the decision of *Bell v. Blount*, 11 N. C. 384, as an authority to show the jurisdiction of the court. Where the right infringed is of a doubtful character, as the right of view over another's ground, there a court of equity will order the right to be established at law, before it will grant an injunction, in the meantime, staying the owner of the land from closing up the view; but here the rights infringed upon, are of a character not in the least doubtful, the health and comfort of the relators, and others for whom they act. Injunction perpetuated.

See 19 L. R. A. (N. S.) 1173, 21 Ib. 826, 23 Ib. 691, and notes. See *Injunction*, Century Dig. §§ 82-85; Decennial and Am. Dig. Key No. Series, §§ 36, 37; "Nuisance," Cent. Dig. § 192; Dec. and Am. Dig. Key No. Series § 80.

IVESON v. MOORE, 1 Salkeld, 15. 1700.

Public Nuisance. Private Injury. Special Damage.

Case, and declared that he was possessed of a colliery, and that there was a highway near, by which he used to carry coals, and that he had a certain quantity of coals dug ready for sale, and that defendant dug a colliery near his, and, intending to draw away his customers and deprive him of the profit of his colliery, stopped up the said way, so as carts and carriages could not come to his colliery. . . . All the court agreed, that *where an action arises from a public nuisance, there must be a special damage*, for he that did the nuisance is punishable at the suit of the public; and to allow all private persons their actions, without special damage, would create an infinite and endless multiplicity of suits. . . . The court being evenly divided on whether or not the plaintiff had shown any special damage within the legal significance of that term, the plaintiff failed to recover.

For other cases of special injury, see 9 L. R. A. (N. S.) 496, 13 Ibid. 253, and notes (obstructing highway); 19 Ibid. 517, 20 Ibid. 646-769 (liability of a city for permitting obstructions in street); 20 Ibid. 146, 21 Ibid. 735, and notes (power of a city to compel removal of signs and other obstructions in streets); 21 Ibid. 209 (liability of counties for nuisance); 3 Ibid. 759 (exploding bombs in highway); 12 Ibid. 389 (blasting on one's own premises); 5 Ibid. 1028 (maintaining a pest hospital, etc.); 3 Ibid. 1119 (punitive damages in actions for nuisance, when allowed); diverting or obstructing running water, 6 Ibid. 136, and note, 141 N. C. 108, 144 N. C. 64, 448. See "Nuisance," Century Dig. §§ 164-169; Decennial and Am. Dig. Key No. Series, § 72. See note to Simpson v. Justice, 43 N. C. 115, post, in this section.

MANUFACTURING CO. v. RAILROAD, 117 N. C. 579, 23 S. E. 43. 1895.

Public Nuisance. Private Injury. Special Damage.

[Action for damages for obstruction of plaintiff's boat by defendant's bridge across Tar river. Verdict and judgment against defendant. Defendant appealed. Affirmed as to all rulings except that relating to the proper measure of damages, as to which a new trial was ordered. The verdict and judgment were left undisturbed as to all other issues except that of damages.

Plaintiff alleged that the defendant obstructed the navigation of Tar river by constructing a bridge, without a draw, across the river; that such obstruction was a nuisance; that plaintiff's boat was obstructed in transporting freight; that on one occasion the boat was detained for five days, and at another time for ten days—the boat being loaded with freight on both occasions; and that the owners were damaged to the extent of five hundred dollars by such delays.

The answer denied that plaintiff's boat was licensed to navigate Tar river, and that the bridge in question was a nuisance, etc. There was evidence to the effect that plaintiff's boat was delayed as alleged in the complaint and that plaintiff's expenses in operating the boat were ten dollars per day and the estimated profit of operating the boat five dollars per day. There was also evidence of various other losses suffered by plaintiff by reason of the obstruction and delays complained of.

Defendant moved to dismiss the action on the ground that while the

complaint showed that the obstruction complained of was a public nuisance, it failed to allege that the damage claimed by plaintiff was *special and particular* to the plaintiff's boat. This motion was denied, and defendant excepted. There were other errors assigned, but only so much of the opinion as relates to this exception is here inserted.]

AVERY, J. The most interesting question presented by this appeal is whether the plaintiff, in any aspect of the evidence, has shown such special damage as would entitle him to redress by civil action for a public nuisance. The law provides an adequate remedy for the wrong to the public, and thereby prevents a multiplicity of vexatious private actions. But, in order to the maintenance of a civil action by an individual, in addition to the indictment by the state, it is not made incumbent on him to show an injury from which he is the sole, or even a peculiar, sufferer. The damage recoverable in a civil action founded upon the obstruction of a public highway must, however, be such as is not common to every one who actually does pass or may travel over the highway. It must be unusual or extraordinary, but not necessarily singular. While the wrong must be special, as contradistinguished from a grievance common to the whole public, who have the right to use the highway, it may nevertheless be the common misfortune of a number, or even a class of persons, and give to each a right of redress. The amounts of damage recoverable by them may vary according to the extent of the loss shown in each case, but every one of them may maintain his status in court by alleging and proving precisely the same sort of wrong caused by the same obstruction. For instance, in the familiar case of the plaintiff who was injured by falling into a ditch dug by another across the public highway, referred to by the elementary writers and the courts to illustrate the principle upon which civil actions are maintainable in such cases, it would not have impaired the right of the first man who suffered from falling into it if a dozen of his neighbors had tumbled into it afterwards on the same day, and had received more serious injury than he. So in *Downs v. City of High Point*, 115 N. C. 182, 20 S. E. 385, where the municipality created a public nuisance by negligence in allowing a sewerage ditch to discharge its contents in a place where the nauseous smell annoyed the whole public, but gave to the plaintiff a right of action because of his sickness and that of members of his family, due solely to the disagreeable odors, it would have been none the less competent for him to claim the right to show special damage, or such as was not common to the whole public, because it appeared that other families in the vicinity and on all sides of the defective ditch had suffered in a similar way, and claimed like redress in the courts. Bishop, in his work on Non-contract Law (section 424), by way of illustrating the principle we are discussing, says: "So, likewise, it is a nuisance to obstruct a navigable stream. Therefore, if one is by such obstruction prevented from fulfilling his contract, he can maintain a civil suit against the obstructor." The first authority cited to sustain the author's view was *Dudley v. Kennedy*, 63 Me. 465.

where the facts were that the plaintiff, who had engaged to transport rocks and gravel in boats on the Kennebec river, which is a navigable stream, was prevented from carrying out his contract by a boom placed across the river between the point at which the rock and gravel were procured and the point of delivery, and the court held that the defendant was liable in a civil action for special damage. Though few of them are so directly in point as the case just cited, there is no dearth of authorities in which the general principle, as we have formulated it, is so fully sustained as to make its application to the case at bar obvious and the deduction inevitable. *Guesley v. Codling*, 2 Bing. (9 E. C. L.) 407; *Chichester v. Lithoridge*, Nile's Rep. (C. P.) 70, 74; *Hughes v. Heiser*, 2 Am. Dec. 459, Binney, 463; *Rose v. Miles*, 2 M. & S. 101; *Burroughs v. Pixley*, 1 Am. Dec. 56 (1 Root, 362).

It is not material whether this particular boat was licensed or whether other individuals owned boats that were engaged in navigating the river. If the plaintiff suffered damage common to a class whose business required the transportation of material for manufacturing purposes from a point below the obstruction to a plant located above it, but not common to the whole public, his right is not impaired by the fact that the boat was doing business as a common carrier as well as for the manufacturers who owned it. . . .

We conclude, therefore, that there was error in the instruction given as to the proper measure of damages, while there was no error in the other rulings complained of, and a new trial will be awarded only upon the question of the amount of damage which the plaintiff is entitled to recover. *Tillett v. R. R.* 115 N. C. 662, 20 S. E. 480. New trial as to damages.

See "Navigable Waters," Century Dig. § 88; Decennial and Am. Dig. Key No. Series § 20.

McMANUS v. RAILROAD CO., 150 N. C. 655, 64 S. E. 766. 1909.

Public or Mixed Nuisance. Private Injury. Special Damage. Liability of Landlord for Nuisance Caused by Tenant.

[Action for damages, etc., for maintaining a nuisance. Upon the verdict a judgment was rendered against defendant, and he appealed. Judgment set aside and cause remanded for trial on fuller issues.]

Plaintiff alleged that he owned a dwelling-house and other houses near to a rock quarry owned by defendant, but by it demised to the city of Charlotte; that the defendant unlawfully permitted and tolerated a nuisance to be kept by the city of Charlotte on the demised premises by dumping into the excavation caused by quarrying, street cleanings, dead animals, etc., and by permitting a great quantity of stagnant water to accumulate and remain therein; that the odors emitted from the quarry rendered plaintiff's adjacent property almost uninhabitable, caused sickness, caused the tenants to leave, and greatly reduced the rental value of plaintiff's property, etc; that defendant unlawfully and wrongfully maintained, permitted and allowed such nuisance upon its land, on account of which the plaintiff had suffered, and continued to suffer, special and peculiar damage to his health, and to his property which adjoined the quarry, to the extent of \$2,000.

The answer denied the material allegations of the complaint. The following issues were submitted without objection by either party, and were answered by the jury as indicated:

"1. Did the defendant maintain, or permit to be maintained, on the premises, a public nuisance? Ans. Yes.

"2. What special damages, if any, has the plaintiff suffered on account of said nuisance? Ans. Nothing.

Upon the verdict, judgment was rendered against the defendant, ordering it to abate the nuisance within ten months. Defendant excepted.]

HOKE, J. It is very generally held, uniformly so far as we have examined, both here and elsewhere, that in order for a private citizen to sustain an action, by reason of a public nuisance, he must establish some damage or injury special and peculiar to himself, and differing in kind and degree from that suffered in common with the general public. *Pedrick v. Ry.*, 143 N. C. 485, 55 S. E. 877, 10 L. R. A. (N. S.) 554. This limitation on a right of action, so expressed in many well-considered decisions, must be understood to apply in strictness where the wrong complained of consists in the unlawful interference with some public right, a right held by a plaintiff in common with all members of a community, and does not obtain when a public nuisance involves also the invasion of the private right of the litigant. In these cases a person who is injured in some substantial right of person or property is not deprived of his action because the wrong done is so extensive, and of such a character and placing, that it amounts to an indictable offense. This apparent exception may perhaps be referred to the more general rule, at first stated, by considering that any and all persons, who come within the sphere and influence of a nuisance to an extent that subjects them to an injury of the kind stated, suffer the special or peculiar damage required to the maintenance of an action by the individual. Mr. Wood, in his work on Nuisances, so treats the question (*Wood on Nuisances*, 2d ed. s. 16), referring cases coming within the exception to the head of mixed nuisances; public "in that they produce injury to many persons, or all the public, and private because at the same time they produce a special and particular injury to private rights, which subjects the wrongdoer to indictment by the public, and also to damages at the suit of the person injured."

The distinction to which we were adverting is very well brought out in the case of *Wesson v. Washburn*, 95 Mass. 95, 90 Am. Dec. 181, in which it was held: "Private Action for Nuisance General in its Operation.—Action will lie against owners of a mill for injuring plaintiff's dwelling by shaking and jarring the same, and surrounding it with noisome odors and vapors, although all the other residents of that locality have suffered like injury. The rule that, where the right invaded or impaired is a common and public one, which every subject of the state may use and enjoy, an individual action does not lie, does not apply to cases where the alleged wrong is done to private property, or the health of individuals is injured, or their comfort destroyed, by the carrying on of offensive trades, or the creation of noisome smells or disturbing noises, no matter how extensive or numerous may be the

instances of discomfort or injury to persons or property thereby occasioned." And in the opinion Chief Justice BIGELOW, speaking to this question, said: "Where a public right or privilege common to every person in the community is interrupted or interfered with, a nuisance is created, by the very act of interruption or interference, which subjects the party through whose agency it is done to a public prosecution, although no actual injury or damage may be thereby caused to any one. If, for example, a public way is obstructed, the existence of the obstruction is a nuisance, and punishable as such, even if no inconvenience or delay to public travel actually takes place. It would not be necessary, in a prosecution for such a nuisance, to show that any one had been delayed or turned aside. The offense would be complete, although during the continuance of the obstruction no one had occasion to pass over the way. The wrong consists in doing an act inconsistent with, and in derogation of, the public or common right. It is in cases of this character that the law does not permit private actions to be maintained on proof merely of a disturbance in the enjoyment of the common right, unless special damage is also shown, distinct not only in degree, but in kind, from that which is done to the whole public by the nuisance. But there is another class of cases in which the essence of the wrong consists in the invasion of private right, and in which the public offense is committed, not merely by doing an act which causes injury, annoyance and discomfort to one or several persons who may come within the sphere of its operation or influence, but by doing it in such place, and in such manner, that the aggregation of private injuries becomes so great and extensive as to constitute a public annoyance and inconvenience, and a wrong against the community, which may be properly the subject of a public prosecution. But it has never been held, so far as we know, that in cases of this character the injury to private property, or to the health and comfort of individuals, becomes merged in the public wrong so as to take away from the persons injured the right which they would otherwise have to maintain actions to recover damages which each may have sustained in his person or estate from the wrongful act. . . . The real distinction would seem to be this: That when the wrongful act is of itself a disturbance or obstruction only to the exercise of a common and public right, the sole remedy is by prosecution, unless special damage is caused to individuals. In such case the act of itself does no wrong to individuals distinct from that done to the whole community. But when the alleged nuisance would constitute a private wrong by injuring property or health, or creating personal inconvenience or annoyance, for which an action might be maintained in favor of a person injured, it is none the less actionable because the wrong is committed in a manner and under circumstances which would render the guilty party liable to indictment for a common nuisance." See *Manufacturing Co. v. Railway*, 117 N. C. 579, 23 S. E. 43.

The nuisance established by the verdict on the first issue is of

the kind considered in the opinion just quoted, and would give a right of action to any and all persons who come within its influence and effect, to the extent of suffering injury to their private rights, either of person or property; *but the plaintiff is not entitled to the judgment given him by reason of the verdict on the second issue, to the effect that no special damages have been suffered by plaintiff on account of the nuisance*, and for the lack of any finding or fact established in the record showing that plaintiff has suffered either injury or damage of any kind done or threatened. There is evidence on the part of plaintiff tending to show both, but neither has been authoritatively established, and the court is not at liberty to infer or act upon it till this is done.

Where a nuisance has been established, working harm to the rights of an individual citizen, the law of our state is searching and adequate to afford an injured person ample redress, both by remedial and preventive remedies, as will be readily seen by reference to numerous decisions of the court on the subject. *Revisal*, s. 825; *Cherry v. Williams*, 147 N. C. 452, 61 S. E. 267; *Pedrick v. Railway*, *supra*; *Reyburn v. Sawyer*, 135 N. C. 328, 47 S. E. 761, 65 L. R. A. 930, 102 Am. St. Rep. 555; *Manufacturing Co. v. Railway*, *supra*; *City of Raleigh v. Hunter*, 16 N. C. 12; *Tarboro v. Blount*, 11 N. C. 384, 15 Am. Dec. 526; *Railway v. Fifth Baptist Church*, 108 U. S. 317, 2 Sup. Ct. 719, 27 L. Ed. 739. But in wrongs of the kind presented here, not involving any physical interference with the personal or proprietary rights of another, a recovery cannot be had, even for nominal damages, by simply showing that a nuisance has been created or maintained; but plaintiff must go further, and show that it has injuriously affected him in some substantial right, or there is imminent danger that it will do so. Where the essential or issuable facts are referred to a jury for decision, and there are no additional facts admitted in the pleadings, or otherwise, and none of the kind of which a court takes judicial notice, the judgment must follow as a conclusion of law upon the verdict. In the case before us the defendant in its pleadings has denied that plaintiff is the owner of any property adjacent to this alleged nuisance, or that any property of his is injuriously affected thereby; and, while a perusal of the evidence discloses that no debate was made on that point in the trial below, the court, as stated, is not at liberty, in a case of this kind, to act upon the evidence, but can only award or refuse relief upon facts established in some authorized way, and, so far as appears, there are no facts so established which show that plaintiff's property comes within the influence and operation of the alleged nuisance, and no damages, special or otherwise, have been shown which in any way affect him.

Nor do we think that defendant is entitled to judgment on the verdict as rendered, for the reason that the issues are not fully responsive to the pleadings. As we have heretofore endeavored to show, the nuisance alleged in the complaint, and established by the verdict on the first issue, is of a kind and character which involves the invasion of the rights of all owners, or lawful occu-

pants of adjacent property, whose individual rights are injuriously affected; and a right of action on any one of them is in no way impaired because the injury done him is the same, or similar in kind, to that of all others in like circumstances, however numerous. Such owner is not required to establish the existence of damage or injury special and peculiar in reference to the injury generally suffered by other adjacent owners who are similarly situated. As to them, therefore, or any one of them, the second issue imposes a greater burden than is required to establish an actionable wrong against the defendant; and in view of the kind of nuisance alleged and established, we are of opinion that the verdict is not sufficiently full and responsive to entitle either plaintiff or defendant to judgment, in that it does not determine all the issuable facts embraced in the pleadings, and the cause should be referred to another jury. *Bryant v. Ins. Co.*, 147 N. C. 181, 60 S. E. 983.

For the error indicated, the judgment in favor of the plaintiff will be set aside, and the cause remanded that a trial may be had on issues determinative of the rights of the parties involved in the action.

BROWN, J., dissenting: I feel constrained to dissent from the opinion of the court because I am convinced that upon the issues as answered by the jury the action should be dismissed. One question only is presented: Can the plaintiff maintain this action on the complaint, answer, and verdict? In his complaint the plaintiff alleges, in substance, that the defendant is maintaining a public nuisance in respect to a large abandoned rock quarry, in permitting the city of Charlotte to throw filth and refuse into it, whereby the plaintiff is damaged. Why plaintiff does not sue the city of Charlotte is not stated. Upon the trial the issues were submitted by consent, without exception or objection, as being the only issues raised by the pleadings. . . . [After quoting the issues and verdict thereon the opinion proceeds:] The defendant moved for judgment dismissing the action. The court denied the motion, and defendant appeals, assigning such refusal as error. There is no other question presented upon this appeal.

A plaintiff cannot have judgment abating a public nuisance when the jury have found that he has suffered no special damage. The remedy is by indictment. *Pedrick v. Railroad*, 143 N. C. 496, 55 S. E. 877. Special damage is such damage as is not common to the public. *Pedrick v. R. R.*, *supra*. . . . Not only do the averments of the complaint state facts which constitute a public nuisance, but plaintiff admits it by consenting to the form of the first issue. That being so, and the jury having found that plaintiff suffered no special damage, it would seem that ordinarily the action would be dismissed without much controversy.

Although the plaintiff has not excepted or appealed, the court orders a new trial of the whole case because the issues submitted, it is said, are not determinative of the issues raised by the pleadings. And this is done *ex mero motu* by the court, although

neither appellant nor appellee asks for it, and notwithstanding that the cause is before us solely upon the motion of defendant for judgment upon the issues [verdict]. If the defendant is not entitled to it, then the judgment, it seems to me, necessarily stands affirmed. There are two answers to the position of the court which appear to me to be conclusive. The first is, that the form of the issues was agreed upon, and if they are not full enough, or if they are not properly worded, it is plaintiff's fault. He should have excepted and tendered others. This has been decided repeatedly. Clark's Code, s. 395.

. . . There are two questions or issues raised by the pleadings; one is the nuisance, and the other is the damage, and both were submitted to the jury. The court has not pointed out any other issues raised by the pleadings than those I have named. But the court says, in effect, that the damages are not to be confined to special damages, and that the plaintiff may recover judgment if he "has suffered either injury or damage of any kind done or threatened." While this proposition, I submit, is against all of our own precedents (Pedrick's case, *supra*), yet, admitting it, the fact remains that an issue in respect to damages was submitted, and the form of it was approved by plaintiff. If it was confined erroneously to special damages, it was plaintiff's own fault, and if he does not complain, why should this court find fault? Surely two issues as to damages should not have been submitted, but if an additional issue in respect to some other kind of damage was proper, it was incumbent on plaintiff to tender it.

It is perfectly evident that the learned and astute lawyers for the plaintiff framed the damage issue in its present form because their complaint specifies with care and particularizes the elements of damage, and each item thereof, and they constitute special damages only peculiar to this plaintiff within every known and accepted definition of that term. Pedrick v. Railroad, *supra*: Mfg. Co. v. Railroad, *supra*. . . .

The learned judge below and the 12 jurors had better opportunity to judge of the value of plaintiff's evidence than we have, and if the "12" erred in finding the second issue, the plaintiff seeks not to correct it by excepting and appealing, and why should this court undertake to do so? In no event, I submit, is the court justified in setting aside the findings already made and ordering a new trial. They should be permitted to stand, as no error has been assigned by either side affecting them. . . .

But in as much as every allegation of the pleadings and every word of the evidence are directly pertinent to the issues submitted, I fail to see the necessity for any further findings. To my mind it is plain that the jury have already passed upon the entire case, and under such circumstances for the court of its own motion to order a new trial appears to me, with entire deference for my Brethren, to be at variance with the practice of the court.

The dissenting opinion cites and quotes from many authorities, but only so much of that opinion is here inserted as points out the grounds of the dissent.]

For injuries to the health of an individual caused by a public nuisance, see *Story v. Hammond*, 4 Ohio, 376, inserted at ch. 5, sec. 6, post. See "Nuisance," Century Dig. §§ 163-169; Decennial and Am. Dig. Key No. Series, §§ 71, 72.

SIMPSON v. JUSTICE, 43 N. C. 115, 120, 121. 1851.

Jurisdiction and Practice in Equity in Cases of Private Nuisance.

[Bill for a perpetual injunction against the erection and operating of a turpentine distillery near to the plaintiff's residence. Answer filed. Case transferred to the supreme court for hearing. Decree dismissing the bill.

The bill was filed in July, 1847, but no motion was made for an injunction until five years thereafter. In the meantime the defendant had built the distillery and had been operating it for several years.

The bill alleged that plaintiff owned and occupied a comfortable residence in Newbern; that defendants were about to erect a distillery so near the plaintiff's dwelling as to be a nuisance in two ways—one by reason of the great danger from fire, the other from smoke and soot. The answer denied that the distillery would endanger plaintiff's dwelling or injure it, and set out facts that would tend to show that plaintiff's fears and apprehensions were groundless.]

PEARSON, J. . . . The bill is sworn to, but no application for an injunction was made, and the defendants erected the distillery, and have since been carrying on the operation.

The erection of the distillery is complained of as a private nuisance. There is no allegation that it would be injurious to the town, or any considerable part of it. It is true, the plaintiff alleges, that many of his neighbors will be subjected to a like inconvenience; but they do not join with him in making the complaint, and there is no proof in regard to them. We are, therefore, to consider of it in the light of a private nuisance. As to a nuisance of this kind, the jurisdiction of courts of equity to interfere by injunction, is of recent origin, and is always exercised sparingly and with great caution; because if, in fact, there be a nuisance there is an adequate remedy at law, by successive actions on the case. *Atty-Gen. v. Nichols*, 1 Ves. 338; an anonymous case before Lord THURLOW, 1 Vesey, Jr. 140.

There is an obvious difference between a thing which is a nuisance of itself, and one which may or may not be a nuisance, according to the manner in which it is used. The present case comes under the latter head. From the proof it seems, that if the fire is kept up by burning "scrappings," the "smoke, black and soot" will be carried to the lot of the plaintiff, when the wind is north of east; if pine wood be used, this result may also follow, but in a very slight degree; and if ash wood be used, the plaintiff will not be at all affected, without reference to the wind. So the annoyance to the plaintiff must be looked upon as contingent. It depends on the wind, and on the kind of fuel which may be used. In such cases, it is settled, that this court will not interfere until the fact of "nuisance" has been established by an action at law. *Earl of Ripon v. Hobart*, 8 E. C. L. R. 336.

Again: This bill was filed July, 1847. The plaintiff did not then move for an injunction (possibly because of an unwillingness to give the bond). In the meantime, the defendants have gone on, as they had a right to do, and erected the distillery, and have kept it in constant operation for near five years. It is a clear principle of equity—so clear as to strike every one at the first blush—that, where a party, instead of taking an injunction in the first instance, stands by and allows the other to make an outlay of his money, in erecting buildings and other fixtures; if, at the hearing, he prays for a perpetual injunction, he must do so on the ground, that, in the meantime, the fact of "nuisance has been established by an action at law; or at all events he must support his application by strong and unanswerable proof of nuisance." If this principle needs any authority for its support, it will be found in the case last above cited. . . . Bill dismissed with costs.

For an excellent summary of the jurisdiction and practice of courts of equity in cases of private nuisance, see the brief of plaintiff's counsel in the principal case.

The jurisdiction in equity to restrain the erection or continuance of nuisances, either public or private, which are likely to produce irreparable injury, is well established. It is equally well settled that injury to the health of the inhabitants of a town, or to the health of an individual and his family, is an irreparable injury. The court will act with more caution in restraining a public enterprise because it may be a nuisance to an individual than where it is a nuisance to the public. *Clark v. Lawrence*, 59 N. C. 83. By reading the principal case and the opinion in *State v. Suttle*, 115 N. C. 784, 20 S. E. 725, it will be seen that it is unwise to act too precipitately or to delay too long in applying for an injunction to prevent or abate a nuisance; see also on the same subject, *Burrall v. Tel. Co.*, 79 N. E. 705, 8 L. R. A. (N. S.) 1091, and note. For the liability of a city for defective streets and obstructions therein, for failure to prevent improper conduct in, or use of, its streets—such as fireworks, coasting and bicycles, and dogs, cows, and other animals running at large, etc. see 19 Ib. 507, 20 Ib. 513, 21 Ib. 614, 23 Ib. 636, and elaborate notes; the keeping of barking dogs may be enjoined, 7 Ib. 249, and note; the storing of explosives, 16 Ib. 691, and note; blasting, 6 Ib. 570, and note; obstructing highways by gates etc., 7 Ibid. 49, and elaborate note; obstructing highways some distance from plaintiff's land, 8 Ib. 227, and note, compare 21 Ib. 75 and note; maintaining a pest hospital, 5 Ib. 1028, and note; driving foul air against windows, 9 Ib. 695, and note; keeping brothels and pool rooms, 11 Ib. 1060, 21 Ib. 836, and notes; pollution of streams by city, 20 Ib. 1050, and note, see also 1 Ib. at p. 124, 1 Ib. 952; obstructing and diverting natural stream, 6 Ib. 136, 141 N. C. 108, 144 N. C. 64, 448; Spite fence, 151 N. C. 433. That the courts act with caution in granting injunctions to prevent or abate alleged nuisances, see *Cherry v. Williams*, 147 N. C. 452, 61 S. E. 267; *Hyatt v. Myers*, 73 N. C. 232; *Dorsey v. Allen*, 85 N. C. 358; 29 Cyc. 1219 et seq. See note to *Iveson v. Moore*, ante, in this section. See "Nuisance," *Century Dig.* §§ 49, 58; *Decennial and Am. Dig. Key No. Series*, §§ 18, 23.

ANONYMOUS, 1 Vesey, Jr. 140. 1790.

Injunction Before Answer. Preliminary Mandatory Injunction. Practice.

[Motion for an injunction on bill filed upon the 4th of May. The object of the motion was to compel the party to put every thing in the same state in which it was before, by filling up a ditch he had made, as well as to prevent digging farther.]

Solicitor General, for the motion, said a similar motion had been granted in Lord Byron's case, on account of the irreparable mischief he might have done.]

LORD CHANCELLOR (Thurlow). I will not order him to fill up this ditch before answer. That would be a great deal too much to do. Here is a transaction upon the 15th of March, and you come on the 4th of May, and file a bill for an injunction; and probably have served no process: the consequence is, the party hears of the injunction before he hears of the bill. I do not like granting these injunctions on motion. This ditch may be a mile long. Take an order that he shall do nothing more till answer, or farther order.

See "Nuisance," Century Dig. §§ 72-76; Decennial and Am. Dig. Key No. Series § 31.

BAILEY v. SCHNITZLUS, 45 N. J. Eq. 178, 182-184, 185, 16 Atl. 680. 1886.

Preliminary Mandatory Injunction. Practice.

[Bill for an injunction to restrain defendants from filling up or obstructing a watercourse, and to command them to remove obstructions theretofore placed therein by them. Decree for injunctions as prayed for. Appeal by defendants. Reversed.]

The decree was made before the final hearing but on bill, answer, affidavits, rule to show cause, and oral evidence taken before the chancellor. By the decree the defendants were not only restrained from further acts tending to obstruct the stream; but a mandatory injunction to remove the obstructions already made, was ordered.]

SCUDDER, J. . . . Such is the true position of the case that it is here to be examined on the affidavits taken in proceedings for a preliminary injunction, and not on appeal from a final decree.

The gravamen of the defendant's appeal is that, by this course of proceeding, the court has been induced to grant a mandatory order to remove alleged obstructions which have been put up for the improvements of his property, under claim of right to do so, and with denial of the right of the complainant to overflow his lands. This right of overflow has never been adjudged at law, nor according to the established practice in equity, on a final hearing. The practice of these courts in ordering mandatory injunctions on a preliminary or interlocutory motion was thoroughly examined by Chancellor ZABRISKIE in *Locomotive Works v. Railroad Co.*, 20 N. J. Eq. 379, with the conclusion that

a mandatory injunction, or one which commands the defendant to do some positive act, will not be ordered, except on final hearing, and then only to execute the decree or judgment of the court, and never on a preliminary or interlocutory motion, except in cases of obstruction to easement or rights of like nature, in which a structure erected and kept as the means of preventing such enjoyment will be ordered to be removed as part of the means of restraining the defendant from interrupting the enjoyment of the right. There is, however, a qualification to be added to this statement of the principle established in that case which has been subsequently approved and followed in our courts. It is applicable to the present case, and is found in *Durell v. Pritchard*, L. R. 1 Ch. App. 244, which decides that there is no rule which prevents the court from granting a mandatory injunction, where the injury sought to be restrained has been completed before the filing of the bill, and there is no difference in this respect between injury to easements and to other rights. But the court will only grant such an injunction to prevent extreme or very serious damage. That was a case on final hearing where the complaint was made that there was a substantial obstruction both to the right of way and to the light and air by the erection of a building near to that occupied by the complainant. The court said that as to none of these grounds was there any such extreme or serious damage as to justify the mandatory injunction which was asked. As to the right of way, it was not wholly stopped, and the question was one of comparative convenience of the right of way as it formerly existed, and as it now exists, and that the diminution of light and air was not such as would warrant the court in granting the relief which was asked by the removal of the building. The court doubted also whether the complainant had, at the time of filing his bill, any case entitling him to relief in equity. *Hart v. Leonard*, 42 N. J. Eq. 416, 7 Atl. Rep. 865, considers the cases wherein a substantial dispute over a private legal right in land is cognizable in a court of equity. We have decided this case on other grounds. In *Lord's Ex'rs v. Iron Co.*, 38 N. J. Eq. 458, Vice-Chancellor VAN FLEET has stated what is now the settled law in our courts, that, as this form of injunction to accomplish its purpose must command or coerce the defendants to do certain affirmative acts, not merely to remain inactive or refrain, it is rarely granted before final hearing, or before the parties have had a full opportunity to present all the facts in such manner as will enable the court to see and judge what the truth may be. It is always granted cautiously, and is strictly confined to cases where the remedy at law is plainly inadequate. A preliminary mandatory injunction will be ordered only in case of extreme necessity. *Railroad Co. v. Stock-Yard Co.*, 43 N. J. Eq. 77, 605, 10 Atl. Rep. 602, 12 Atl. Rep. 374; and 13 Atl. Rep. 615; *Herbert v. Railroad Co.*, 43 N. J. Eq. 21, 10 Atl. Rep. 872; *Whitecar v. Michenor*, 37 N. J. Eq. 14; *Railroad Co. v. Baker*, 27 N. J. Eq. 166; 1 High Ind. § 2; 2 Story, Eq. Jur. § 929b.

The examination of the facts in this case do not show that ex-

little or very serious damage, at least, will ensue from withholding the relief given by this mandatory order; nor does it clearly appear that the complainant is entitled to it. . . . It is a case of inconvenience, rather than one of extreme necessity; and the relief sought by mandatory injunction, before the facts are fully heard and settled on final hearing, is not according to the practice of a court of equity. The injunction order will be reversed. Unanimously reversed.

See "Waters and Water Courses," Century Dig. §§ 130, 260-264; Decennial and Am. Dig. Key No. Series § 177.

SHOOTING CLUB v. THOMAS, 120 N. C. 334, 26 S. E. 1007. 1897.

Enforcing Obedience to Mandatory Injunction.

[Judgment committing defendant to prison until he should comply with a mandatory injunction which he had failed to obey. Defendant appealed. Affirmed.]

FAIRCLOTH, C. J. At spring term, 1896, it was ordered and adjudged that the defendant remove a certain brick building from Winston avenue on or before September 1, 1896. Failing to obey said order, an affidavit was filed on September 8, 1896, and notice given to defendant to show cause why he should not be attached for contempt. The return admitted noncompliance, and the respondent averred by affidavit that he was unable to obey the order. His honor heard proofs by affidavit from both parties, and found (1) that defendant had neglected and refused to remove said building as he was ordered to do; (2) that said defendant has been since said judgment, and still is, able to comply with the same, and is in contempt of court. It was thereupon ordered that the defendant be imprisoned in the county jail until he complies with the judgment rendered at spring term, 1896. We can see no reason why the judgment, committing the defendant to prison, should not be affirmed. That part of the order directing the sheriff to remove the building at plaintiff's cost is not appealed from, and we express no opinion about it. Millhiser v. Balsley, 106 N. C. 433, 11 S. E. 314; Baker v. Cordon, 86 N. C. 116. Affirmed.

For contempt proceedings, to enforce obedience to an injunction, see Davis v. Fibre Co., 150 N. C. 84, 63 S. E. 178. See "Injunction," Century Dig. §§ 445-483; Decennial and Am. Dig. Key No. Series, § 222-227.

CARRUTHERS v. TILLMAN, 2 N. C. 501. 1797.

Private Nuisance. Successive Actions for Damages.

[This was an action on the case for a nuisance and overflowing the lands of the plaintiff, by erecting a milldam; and evidence was given of overflowing about thirty or forty acres of low land, which before the erection was usually overflowed at high water.]

Per Curiam. Williams and Haywood, Justices. This action lies for any overflowing of the plaintiff's land, the maxim being, you must so use your own, as not to prejudice another's property; but the action may be continued from time to time, till the defendant is compelled to abate the nuisance; every continuance thereof after a preceding action being considered as a new erection—the first action is regarded as a trial of the question, whether a nuisance or not—therefore it is not proper, in the first instance, to give exemplary damages, but such only as will compensate for actual loss, as killing the timber or overflowing a field, so as to prevent a crop being made upon it, and the like. But where the abating the nuisance will restore the lands to the same value and use as before the nuisance, and no real loss has been as yet sustained, the damages should be small; but if after this the nuisance should be continued, and a new action brought, then the damages should be so exemplary as to compel an abatement of the nuisance. There was a verdict for the plaintiff, and six-pence damages.

See "Waters and Water Courses," Century Dig. § 254; Decennial and Am. Dig. Key No. Series § 178

BRADLEY v. AMIS, 3 N. C. 399. 1806.

Private Nuisance. Successive Actions for Damages.

[This was an action for a nuisance, by overflowing the plaintiff's land; a former action had been brought and damages assessed at three pounds, and a judgment given against the defendant.

TAYLOR, J. If the jury are satisfied that the defendant has caused the nuisance as stated by the plaintiff, they should assess damages for the time elapsed since the commencement of the former action to the commencement of the present one; but the damages are usually light, because the action may be repeated for every continuance of the nuisance after a former action.

I cannot think the directions concerning the damages correct, because if the keeping up of the nuisance will afford more profit to the wrongdoer than the small damages assessed by the jury, he will keep it up forever, and thus one individual will be enabled to take from another his property against his consent, and detain it from him as long as he pleases. The damages ought not to be for what the incommoded property is worth, but competent to the purpose in view; that is, a demolition of the erection that occasions the nuisance. Sometimes the profits of such erections as merchant mills for instance, are of much greater value in one year, than the fee simple of the annoyed property. In such cases the object of the law cannot be obtained but by damages equivalent to the profits gained by the erection, or by damages to such an amount as will render those profits not worth pursuing.

See "Nuisance," Century Dig. §§ 100, 118; Decennial and Am. Dig. Key No. Series §§ 41, 50

RIDLEY v. RAILROAD, 118 N. C. 996, 997-999, 1009, 24 S. E. 730. 1896.

Private Nuisance. When Successive Actions not Allowed.

[Action for damages resulting from an alleged nuisance. Verdict and judgment against defendant. Defendant appealed. Reversed.]

The plaintiff sued for alleged damages to his crops and land caused by overflow resulting from the ponding of water by the roadbed and bridge of defendant. The defendant tendered the following issues, which the judge refused to submit to the jury: "Are the bridge and embankment of defendant permanent structures?" "Is the damage of plaintiff's land permanent in its character?" These issues arose upon defenses duly set up in the answer. Only part of the opinion is here inserted.]

AVERY, J. Ordinarily, where a trespass results in a nuisance, not only is the original wrong actionable, but successive suits may be brought for its continuance, in each of which the damages, if apportionable, can be estimated only up to the time when it was brought, in some of the states, but in this state up to the time of trial. 5 Am. & Eng. Enc. Law, 17; Blunt v. McCormick, 3 Denio, 283; Bare v. Hoffman, 79 Pa. St. 71; Russell v. Brown, 63 Me. 203. In ordinary transactions between individuals, where the trespass consists in the erection of mere temporary structures that prove to be nuisances, the law presumes that the tortfeasor will desist from keeping it up after being once mulcted in damages; but, where he persists in the wrong, permits continued actions to be maintained against him, as an inducement to its removal. Battis-hill v. Reed, 18 C. B. 696; Bare v. Hoffman, *supra*; 5 Am. & Eng. Enc. Law, p. 17, note 1. Where the building of a railroad is authorized by law, and is done with reasonable care and skill, it is not a nuisance, and the company is not answerable, after paying the sum assessed or agreed upon by the owner for taking the land occupied for the public use, in any additional damage resulting from the original construction. Adams v. Railroad Co., 110 N. C. 325, 14 S. E. 857; 5 Am. & Eng. Enc. Law, p. 20. But even where the injury complained of, either by the servient owner or an adjacent proprietor, is due to the negligent construction of such public works as railways, which it is the policy of the law to encourage, if the injury is permanent, and affects the value of the estate, a recovery may be had at law of the entire damages in one action. Smith v. Railroad Co., 23 W. Va. 453; Town of Troy v. Cheshire R. Co., 3 Fost. (N. H.) 83; Railroad Co. v. Maher, 91 Ill. 312; Bizer v. Power Co., 70 Iowa, 146, 30 N. W. 172; Fowle v. Railroad Co., 112 Mass. 334, 338; *Id.*, 107 Mass. 352; Railroad Co. v. Esterle, 13 Bush. 667; Railroad Co. v. Combs, 10 Bush. 382, 393; Stodghill v. Railroad Co., 53 Iowa, 341, 5 N. W. 495; Cadle v. Railroad Co., 44 Iowa, 11. The right to recover prospective as well as existing damages in an action depends usually upon the answer to the test question whether the whole injury results from the original tortious act or "from the wrongful continuance of the state of facts produced by those acts." Town of Troy v. Cheshire R. Co., *supra*. In this case, which has been cited as authority by text-writers and many of the courts of the states, the action was

brought for damages for the occupation of a street and town bridge by a railway company, and it was conceded that in the sense that the highway was obstructed the company had created a nuisance. . . . "Injuries caused by permanent structures infringing upon the plaintiff's rights in his land, such as railroad embankments, culverts, bridges, permanent dams, and permanent pollutions of water," says Gould in his work on Waters (section 416), fall within the class where "the plaintiff is required to recover his entire damage, present and prospective." *Id.*, § 582; *Duncan v. Sylvester*, 24 Me. 482. . . . Where a railroad company duly authorized by law to construct a railway built an embankment partly on the bed of a river, and thereby changed the current of the stream from its proper course, and caused it to wash away adjacent land, it was held by the supreme court of Massachusetts in *Fowle v. Railroad Co.*, 107 Mass. 354, that a second action, brought to recover damage for the wrongful washing away of more of plaintiff's land, due to the same diversion of the water course, was barred by the judgment in the former action instituted for the same purpose, though several acres of land had been washed away after the judgment in the first and before the bringing of the last action. Gray, J., for the court, said: . . . "This case is not like one of illegally flowing land by means of a milldam, when the change is not caused by the mere existence of the dam itself, but by the height at which the water is retained by it. . . . Nor is it the case of an action against a grantee who, after notice to remove it, maintains a nuisance erected by his grantor." When the same case came up on appeal again (112 Mass. 334, 338), the court said: "As a general rule, a new action cannot be brought unless there be a new unlawful act, and fresh damage. There is an exception to this rule in cases of nuisance, where damages after action brought are held to be recoverable because every continuance of a nuisance is a new injury, and not merely a new damage. The case at bar is not to be treated strictly, in this respect, as an action for an abatable nuisance. More accurately it is an action against the defendant for the construction of a public work under its charter in such a manner as to cause unnecessary damage by want of reasonable care and skill in its construction. For such an injury the remedy is at common law. And if it results from a cause which is either permanent in its character, or which is treated as permanent by the parties, it is proper that entire damages should be assessed with reference to past and probable future injury."

Upon a careful consideration of the authorities already cited and those that will be added, and the reasons on which they rest, we deduce the following principles as decisive of the questions involved in this appeal:

1. A railway company that has constructed its road under lawful authority creates neither an abatable public nuisance nor a continuing private nuisance by failing to leave sufficient space between embankments, or by means of culverts for the passage of the water of running streams, in case of any rise in the streams

that might reasonably be expected; and the injury due to that cause may be compensated for by the assessment of present and prospective damages in a single action.

2. It is the legal right of either plaintiff or defendant to elect to have permanent damages assessed in such an action upon demand made in the pleadings, and when either makes the demand the judgment may be pleaded in bar of any subsequent action. The defendant is required to set up this or any other equity upon which it relies, as well as to prove the averment on the trial. But where a plaintiff is allowed, without objection, to have such damage apportioned, the judgment is not a bar, and either party to a subsequent suit involving the same question may demand that both present and prospective damages be assessed, and upon proof of a previous partial assessment the jury may consider that fact in diminution of the permanent damage. . . .

Having set up in its answer that the damage was permanent, and excepted on the trial to the refusal of the court to submit an issue involving that question, the defendant is entitled to a new trial.

Revisal, 1905, sec. 825, provides: "Injuries remediable by the old writ of nuisance are subjects of action as other injuries; and in such action there may be judgment for damages, or for removal of the nuisance, or for both." For abatement of nuisance by the act of the individual, without resort to the courts, see ch. 1, sec. 4, ante. See "Nuisance," Century Dig. § 125; Decennial and Am. Dig. Key No. Series, § 50; "Waters and Water Courses," Century Dig. § 238; Decennial and Am. Dig. Key No. Series, § 176.

SEC. 12. TRESPASS QUARE CLAUSUM FREGIT.

DOUGHERTY v. STEPP, 18 N. C. 371. 1835.

What Constitutes a Trespass. Entry Under Claim of Right.

[Action of trespass quare clausum fregit. Verdict and judgment against plaintiff, and he appealed. Reversed.]

The proof offered to establish a trespass was, that defendant went upon the locus in quo, with a surveyor and chain carriers, and surveyed a part of it, claiming it as his own. No trees were marked or bushes cut. The judge held that these acts did not constitute a trespass.]

RUFFIN, C. J. In the opinion of the court, there is error in the instructions given to the jury. The amount of damages may depend on the acts done on the land, and the extent of the injury to it therefrom: but it is an elementary principle, that every unauthorized, and therefore unlawful entry, into the close of another, is a trespass. From every such entry against the will of the possessor, the law infers some damage; if nothing more, the treading down the grass or the herbage, or, as here, the shrubbery. Had the locus in quo been under cultivation or enclosed, there would have been no doubt of the plaintiff's right to recover. Now our courts have for a long time past held, that if there be no adverse possession, the

title makes the land the owner's close. Making the survey and marking trees, or making it without marking them, differ only in the degree, and not in the nature of the injury. It is the entry that constitutes the trespass. There is no statute, nor rule of reason, that will make a wilful entry into the land of another, upon an unfounded claim of right, innocent, which one, who set up no title to the land, could not justify or excuse. On the contrary, the pretended ownership aggravates the wrong. Let the judgment be reversed, and a new trial be granted.

See "Trespass," Century Dig. § 15; Decennial and Am. Dig. Key No. Series § 14.

RASOR v. QUALLS, 4 Blackford, 286. 1837.

What Constitutes a Trespass. License from the True Owner. Matter of Aggravation.

[Trespass quare clausum fregit. Verdict and judgment against plaintiff, and he appealed. Affirmed.]

There are two counts in the declaration. The first, for breaking plaintiff's close and taking off some of his grain. Defendant pleaded specially to this count that the locus in quo belonged to a third person by whose permission the defendant entered and did the acts complained of. Demurrer to this plea. Demurrer overruled. Exception. Only that part of the opinion that discusses this exception is inserted.]

BLACKFORD, J. . . . The first question submitted by the parties is—Was the special plea to the first count valid?

That question we decide in the affirmative. The ground of action contained in the first count, is the breaking and entering the plaintiff's close. The taking away the grain mentioned in that count, belongs to the description of the trespass, and is only laid by way of aggravation. It was not necessary that the plea should notice this matter of aggravation, as appears by the following cases: In trespass for breaking and entering the plaintiff's house, debauching his daughter and getting her with child, per quod servitium amisit, if the defendant can justify the entering of the house, he defeats the action. *Bennett v. Alcott*, 2 T. R. 166. So, in trespass for breaking and entering the plaintiff's house, and expelling him therefrom, a justification of the breaking and entering the house is a bar to the suit. *Taylor v. Cole*, 3 T. R. 292. It is therefore settled, that all the defendant had to show, in answer to the first count, was, that he had a right to enter on the premises; and we are next to inquire, whether that right is shown by the plea. It is decided, that a person having the freehold and a right to the possession, may enter on the close even by force, without subjecting himself to an action of trespass by the party in possession. *Taunton v. Costar*, 7 T. R. 427; *Butcher v. Butcher*, 7 Barn. & Cres. 399. And any person, by virtue of an authority from such owner, may do the same. There is, indeed, a decision in point to show, that proof that the freehold was in a third person, and that the defendant entered under his authority, is a good defense to a charge of breaking the

close—Diersly and Nevel's case, 1 Leonard's Rep. 301. This case in Leonard is cited in Gilbert's Evidence, p. 255, and is approved by Justice Lawrence in *Argent v. Durrant*, 8 T. R. 405. These authorities prove, that the facts contained in this special plea, are an answer to the charge in the first count of breaking the plaintiff's close; and they must consequently be considered a sufficient answer to that count. The defendant had his choice to plead these facts specially, or to give them in evidence under the general issue. 1 Chit. Pl. 538, 541. . . .

As to unlawful acts done on the premises after entry, the entry being lawful, see *Newell v. Whitcher*, 38 Am. Rep. 703, inserted at ch. 5, sec. 4, post, 6 L. R. A. 736. See "Trespass," Century Dig. §§ 62, 104; Decennial and Am. Dig. Key No. Series, §§ 27, 43.

BRAME v. CLARK, 148 N. C. 364, 62 S. E. 418. 1908.

Measure of Damages. Elements of Damage.

[Action of trespass. Judgment against defendant, and he appealed. Affirmed.]

The complaint alleged that the defendant unlawfully, forcibly, maliciously, and wickedly entered upon a parcel of land on which plaintiff resided; that such entry was made with the wicked intent to seduce plaintiff's wife; and that the defendant did then and there attempt to seduce plaintiff's wife. The defendant demurred upon the ground that no special damage to plaintiff is alleged; that no actionable wrong is set out; that only an attempt to seduce is alleged, which "is not actionable." Demurrer overruled, and defendant allowed sixty days within which to answer. Defendant excepted.]

CONNOR, J. There can be no doubt that the plaintiff has alleged an actionable wrong—a trespass upon his possession of real estate. It is elementary that "every unauthorized, and therefore unlawful entry into the close of another is a trespass. From every such entry, against the will of the possessor, the law infers some damage; if nothing more, the treading down the grass, or the herbage." *Ruffin, C. J., in Dougherty v. Stepp*, 18 N. C. 371. His honor's judgment was clearly correct. Both parties, however, discussed, although from different points of view, the question of damages, which, upon the admissions made by the demurrer, plaintiff was entitled to recover. The defendant argued the case upon the theory that two causes of action are stated—one for trespass on realty; the other for injury, etc., inflicted upon the wife. His learned counsel strongly contends that the conduct of the defendant was not an actionable wrong to the plaintiff. However this may be, and without intimating any opinion upon it, we do not so construe the complaint. The plaintiff alleges a malicious, unlawful, and forcible trespass, setting out that it was made with the malicious intent to and did in truth then and there wilfully, wickedly, maliciously, etc., insult and attempt to seduce and carnally know plaintiff's wife. This matter is stated as the foundation for a claim of actual and vindictive damages; the cause of action being the trespass.

We are asked to pass upon the question whether, in the assessment of damages, these matters may be considered by the jury in aggravation.

In *Duncan v. Staleup*, 18 N. C. 440, Daniel J., says "In looking into the books we find the rule in this action to be that the jury are not restricted in their assessment of damages to the amount of the mere pecuniary loss sustained by the plaintiff, but may award damages in respect to the malicious conduct of the defendant, and the degree of insult with which the trespass was committed. The plaintiff is at liberty to give in evidence the circumstances which accompany and give character to the trespass." In this case vindictive damages were awarded. In *Day v. Woodworth*, 54 U. S. 363, 14 L. Ed. 181, Grier, J., said: "In actions of trespass, when the injury has been wanton and malicious, or gross and outrageous, courts permit juries to add to the measured compensation of the plaintiff, which he would have been entitled to recover, had the injury been inflicted without design or intention, something further by way of punishment or example, which has sometimes been called 'smart money.' " This was an action *quare clausum fregit*. In *Mitchell v. Billingsley*, 17 Ala. 396, it was shown that defendant, in the commission of the trespass, used indecorous and insulting language, and that one of the defendants had a pistol. Exemplary and punitive damages were awarded. In *Merest v. Harvey*, 5 Taunt. 442, Heath, J., says: "I remember a case where a jury gave £500 damages for merely knocking a man's hat off; and the court refused a new trial. . . . It goes to prevent the practice of dueling, if juries are permitted to punish insult by exemplary damages." Gibbs, C. J., said: "I wish to know, in a case where a man disregards every principle which actuates the conduct of a gentleman, what is to restrain him, except large damages. . . . I do not know upon what principle we can grant a rule in this case, unless we were to lay it down that the jury are not justified in giving more than the absolute pecuniary damage that the plaintiff may sustain." In this case for a trespass £500 was given. In discussing the question whether for injuries sustained by a plaintiff in respect to his marital rights his action was for trespass or case, Mr. Street says: "Clearly we are here confronted with a class of wrongs which historically have their roots in the law of trespass, but which, nevertheless, in maturity lie altogether beyond the field of trespass, and belong to that body of legal injuries in which harm is conceived as being done, not to persons or property, but to rights incident to them." *Foundations of Legal Liability*, 264.

It is suggested that, while it is true that exemplary damages may be recovered for malicious trespass upon property and for insulting language to the owner, the wife alone can sue for damages sustained by her on account of indecent and insulting language and conduct. For the purpose of supporting this view the recent changes made by the constitution and statutes in respect to the property and personal rights of married women are relied upon. We cannot think that because the property rights of the wife have been enlarged, and her right to sue alone for injuries to her person and property

are conferred, the right and duty of the husband to be the head of the family, to protect the honor and virtue of his wife, or to recover for injuries sustained by interference with his marital rights have been destroyed. It is true that, as held by this court, while he may be reduced to a mere steward or overseer of his wife's property, he is no less her husband, with all of the rights and duties incident to that relation. That which degrades or destroys her honor must affect him. It cannot be that if, by permission of the wife, he is living on her land as his home, the law will not afford him protection against and damage for a malicious wrong done to him through his wife. The law would but mock him if, when his home is invaded, his wife insulted, and her virtue assaulted, it gave him, for such injuries, but a penny, permitting the offender to go "scot free." If in the bitterness of his wounded spirit he sought redress by violation of the criminal law, subjecting himself to infamous punishment, the sympathy of his fellow men would be but little comfort to him. No man can long retain the respect of his wife and children if he does not seek redress for a malicious trespass upon his home and attempt to seduce his wife. The ancient law declared: "A patriarch is lord in his own house and family, and no person has a right to interfere with him; not even the village elder or the imperial judge." Again it is said: "The house father was responsible for the due performance of his *vacra* and for the purity of his ritual." States grow in virtue and strength, citizens are loyal and home-loving, in proportion as the unity of the family is preserved. The husband and father is recognized as the head of the family; the wife living under his protection and looking to him to guard her person and honor from all harm. The husband must have redress for wrongs done him by awarding such actual and exemplary damages as a jury may find to be proper, rather than by violating the criminal law.

The judgment of his honor was correct, and must be affirmed.

See *Newell v. Whitcher*, 38 Am. Rep. 703, inserted at ch. 5, sec. 4 post; see also 23 N. E. 78, 6 L. R. A. 736, for a case in every way similar to the principal case, though the decision is somewhat different. See "Trespass," Century Dig. §§ 134, 142; Decennial and Am. Dig. Key No. Series, §§ 50, 54.

ALLEN v. CROFOOT, 5 Wendell (N. Y.), 506, 509. 1830.

Doctrine of Trespass Ab Initio.

[Crofoot sued Allen, in trespass, for entering Crofoot's house in his absence and taking copies of certain papers. Allen pleaded the general issue and license to enter the house. Verdict and judgment against Allen, and he carried the case to the supreme court by writ of error. Reversed.]

Allen was anxious to obtain copies of some papers which he had left with Crofoot. Allen was an attorney at law and had surrendered the papers to Crofoot in settling a matter with him for a client. Afterwards Allen doubted the propriety of his surrendering the papers and went to Crofoot's house to get copies of them. Crofoot was not at the house, but Allen knocked at the door and was admitted. He told a plausible falsehood to Mrs. Crofoot and her brother, who were in the house, and thereby

got access to the papers, and copied them. It was sworn in evidence that Allen had admitted that he could not have obtained copies of the papers if he had not deceived Mrs. Crofoot and her brother. The judge charged that Allen was liable in trespass if he obtained the papers fraudulently, even if he had leave to enter the house; but if he acted correctly and openly in obtaining the copies, and had leave to enter, he was not liable. Defendant excepted to this charge. From the argument it seems to be immaterial whether the permission to enter the house was, or was not, obtained by the fraud of Allen.]

SAVAGE, C. J. . . . It is urged by the plaintiff in error that the court below erred in charging the jury that the action was sustainable if they should find that the defendant entered the plaintiff's house fraudulently, to obtain improperly copies of papers in the absence of the plaintiff. It was decided in *The Six Carpenters' case*, 4 Co. 290, that where an authority to enter upon the premises of another is given *by law*, and it is subsequently abused, the party becomes a trespasser *ab initio*; but where such authority or license is given *by the party* and it is subsequently abused, the party guilty of the abuse may be punished, but he is not a trespasser; and the reason of the difference is said to be that in case of a license *by law* the subsequent tortious act shows *quo animo* he entered; and having entered with intent to abuse the authority given by law, the entry is unlawful; but where the authority or license is given *by the party*, he cannot punish for that which was done by his own authority. Whether this is not a distinction without a difference of principle, it is not necessary to inquire. A better reason is given for it in *Bac. Abr. tit. Trespass, B.* Where the law has given an authority, it is reasonable that it should make void everything done by the abuse of that authority, and leave the abuser as if he had done everything without authority. But where a man who was under no necessity to give an authority does so, and the person receiving the authority abuses it, there is no reason why the law should interpose to make void everything done by such abuse; because it was the man's folly to trust another with an authority who was not fit to be trusted therewith. It is contended that the license, being obtained by fraud, was void. The defendant knocked at the door and was told to walk in; he was found copying certain papers; but how he obtained them, on what representation, or from whom, the evidence does not disclose. One witness does indeed testify that he said he would not have got the copies, if he had not practiced a deception on the wife and brother-in-law of the plaintiff. If this declaration should be considered evidence of his having made improper representations to obtain the papers, then the question arises: Does he thereby become a trespasser *ab initio*?

It has been decided that to enter a dwelling house without license is in law a trespass, 12 Johns. 408; and that possession of property obtained fraudulently confers no title. Under such circumstances, no change of property takes place, 15 Johns. 186; and it is argued that, as fraud vitiates everything into which it enters, a license to enter the house fraudulently obtained is void, and is no license. The principle of relation has never been applied to such a case, nor is it necessary for the purpose of justice to extend it further than

to cases where the person enters under a license *given him by law*. In such cases, as the party injured *had not the power to prevent the injury*, it seems reasonable that he should be restored to all his remedies. Judgment reversed.

In the Lawyers' Edition of the New York Com. Law Rep. Book 10, p. 930, there is a note giving a great number of cases, in England and America, which are said to support the principal case. In *Winder v. Blake*, 49 N. C. at p. 335, it is said by Pearson, J., that the law gives a license to the customers of innkeepers, shopkeepers, and the like, who undertake to serve the public; and, as the law gives the license, it makes the customer who abuses it a trespasser *ab initio*. For which he cites *The Six Carpenters' case*, 8 Rep. In 23 N. E. 78, 6 L. R. A. 736, is an Indiana case which approves what is said in *Razor v. Qualls*, inserted ante to the effect that if a licensee debauch licensor's daughter after a lawful entry under the license, no recovery can be had in an action of *trespass q. c. f.*, and decides that an attempt to seduce licensor's wife will not sustain an action of *trespass q. c. f.*, because the entry was lawful, and the doctrine of *trespass ab initio* has no application except to those cases in which the entry is by authority or license given *by the law*. If the entry is by license, acts done after such entry are to be redressed by some other remedy appropriate to the injury, but not by *trespass q. c. f.* In *Whitfield v. Bodenhammer*, 61 N. C. at p. 364, it is said by Pearson, C. J.: "If one enters into the house or upon the land of another by his permission, and afterwards does an act inconsistent with the agreement or license under which he entered, he cannot be treated as a trespasser *ab initio*. That fiction is confined to cases in which the entry is allowed by law, as upon an entry into a tavern or store. *Six Carpenters' case*, *Coke's Rep.*" *Battle, J.*, says, in *Parish v. Wilhelm*, 63 N. C. at p. 52: "The principle was fully discussed and settled in the celebrated *Six Carpenters' case*, that if a man abuse an authority given him *by the law*, he becomes a trespasser *ab initio*." After quoting from that case the rule and the reason given for the rule, he adds: "A better reason was, we think, given in *State v. Moore*, 12 N. H. 42, to wit, that it was the policy of the law for preventing its authority being turned into an instrument of oppression and injustice." But in *State v. Conder*, 126 N. C. 985, 35 S. E. 249, where the landlord entered the demised premises *by his tenant's permission* and afterwards retained possession *manu forti*, it is said by Douglas, J., at p. 988: "The defendants seek to justify their conduct on the ground that they were originally admitted into peaceable possession; but if, as claimed by the prosecutor, they were admitted as a matter of favor under the false assurance that they would remain only a few days, and then sought to retain the qualified possession thus obtained through artifice, to the exclusion of the prosecutor, they would thus make themselves trespassers *ab initio*." See further, upon the subject of trespassers *ab initio*, *Bish. Non-Cont. Law*, § 391. See "Trespass," *Century Dig.* § 11; *Decennial and Am. Dig.* Key No. Series, § 13.

KENNEDY v. WHEATLEY, 3 N. C. 402. 1806.

What Title Will Support Trespass q. c. f.

TAYLOR, J. This is an action of trespass, for breaking the plaintiff's close, entering upon his lands, etc., and the defendant's counsel relying upon the English law, insists that an *actual possession in the plaintiff at the time of the trespass committed*, is necessary to be proved, to support the action. In England all their lands are occupied, and a trespass cannot be committed but upon the possession of some one, and it must be proved who was the actual occu-

pant, for the purpose of ascertaining the person who is entitled to the action. Here a great part of our lands are not occupied by any actual possession: and if we were to require the same proof that is required by the English law, we should expose the unoccupied lands of every person to be trespassed upon, and the timber to be cut down and destroyed to whatever extent those who were in the neighborhood thought proper, and the owner could have no remedy.

For title that will and will not support the action, see 23 L. R. A. (N. S.) 270. In *Cahoon v. Simmons*, 29 N. C. 189, it is said by Ruffin, C. J.: "From the necessity of the case, it has long been held in this country, not that the action will lie without possession, but that it will lie upon that possession which the law implies to be in the owner of land, when no other person is, in point of fact, on it. Therefore, in order to entitle one to maintain trespass q. c. f., when he has no occupation of any part of the premises, he must show a title in himself from which the law can deduce that constructively he has the possession." In *Moore v. Angel*, 116 N. C. at p. 845, 21 S. E. 699, Avery, J., says: "In order to support an action for simple trespass a plaintiff must show *actual possession where any person is holding adversely*; but, in the absence of *adverse occupation, the constructive possession, which proof of title draws to him, is sufficient*." See "Trespass," Century Dig. §§ 32-37; Decennial and Am. Dig. Key No. Series, § 20.

MYRICK v. BISHOP, 8 N. C. 485. 1821.

What Title Will Support Trespass q. c. f. Constructive Possession.

[Action of trespass quare clausum fregit. Judgment against defendant, and he appealed. Affirmed.]

The plaintiff proved that he was in possession of *part of a large tract of land, within the boundary of which was the locus in quo*; but he was not in the actual possession of the locus in quo at the time of the alleged trespass. The defendant showed no title, but he resisted the plaintiff's action on the ground that the locus in quo was *vacant land*. The judge charged that if the locus in quo was part of a tract granted to the plaintiff, plaintiff's possession of a *part of the tract* would be such possession of the whole as would enable him to support this action of q. c. f. against a wrongdoer.]

TAYLOR, C. J. The plaintiff, having a deed covering the land where the trespass was committed, and being in possession of part within the boundaries of the deed, was in actual possession of the whole. The deed ascertained the extent of the possession. Whoever is in possession, may maintain an action of trespass against a wrongdoer to his possession, because it is a possessory remedy, founded merely on the possession, and it is not necessary that the right should come in question. 3 Burr. 1563; 1 East, 246. The judgment must be affirmed.

HENDERSON, J. *Possession alone* is sufficient to maintain trespass against a *wrongdoer*. 1 East, 244, *Graham v. Pent*, and the cases there cited, to wit, 3 Burr. 1563; 2 Stra. 1238; Willes, 221. And it is consistent with first principles, and in fact would be strange if it were not so; for wretched would be the policy which required the

title to be shown in every instance where the peaceable possession was disturbed by an intruder who had no right. It would tend to broils and quarrels, and the possessor would resort to force to defend his possession, if the law afforded him no redress. It cannot, therefore, for a moment be doubted, that the law is as stated above; and for myself, I would go farther, although by brethren do not deem it necessary to express an opinion on the point, that possession is *prima facie* evidence of title, and until the contrary shall appear, sufficient to maintain an action on the title against a wrongdoer, *ex gr.* an action of ejectment. This of course has reference to a case where the title is shown to be out of the state. I do not deem it necessary to say anything on constructive possession, for in the case before us, the plaintiff's possession was an actual one; *possession of any part of a tract of land, there being no conflicting occupation, is an actual, and not a constructive possession, of the whole tract.* If any part is adversely occupied under an *inferior title*, the possession under the *good title extends to the actual adverse occupation.* Here there was no adverse occupation, and the actual possession of the plaintiff was coextensive with his deed. A constructive possession is where a person has title, but no possession, and there is no one in possession, it being vacant, there the title draws to it the possession in law, or by construction of law. I think the rule for a new trial should be discharged, and judgment entered for the plaintiff.

See "Trespass," Century Dig. §§ 38-42; Decennial and Am. Dig. Key No. Series, § 20.

TREDWELL v. REDDICK, 23 N. C. 56. 1840.

What Constitutes such Possession as Will Sustain Trespass q. c. f.

[Trespass q. c. f. for cutting timber in a cypress swamp. Judgment of nonsuit against plaintiff, and he appealed. Affirmed.]

Plaintiff showed a deed to the locus in quo, but defendants showed that they had used the land by cutting timber on it, erecting tents for their hands, etc., before the date of plaintiff's deed and up to the trial; the locus in quo was not fit for occupancy, and could be used in no way except that adopted by the defendants. The plaintiff showed that his deed covered a large body of land, the boundaries whereof included the locus in quo; and that plaintiff had been, for sometime previous to the commencement of this action, in possession of a part of the tract embraced in his deed.

It was shown that the plaintiff had never been in *actual* possession of the locus in quo; but that defendants had been in adverse possession thereof during the whole of plaintiff's alleged possession—that is, if the defendants' acts of dominion as stated above amounted, in law, to possession. The judge was of opinion that the defendants were in possession, and that while a possession of a part gave possession of the whole to him who had title, still that rule was subject to the exception that if another was in the actual adverse possession of part of the premises, the owner's constructive possession would not include the part so held adversely by another. In deference to this opinion, the plaintiff submitted to a nonsuit and appealed.]

GASTON, J. The opinion expressed by his Honor, on the trial of the cause, seems to us entirely correct. Upon the evidence, it cannot be questioned, we think, but that the defendant was in actual

possession of the locus in quo before, at, and after, the date of the plaintiff's deed, down to the institution of this action. It was a possession as decided and notorious as *the nature of the land would permit*—affording unequivocal indication to all persons that he was exercising thereon the dominion of owner. Doe on dem. Burton v. Caruth, 18 N. C. 2; Simpson v. Blount, 14 N. C. 34. The actual occupation of the plaintiffs has never approached within less than a mile and a half of the part of the swamp thus held by the defendant. *The constructive possession, arising from title, cannot be extended to that part whereof there is an actual opposing possession, whether with or without a paper title.* Graham v. Houston, 15 N. C. 232. And, without possession, the action of trespass cannot be maintained. The judgment of nonsuit is affirmed.

See "Adverse Possession," Century Dig. §§ 113, 591; Decennial and Am. Dig. Key No. Series, §§ 23, 103; "Trespass," Century Dig. § 40; Decennial and Am. Dig. Key No. Series, § 20.

HORTON v. HENSLEY, 23 N. C. 163. 1840.

What Possession Will Sustain Trespass q. c. f. Against a Mere Tort Feasor. Aiders, Abettors, etc.

[Trespass q. c. f. for tearing down a dam. Verdict and judgment against defendants and they appealed. Affirmed.]

There was evidence tending to show that plaintiff had been in possession of the locus in quo for some years; that the defendants came to his house, claimed to have authority to lay off a slope in the dam, and asked his permission to lay off the slope; that plaintiff denied their authority and cautioned them that whatever they should do would be at their peril; that all the defendants went to the dam, and some participated in tearing it out, while others remained on the bank taking no active part in demolishing the dam, but evidently countenancing it and assenting to what was done.

The court charged that, if plaintiff was in possession at the time the dam was destroyed, he was entitled to recover damages from all of the defendants who had aided, abetted, counseled or commanded the trespass, or who had assented thereto after it was done. The defendants offered no evidence of title in themselves. The plaintiff showed that he had a dam and a mill-house on the land, and cultivated the land adjacent thereto; that he used the mill-house; and had repaired the dam only a few days before the acts of the defendants. The judge instructed the jury that if this were true, the plaintiff had such possession as would entitle him to recover of these defendants.]

GASTON, J. We see no ground on which the judgment can be impeached. It is not to be questioned but that *possession alone is sufficient to maintain an action of trespass against mere tort feasors.* The evidence to show possession in the plaintiff was pertinent, direct and uncontradicted. And in trespass, all procurers, aiders and abettors—nay, those who are not even privy to the commission of a trespass for their use and benefit, but who *afterwards assent to it*—are in judgment of law principals. Com. Dig. Tres. C. 1; 4 Inst. 317. The judgment is affirmed.

See further on the subject of what title will support trespass *q. c. f.* against a mere wrongdoer, *Stokes v. Fraley*, 50 N. C. 377, inserted post, in this section. See "Trespass," Century Dig. § 38; Decennial and Am. Dig. Key No. Series, § 20.

PARKER v. STANILAND, 11 East, 362, 366. 1809.

Trespass q. c. f. Lessees and Purchasers of Fructus Industriales and Naturales.

[This was an action to recover the price of certain potatoes which plaintiff had sold to defendant. The potatoes were matured but unsevered at the time of the sale. Defendant bought them in the ground and was to dig them himself. The defense was, that the potatoes being unsevered when the sale was made, the contract was within the statute of frauds and void because not in writing. In the course of the opinion of Lord Ellenborough, C. J., it is said:]

. . . The lessee *primae vesturae* may maintain trespass *quare clausum fregit*, or ejectment for injuries to his possessory right: but this defendant could not have maintained either, for he had no right to the possession of the close—he had only an easement [license], a right to come upon the land for the purpose of taking up and carrying away the potatoes; but that gave him no interest in the soil. I am not disposed to extend the case of *Crosby v. Wadsworth*, 6 East, 602, further, so as to bring such contract as this within the statute of frauds, as passing an interests in land.

In *Stewart v. Doughty*, 9 Johns. (N. Y.) 108, it is held that the purchaser of a growing crop, at execution sale, may maintain trespass *q. c. f.* against one who forcibly interferes with his cultivation and harvesting of the crop. *Crosby v. Wadsworth*, 6 East, 602, Co. Litt. 4, b, Com. Dig. tit. Trespass, B, 1, and 1 Chit. Plead. 176, 177, are cited as authority. At the end of the opinion it is said: "The general language of the authorities is to the effect that the grantee *vesturae terrae* or *herbagii terrae* may maintain trespass, though he has not the soil." See "Trespass," Century Dig. § 25; Decennial and Am. Dig. Key No. Series, § 19.

BAER v. MARTIN, 8 Blackford, 317. 1846.

Trespass q. c. f. by Owner of an Easement.

[Per Curiam.] A right granted by one man to another to convey water through the land of the grantor, by means of a race, to the mill of the grantee, is an incorporeal hereditament. Angell on Water-courses, 57, 59.

And for an injury to such a right, an action of trespass *quare clausum fregit* will not lie. *Conner v. The Pres. and Trust. of New Albany*, 1 Blackf. 88; 1 Chit. Pl. 162.

See "Trespass," Century Dig. § 9; Decennial and Am. Dig. Key No. Series, § 11.

CONNER v. NEW ALBANY, 1 Blackford, 87, 88. 1820.

Trespass q. c. f. by a City or Town for Injury to Streets.

[The authorities of the town of New Albany brought trespass q. c. f. against Conner. Verdict and judgment against Conner, and he carried the case to the Supreme Court by writ of error. Reversed.]

The facts appear in the opening of the opinion. The question presented is: Has a town such a possessory right in the streets as will sustain trespass q. c. f. brought by the town against a trespasser?]

HOLMAN, J. We learn from the record in this case, that the president and trustees of New Albany commenced an action of trespass in the Circuit Court against Conner, in which issue was joined on the plea of not guilty, and a verdict and judgment were rendered for the plaintiffs. The only evidence of trespass was that of digging up the soil, so as to form a road across one of the streets in said town. On this evidence the Circuit Court instructed the jury, that the president and trustees of the town of New Albany had a right to maintain the action by virtue of the qualified possession, which, by law, they had in the streets of the town. To which opinion of the court Conner excepted: and which opinion is the only error complained of in the case. A slight attention to the nature of a public street, and an examination of the powers of a town corporate, will enable us to determine this question. A street in a town is a public highway. It is a subject of common use, and not of exclusive possession; *an incorporeal hereditament*, in which all persons possess equal right, the right of passing over it; and is, in its nature, *incapable of being reduced into possession*. But it is a subject of government: and the government of it is, by the act regulating the incorporation of towns, placed in the hands of the corporation. They have the power to keep it in repair, to remove nuisances, etc.: but this power is no more than a supervisor possesses over a common highway, and is certainly of *a very different nature from possession, either absolute or qualified*. Consequently, no possessory right exists in the corporation, by which the action can be supported. See *Conner v. The Pres. and Trust. of New Albany*, 1 Blackf. 43. Works of use or ornament, erected in the streets by the corporation, are of a different nature, and depend on different principles: and, consequently, present no argument which can affect this case. It follows, of course, that the opinion of the circuit court is incorrect. Judgment reversed.

See "Trespass," Century Dig. § 39; Decennial and Am. Dig. Key No. Series, § 20.

SIR JOHN LADE v. SHEPHERD, 2 Strange, 1004. 1735.
Trespass q. c. l. by Owner of the Fee covered by a Street.

Upon trial of an action of trespass a case was made, that the place where the supposed trespass was committed was formerly the property of the plaintiff, who some years since built a street upon it, which has ever since been used as a highway. The defendant had land contiguous, parted only by a ditch, and that he laid a bridge over the ditch, the end whereof rested on the highway. And it was insisted for the defendant, that by the plaintiff's making it a street, it was a dedication of it to the public; and therefore however he might be liable to an indictment for a nuisance, yet *the plaintiff could not sue him as for a trespass on his private property.* Sed per Curiam.—It is certainly a dedication to the public, so far as the public has occasion for it, which is only for a right of passage. But it never was understood to be a transfer of the absolute property in the soil. So the plaintiff had judgment.

See "Trespass," Century Dig. § 39; Decennial and Am. Dig. Key No. Series § 20.

MAYOR OF NORWICH v. SWAN, 2 Wm. Blackstone, Rep. 1116. 1777.
Trespass q. c. f. by a Town Against an Invader of the Market House Owned in Fee by the Town.

Trespass for breaking and entering their close called the Lower Market-place and placing thereon divers tables, stools, baskets, pots, pans, and other utensils. The defendant pleads, 1st. Not guilty. 2nd. Justification, for that the place where is an open market, and that he placed the tables, etc., there in order to expose them to sale. The plaintiffs reply, that the place where, etc., is their freehold and inheritance, and that the defendant, of his own wrong, and without license, placed his goods thereon. To this the defendant demurred generally, and the plaintiffs joined in demurrer.

De Grey, Chief Justice, stopped Wilson for the plaintiff, because the case was too plain for argument. *Right of market and right of soil are things totally distinct.* Men may have a right to go to market, but not to meddle with or encumber the soil. Toll cannot be due for setting forth these tables and stools, with their furniture, because that must be prescribed for. Pickage it cannot be, because the ground not broken. But it is settled in the Northampton case, that no man can erect stalls in a market, without leave of the owner of the soil. The court cannot criticise and distinguish between a table and a stall. As to the case in Lord Raymond, I shall say nothing to it, only that this is not that case. Judgment for the plaintiff.

See "Trespass," Century Dig. § 9; Decennial and Am. Dig. Key No. Series, § 11.

GANLEY v. LOONEY, 14 Allen (Mass.), 40. 1867.

Trespass q. c. f. by Owner of Servient Estate Against Owner of an Easement.

[Action of tort (in the nature of trespass q. c. f.) by Ganley, owner in fee of a servient estate, against Looney, who owned an easement appurtenant to a dominant estate, for an injury to the servient estate. Verdict and judgment against defendant, and he appealed. Affirmed.]

Ganley owned a lot in fee and granted to Looney, as appurtenant to a house and lot conveyed to him by Ganley, "the use in common with the owner and occupants" (of *grantor's* dwelling house) of the locus in quo and of a well of water thereon. Looney located a pig-pen over the well and dug a large hole in the locus in quo. The judge instructed the jury that Looney had only an easement in the lot; that such easement was to be exercised reasonably; and if the acts of Looney were unreasonable and not within the easement granted, they were *trespasses for which plaintiff could recover in this form of action*. Exception by defendant.]

GRAY, J. The plaintiff was the *owner in fee* of the close upon which the alleged trespass was committed. The *defendant had only an easement* in this close, to use it in common with the plaintiff as owner of the land adjoining. The defendant had no title in fee, and although he had a right, by virtue of his easement, to enter upon the close, yet if he used the close for a purpose not within the terms of the easement, he thereby exceeded his license, was unlawfully upon the land, and liable to an action by the plaintiff as owner of the fee for such trespass. *Davenport v. Lamson*, 21 Pick. 72; *O'Linda v. Lothrop*, ib. 297; *Appleton v. Fullerton*, 1 Gray, 192, 194. In *Eames v. Prentice*, 8 Cush. 337, and *Merriam v. Willis*, 10 Allen, 119, cited for the defendant, in which it was held that an action of trespass for breaking and entering the plaintiff's close could not be supported by proof of taking and carrying away goods only, no unlawful use of the land itself was proved.

The defendant has no just cause of exception to the manner in which the case was left to the jury. The defendant's right of use was well defined by the presiding judge as one which was to be exercised reasonably and in such mode as to be consistent with the similar use by the plaintiff; and the question whether the acts proved came within this definition was rightly submitted to the jury as a question of fact. We may add that if the question were one to be decided by the court, we should have no doubt that building a pig-pen over the well and digging a large hole in the ground were acts inconsistent with the common use of the close by the parties, and therefore, even if there were any doubt of the propriety of submitting the question to a jury, it has been rightly decided, and the defendant has sustained no injury. *Ricker v. Cutter*, 8 Gray, 248. Exceptions overruled.

In *Hays v. Askew*, 52 N. C. 272, it is held that trespass q. c. f. lies by the owner of the servient estate against the owner of an easement for an abuse of the rights conferred by the grant of the easement. See *Griffin v. R. R.*, 150 N. C. 312, 64 S. E. 16, for remedy of an abutting owner where a street is used for purposes not legitimate to the use of a street as a highway. See 7 L. R. A. (N. S.) 506, and note. See "Easements," *Century Dig.* §§ 109, 132; *Decennial and Am. Dig. Key No. Series*, §§ 51, 61.

HATCHELL v. KIMBROUGH, 49 N. C. 163. 1856.

Trespass q. c. f. by Tenant Against his Landlord.

[*Trespass q. c. f.* by Elizabeth Hatchell, lessee, against William Kimbrough, owner in fee, and landlord of plaintiff. Verdict and judgment against defendant, and he appealed. Affirmed.]

The plaintiff was in possession under a demise from defendant. The demise was for a year; upon the terms that plaintiff should pay, as rent, one half the crops, and defendant should furnish a horse for plaintiff to use in making the crop. The defendant caused his slaves to tear the roof off the house on the demised land. This was done *during plaintiff's term* and during a snow. Plaintiff lost one of her eyes from disease caused by exposure, etc., incident to defendant's having the roof torn off. The judge charged that the action was properly brought and that plaintiff could recover if the evidence established the above facts.]

PEARSON, J. 1. The action was well brought. The plaintiff was in possession as lessee for years. The circumstance that the defendant, who was the lessor, furnished the plaintiff with a horse, had no other effect than to entitle him to a larger part of the crop as rent. It did not alter the relation of landlord and tenant, or in any way affect the right of the plaintiff to the exclusive possession. The doctrine in regard to a cropper has no application. *Ross v. Swearingen*, 31 N. C. 481.

2. If the plaintiff was not entitled to recover in this action for the loss of her eye, in aggravation of damages, she could not recover for it at all. The defendant committed but one wrongful act, i. e., breaking the plaintiff's close and carrying off the roof of the house. Of course the plaintiff could bring but one action. *Fetter v. Beale*, 1 Ld. Raymond, 339, 692, 1 Salk. 11; *Hodsoll v. Stallebrass*, 9 Car. and Pa. 63 (38 E. C. L. R. 35), and other cases cited in *Moore v. Love*, 48 N. C. 215, where the matter is fully discussed.

As the loss of the plaintiff's eye is found by the jury to have been the "direct and immediate consequence of the exposure to which she was subjected by having the roof of her house taken off," it was clearly proper that it should be considered in aggravation of damages. *Welch v. Piercy*, 29 N. C. 365. "Every one is presumed, in law, to intend any consequence which naturally flows from an unlawful act, and is answerable for the injury." Accordingly it is there held, that in trespass q. c. f., for letting down the plaintiff's fence, he could aggravate the damages by proof that his hogs got out and were lost. So, in an action of this kind, the plaintiff may, in aggravation, show that the defendant debauched his daughter. All injuries of the sort are included under words *alia enormia*. Judgment affirmed.

See "Landlord and Tenant," Century Dig. § 1355; Decennial and Am. Dig. Key No. Series, § 323.

SILLOWAY v. BROWN, 12 Allen (Mass.), 30, 37. 1866.

Trespass q. c. f. by one Cotenant Against Another Cotenant.

[Tort for breaking and entering plaintiff's close. Judgment against plaintiff, and he appealed. Reversed.]

Plaintiff and defendant were tenants in common of the locus in quo. The defendant took possession and refused to allow plaintiff to enter. "The plaintiff then attempted to enter and get into possession, but was resisted by the defendant and prevented from *occupying or getting effective possession* of the place, and this was the trespass complained of in the first action." There were two actions tried at the same time. The first was trespass q. c. f.—the second was replevin for hay. Only that part of the opinion which treats of the right of one tenant in common to maintain trespass q. c. f. against his cotenant, is here inserted.]

GRAY, J. . . . The general rule is well settled that one tenant in common cannot maintain an action of trespass against another for breaking and entering the close owned in common, and taking the crops; because each has an equal right of entry, occupation and enjoyment, and the possession of one is presumed to be the possession of all. Litt. s. 323. *Keay v. Goodwin*, 16 Mass. 4. But if one does an act which puts an end to the tenancy in common, either by destroying the common estate, or *by ousting his cotenant therefrom*, the latter may maintain trespass quare clausum fregit against him, for otherwise he would have no adequate remedy. Lord Coke cites cases from the year books which show that one tenant in common of a dove house may maintain such action against his cotenant for destroying the flight of doves, or one tenant in common of a park for destroying all the deer, or one tenant in common of land for destroying mete stones thereon. Co. Litt. 200. So in a well considered case in Maine it was held that one tenant in common of a mill and land might maintain such an action against his cotenant for *destroying* the mill. *Maddox v. Goddard*, 15 Maine, 221. The rule is the same if the wrongdoer, *instead of destroying the common property, ousts his cotenant and wholly prevents his enjoyment of it*. Littleton and Coke say that in such case the one ousted might have a writ of ejectment, and Coke adds that he might recover damages for the entry. Litt. ss. 322, 323; Co. Litt. 199b. And in *Goodtitle v. Tombs*, 3 Wils. 118, it was held after recovering judgment in ejectment he might have an action for mesne profits, in which Lord Chief Justice Wilmut and Mr. Justice Gould agreed that the damages would not be limited to the mere rent of the premises. It is now well settled in England that trespass quare clausum fregit may be maintained by one tenant in common against another for an actual expulsion or ouster from the premises. *Murray v. Hall*, 7 C. B. 441, overruling the dictum of Littledale, J., in *Cubitt v. Porter*, 8 B. & C. 269; *Stedman v. Smith*, 8 El. & Bl. 6, 7. The same doctrine has been adjudged in New York and Pennsylvania, and recognized in New Hampshire, and repeatedly by this court. *Erwin v. Olmsted*, 7 Cow. 129; *McGill v. Ash*, 7 Barr. 397; *Odiorne v. Lyford*, 9 N. H. 511; *Munroe v. Luke*, 1 Met. 467, 472; *Bennett v. Clemence*, 6 Allen, 18, 19. There is no reason why a tenant in common, rather than any other person put or kept out of possession of his estate, should be denied the election of suing in trespass, and limited to a writ of entry, in which he could recover no damages for the injury to him by the expulsion or ouster. We are therefore satisfied that upon principle, and according to the weight of authority (notwithstanding the able opinion of

the supreme court of Vermont in *Wait v. Richardson*, 33 Vt. 190, to the contrary?; he may, under such circumstances, maintain trespass *quare clausum fregit*. The defendant's resistance to the plaintiff's attempt to enter, preventing him from occupying or getting effective possession of the land, amounted to an actual ouster. *Co. Litt.* 799b; *Doe v. Prosser*, Cowp. 218; *Gordon v. Pearson*, 1 Mass. 323; *Marey v. Marey*, 6 Met. 371. The alleged consent of the mortgagee gave the defendant no right to the possession of the premises as against the plaintiff, owning the equity of redemption, before any actual entry had been made or suit for possession brought by the mortgagee. *Mayo v. Fletcher*, 14 Pick. 531, 532. The plaintiff was therefore entitled to maintain his action of tort in the nature of trespass against the defendant for keeping him out of possession, *and in the first of these cases the exception must be sustained.*

But one tenant in common cannot maintain trespass or replevin for taking the crops against his cotenant, who has an equal right with him to the possession and enjoyment of the land. The plaintiff's remedy for this, if any, was by an action of contract for his share of the proceeds, which has taken the place in this commonwealth of the action of account given in England by the St. of 4 & 5 Anne, c. 16, s. 27. *Bigelow v. Jones*, 10 Pick. 161; *Barnes v. Bartlett*, 15 Pick. 75; *Badger v. Holmes*, 6 Gray, 118, 119, and cases cited. *In the second case, therefore, the exceptions must be overruled.* . . .

See "Tenancy in Common," Century Dig. § 103; Decennial and Am. Dig. Key No. Series, § 38.

DILLS v. HAMPTON, 92 N. C. 565. 1885.

Trespass q. c. f. by Lessee for Years. Remedy of Reversioner for Injury to the Land.

[Action for damages for injury to real estate. Verdict and judgment against defendant, and he appealed. Affirmed.]

Plaintiff owned the *reversion in fee* and Bumgarner was in possession under a *lease for three years* from plaintiff to Inman—which term Inman had assigned to Bumgarner. Hampton removed a fence on the locus in quo. The removal was under license from Bumgarner. Plaintiff sued Hampton for the damage resulting from the injury done to the land by his removing the fence. The defendant requested the judge to charge, that plaintiff could not recover, because he was not in actual possession of the land when the injury was done. The judge declined to give such instruction, and defendant excepted. The question presented is: If land be let for a term of years, who can sue for an injury done by a third person to such land, and what form of action must be brought?]

ASHE, J. The instructions asked by the defendant are predicated upon the idea that this is an action in the nature of trespass *quare clausum fregit*. If so, there would be error in the refusal of his Honor to give the instructions prayed for by the defendant. But the defendant has misconceived the plaintiff's cause of action. *Upon the facts stated, the nature of the action is trespass on the case*, and the instructions asked are not applicable to such an ac-

tion, and we, therefore, hold there was no error in the refusal of his Honor to give them. When the facts of a case are stated in a "plain and concise statement of the cause of action," the plaintiff is entitled to any relief justified by the facts proved, and not inconsistent with the pleadings. *Moore v. Hobbs*, 77 N. C. 65; *Knigh v. Houghtalling*, 85 N. C. 17.

The gravamen of the plaintiff's action is a permanent injury to the freehold. When there is such an injury done to land, and at the time there is a lease upon it, the *lessee* may sustain an *action of trespass quare clausum fregit*, and at the same time the reversioner may have an action against the trespasser for the injury to his reversionary interest in the freehold.

Here the plaintiff claimed title to the land he had leased to Inman for three years who had assigned the lease to Bumgarner, and the lease had not expired when the trespass complained of was committed. Bumgarner might have sustained an action for the trespass, if he had not given his consent to it; and the plaintiff clearly had a right of action for the trespass, if he had the title and the trespass worked a permanent injury to the freehold affecting his reversion. *Williams v. Lanier*, 44 N. C. 30. These are principles too well settled to require the citation of authorities to support them. If Bumgarner had committed the acts complained of by the plaintiff, he would have been liable to the plaintiff in an action of trespass on the case in the nature of waste under the former system of pleading. . . . Affirmed.

For difference in measure of damages for destruction of *fructus naturales* and *fructus industriales*, see 23 L. R. A. (N. S.) 310, and note.

"If a stranger breaks the close of one having the particular estate and besides injuring such tenant by treading down his grass, taking away his crops, etc., also commits an injury to the inheritance, by cutting timber trees, tearing down houses, etc., the particular tenant may have *trespass q. c. f.* for the injury done immediately to him; and the remainderman or reversioner may have an action on the case, in the nature of waste, for the injury to the inheritance. This doctrine is discussed and settled by *Williams v. Lanier*, 44 N. C. 30. In the case of a tenant at will, there are many authorities for the position that although his action must be *trespass q. c. f.*, still the action of his lessor [the action of the reversioner] may also be *trespass q. c. f.*; provided an injury is done to the land, as by tearing down houses, 'subverting the soil,' etc., . . . but it is distinctly confined to cases where damage is done to the land, and not merely to the possession, as by treading down grass, etc. On the contrary, there are many authorities for the position that even in a case of a tenancy at will, the lessor can under no circumstances maintain an action of *trespass q. c. f.*, because the gravamen of that form of action is an injury to the possession, and that 'case' is the only action which the lessor can maintain. . . . It is not necessary for us to take sides in this controversy." *Pearson, J.*, in *Smith v. Fortescue*, 48 N. C. 65. As it is peculiar that a reversioner should be allowed to maintain an action for waste, or even one in the nature of waste, against a stranger the explanation of that doctrine by *Pearson, J.*, is here copied from *Williams v. Lanier*, 44 N. C. 30, 31: "A reversioner or remainderman could not bring a writ of waste against a stranger, because privacy of estate was necessary to support the action. Hence, anciently, if a stranger broke the close of one having the particular estate, and besides injuring him by 'treading down his grass' taking away his crops, etc., also committed an injury to the inheritance, by cutting timber trees, tearing down houses,

etc., the *reversioner or remainderman* was allowed to bring a writ of waste against the particular tenant; and he, in trespass *quare clausum*, besides damages for the immediate injury, was allowed to recover damages by way of reimbursement for his liability on account of the injury to the inheritance. This was found, in many cases, to bear hard on the particular tenant, and the remedy was frequently an inadequate one for the reversioner or remainderman. For these reasons, it has been settled for upwards of a century, that the latter may bring *case in the nature of waste*, for the injury to the inheritance; and the former, trespass *quare clausum*, for the injury done immediately to him. 1 Chit. Pl. 50, 71; 2 Saund. Rep. 252, b, n. 7." See "Landlord and Tenant," Century Dig. § 509; Decennial and Am. Dig. Key No. Series, § 142; "Trespass," Century Dig. § 36.

PAGE v. HOLLINGSWORTH, 7 Ind. 317. 1855.

Trespass q. c. f. Against the Owner of Trespassing Animals.

[Trespass q. c. f. to recover damages caused by cattle breaking into plaintiff's field and eating his corn. Verdict and judgment against plaintiff, and he appealed. Reversed.]

Hollingsworth owned over three hundred cattle which he confined in pastures. He hired men to watch them and look after the fences around the pastures. In fact, he exercised reasonable precautions to prevent the cattle breaking out. But they did get out and break into Page's field and destroy his corn. The corn field was properly fenced. The judge charged that the defendant was not liable if he exercised proper care in confining his cattle and was guilty of no positive wrong in the matter of the trespass complained of. Exception by plaintiff.]

DAVISON, J. . . . If the trespass in this case had been committed against the *person or personal property* of the plaintiffs, and *not against their real estate*, the instructions would have been clearly right, because cattle, such as those charged with having broken and entered the plaintiff's close, viz., cows, oxen, steers, and the like, are regarded *mansuetae naturae*, not naturally inclined to commit mischief. And the owner, for such trespass merely against the person or personal property, would not be held liable, unless it could be shown that he previously had notice of their viciousness, or that the injury was attributable to some neglect on his part. 1 Chit. Pl. 82, 83; Bac. Abr. tit. Trespass, 1; Vrooman v. Lawyer, 13 Johns. 339; Lyke v. Van Leuven, 4 Denio, 127.

But this rule does not apply to the case before us. Here a *close was broken and entered by such animals*; and though their owner may not know when they are inclined to commit mischief, still it is said "they have a natural and notorious propensity to rove," which he is always presumed to know. Hence, he is bound, at his peril, to confine them on his own land; for if they escape and commit a trespass on the land of another, *unless through the defect of fences which the latter ought to repair*, the law deems the owner himself a trespasser, and holds him liable in trespass *quare clausum fregit*, though he had no notice in fact of such propensity. 3 Blk. Com. 211; 6 Mass. 90; 4 Met. 389; 8 Ibid. 284; 1 Chit. Pl. 83. This is the common-law rule on the subject, and we have heretofore decided that, as a general rule, it prevails in Indiana. Williams v. New Al-

bany R. R. Co., 5 Ind. 111; The Lafayette R. R. Co. v. Shriner, 6 Ind. 141.

If the principles above stated are sound, as we think they are, the ruling of the common pleas cannot be sustained. Against the plaintiffs no delinquency was shown. The fence through which the cattle broke and entered the corn field, was considered by the parties sufficient and in good repair, and the authorities we have cited establish the principle, that the owner of such cattle cannot, in defense of a suit like the present, set up the care and diligence which he may have exercised in an unavailing effort to confine them on his own land. Indeed the defendant in this case may have been entirely innocent; yet his cattle having broken and entered the close, and therein destroyed corn, the plaintiffs not being at fault, the law holds him responsible for the trespass. The jury, in our opinion, were improperly instructed. Judgment reversed.

See *Malony v. Bishop*, 105 N. W. 407, 2 L. R. A. (N. S.) 1188, and note (chickens); *Wood v. Snider*, 79 N. E. 858, 12 L. R. A. (N. S.) 912, and note (cattle driven along highway). See "Animals," Century Dig. § 338; Decennial and Am. Dig. Key No. Series, § 97.

C. H. and D. R. R. CO. v. WATERSON and KIRK, 4 Ohio St. 425, 432.
1854.

English and American Law as to Cattle Roaming at Large.

[Action on the case to recover damages for the killing of two horses by the railroad company. Judgment against the railroad company. The company carried the case to the Supreme Court by writ of error. Affirmed.]

In the course of the opinion, after calling attention to a local statute, Ranney, J., says:]

I will, however, take this occasion to say, that, in my judgment, the owner of domestic animals, in suffering them to run at large under the limitations expressed in the statute, is in no fault; and that there is, therefore, no room for the application of the doctrine which determines when a party in the wrong, may, nevertheless, recover for injuries arising from the negligence of another. In other words, the owner has a perfect right to suffer his animals to go at large, without incurring any responsibility to the owners of uninclosed grounds, upon which they may wander. I am aware, that this is flatly opposed to the common-law doctrine upon the subject, and if that rule of the common law was in force in this state, would be entirely inadmissible. But it is not in force; and it is not in force because, in addition to being utterly inconsistent with our legislation, it lacks all the essential requisites that give vitality here to any principle of the common law, and is opposed to the common understanding, habits, and even necessities of the people of the state.

Indeed, with the strict enforcement of such a rule, the state never could have been settled. The lands were all heavily timbered, and

the introduction of domestic animals, from the scarcity of herbage, requiring a wide range for their support, became indispensable before the forests could be removed. It would have been a novel proposition to a hardy pioneer, when he listened in the morning for the bell that indicated where the oxen that hauled together his logs for burning, might be found, to have told him that his cattle were trespassers on every other man's uninclosed land upon which they might have fed during the night; or that he could plant corn without inclosing the ground, and sue his neighbor whose cattle had eaten it up. Nobody, either lawyer or layman, ever thought of such a thing. The practice of letting cattle go at large was considered as a right, treated as a right, and regulated by numerous statutes as a right. . . .

As to the liability of the owner of cattle for injuries committed by them on the lands of another; the law of England and that of America with regard to the duty of cattle owners in the matter of keeping them up; the duty of landowners to fence their lands, etc., see *Jones v. Witherspoon*, 52 N. C. 555; *Shipman*, Com. Law Pl. 52; 3 Blk. *211; *Bish. Non-Cont. Law*, ss. 824, 825; 6 Wait, Act. and Def. 71; *Revisal*, vol. 1, ch. 35. See "Animals," *Century Dig.* §§ 143, 144, 335; *Decennial and Am. Dig.* Key No. Series, §§ 48, 93.

STOKES v. FRALEY, 50 N. C. 377. 1858.

Judgment in Trespass q. c. f. how far an Estoppel.

[Action of ejectment by Doe on the demise of Stokes. Submitted on case agreed. Judgment against defendant, and he appealed. Reversed.]

In 1856 Stokes sued Fraley in trespass q. c. f. for an alleged trespass upon the same land sued for in the present action of ejectment by him against the same defendant. Fraley pleaded the general issue and *liberum tenementum* in the action of trespass q. c. f., and the title of both parties was fully gone into in the trial of that action, which trial resulted in judgment for damages against the defendant. That judgment was relied on by the plaintiff as an estoppel upon the defendant to dispute the plaintiff's title to the locus in quo in this action. The judge ruled with the plaintiff on that point.]

PEARSON, J. In the action of trespass q. c. f., the defendant pleaded the "general issue," and also pleaded specially "*liberum tenementum*;" to this plea the plaintiff replied, by way of traverse, to wit, that the locus in quo was not the freehold of the defendant. Upon this issue, the question of title was fully gone into, and both issues were found in favor of the lessor of the plaintiff. The question is: does this establish his title by force of an estoppel?

The effect of the finding on the general issue was, that the plaintiff was in possession, and was entitled to recover against a wrongdoer; and further, that the defendant had committed the trespass complained of, and was liable to the plaintiff's action, unless he (the defendant) had title to the land.

The effect of the finding on the issue joined on the special plea was, that the defendant had not title to the land; but non constat, that the lessor of the plaintiff had title; it may well be that neither

had title; and although the possession of the lessor of the plaintiff was sufficient to enable him to recover in the action of trespass *q. c. f.* against the defendant, who was a wrongdoer, that will not enable him to recover in the action of ejectment, because, in that action, he must recover upon the strength of his own title, and not the weakness of his adversary's. He can derive no aid from the record of recovery in the former action, either by estoppel or otherwise, for this title was not put in issue; the title of the *defendant was alone put in issue*.

In *Rogers v. Rateliff*, 48 N. C. 225, the finding was for the defendant, and if he had relied on his special pleas, there would have been an estoppel in respect to his title. The decision in that case does not conflict with our opinion in this; and both tend to a proper explication of the doctrine of estoppel. There is error. Judgment reversed, and a judgment for the defendant on the case agreed.

In *Rogers v. Rateliff*, 48 N. C. 225, cited in the principal case, practically the same question was raised as that embraced in the principal case. Both the "general issue" and "liberum tenementum" were pleaded in an action of trespass *q. c. f.*, and the verdict was for the defendant. That record was relied upon as an estoppel. "The broad question is, when a verdict is in favor of the *defendant*, both upon the general issue and upon an issue taken in a special plea, can the finding upon the latter issue be afterwards used as an estoppel against the plaintiff? . . . Our reflections have brought us to the conclusion that a finding for a *defendant* upon a fact in issue by a *special plea*, is not conclusive, when there is, by the same verdict, a finding for the defendant upon the *general issue*. . . . A finding in favor of the defendant upon the *general issue*, fixes the fact that the *plaintiff has no cause of action*; consequently, it is unnecessary to investigate the matter alleged by the special plea." See "Judgment," Century Dig. § 1054; Decennial and Am. Dig. Key No. Series, § 554.

LUMBER CO. v. LUMEBR CO., 135 N. C. 742, 47 S. E. 757. 1904.

Trespass q. c. f. Under the Code Practice. Title How Put in Issue.

[Action for a trespass. Plaintiff alleged that it owned the locus in quo, and that defendant trespassed thereon. Verdict that plaintiff owned *part* of the locus in quo, *but that defendant had not trespassed on that part*. Judgment was entered which, inter alia, adjudged that plaintiff was the owner of a part of the locus in quo, which part was described in the judgment. Defendant appealed. Judgment modified so as to strike out the adjudication as to the plaintiff's title.]

DOUGLAS, J. . . . The plaintiff brought a civil action in the nature of trespass, alleging its ownership of the land in question, and the defendant's trespass thereon. The jury found, in substance, that the plaintiff owned a part of the lands described in the complaint, but that the defendant had not trespassed upon those particular lands. This was the practical result of the verdict, and its legal effect was to entitle the defendant to a judgment that it go without day, and recover its costs incurred in the action. We do not think that any judgment should have been given, deciding the title to the land, as that was not the essential question involved

in the action. Trespass is essentially an offense against the possession, and an action therefor can be maintained by one not holding the fee. On the contrary, it makes no difference who owns the fee, if the defendant has committed no trespass thereon. If both issues had been found in favor of the plaintiff, it may be that he would have been entitled to a judgment on his title, as a necessary requisite to his recovery; but, as he is not entitled to a recovery, a simple judgment for the defendant should have been entered.

The judgment of the court below will be modified by striking out that part decreeing the plaintiff to be the owner of the lands therein described, and then affirmed. Modified and affirmed.

The action of trespass q. c. f. is used in some jurisdictions *to try the title* to real estate. See 6 Wait, Act. & Def. 90; 28 Am. & Eng. Enc. Law, 627. In *Williams v. Shaw*, 4 N. C. 630, it was said by Taylor, C. J., in 1846, that trespass q. c. f. was "a common and convenient mode of trying the title to land of which there is no actual possession." In *Moore v. Angel*, 116 N. C. 843, 21 S. E. 699, it is decided that where the plaintiff sues in trespass q. c. f. and alleges that he is the owner of the locus in quo, and defendant denies such ownership by plaintiff, the plaintiff is entitled to a judgment *declaring his title* if the jury find in his favor on the issue of ownership. The defendant "must submit to a judgment declaratory of the right of his adversary to the land as to which the plaintiff has been compelled to show the title and prove the trespass." *Cowles v. Ferguson*, 90 N. C. 308; *Harris v. Sneeden*, 104 N. C. 369, 10 S. E. 477; *Murray v. Spencer*, 92 N. C. 264." See "Trespass," Century Dig. § 157; Decennial and Am. Dig. Key No. Series, § 72.

SEC. 13. ACTION ON THE CASE FOR INJURY TO REAL ESTATE.

SMITH v. FORTISCUE, 48 N. C. 65. 1855.

Case in the Nature of Waste.

[Trespass q. c. f. Verdict and judgment against defendant, and he appealed. Reversed.]

Plaintiff was the owner in fee. Sawyer was his tenant at will and in possession. Fortiscue entered the close and carried off some lumber which belonged to neither the plaintiff nor Sawyer. No injury was done to the land. The judge charged that plaintiff could maintain this action of trespass q. c. f. notwithstanding the fact that the possession of the locus in quo was, at the time of the trespass, in the tenant at will.]

PEARSON, J. If a stranger breaks the close of one having the particular estate, and besides injuring him by treading down his grass, taking away his crops, etc., also commits an injury to the inheritance, by cutting timber trees, tearing down houses, etc., the particular tenant may have trespass *quare clausum fregit* for the injury done immediately to him, and the remainderman, or reversioner, may have an action of trespass on the case, in the nature of waste, for the injury to the inheritance. This doctrine is discussed and settled by *Williams v. Lanier*, 44 N. C. 30. . . .

See extract from *Williams v. Lanier*, 44 N. C. 30, quoted in note to *Dills v. Hampton*, 92 N. C. 565, inserted at ch. 3, § 12, ante, for history of the action on the case in the nature of waste. See "Trespass," Century Dig. § 36; Decennial and Am. Dig. Key No. Series, § 20.

LINDEMAN v. LINDSEY, 69 Penn. St. 93, 8 Am. Rep. 219. 1871.

Action on the Case Against the Owner of an Easement for Exceeding his Powers.

[Action on the Case by Lindsey against Lindeman. Verdict and judgment against Lindeman, and he carried the case to the Supreme Court by writ of error.

In 1820, John Whisler owned land on one side of a creek and Jonas Rupp owned land on the opposite side. They executed a deed whereby they mutually agreed, for themselves, their heirs, personal representatives and assigns, that Rupp should build a dam across the creek, and Whisler, his heirs, etc., could use one half of the water in the pond. This right to use one half of the water was conferred by a clause in the agreement, which clause was in the form of a grant of such right. By mesne conveyances the respective lands and rights of Whisler and Rupp passed to Lindsey and Lindeman, respectively. Lindsey claimed that Lindeman injured him by consuming more than half the water in the pond, and brought this action of trespass on the case to obtain redress for such injury. Lindeman made the point that Lindsey's rights grew out of the agreement originally made by and between Whisler and Rupp; that the clause with regard to the use of one half of the water amounted to a covenant; and that, such being the case, Lindsey could not maintain this action of *trespass on the case*, but could only maintain an action of *covenant* for the injury complained of. The judge ruled that this action was properly brought. The question presented is: If the owner of an easement exceed or abuse the rights conferred upon him, can he be sued in *trespass on the case* for the damage consequent upon such misconduct?]

SHARSWOOD, J. . . . The remaining errors relate to the *form of action*. It is contended that it should have been covenant on the agreement of 1820. . . . No one has ever supposed before, that upon a grant by deed of an easement, or privilege upon land or land covered with water, by one man to another, the remedy for a disturbance of such *easement or privilege* was an action of covenant upon the deed. Take a common case of the grant or the reservation of a right of way. Surely, an action on the case may be maintained by the grantor for the obstruction of it [i. e. the right reserved], as well against the grantee and those claiming under him as against strangers. The books are full of such cases in which no such point was made. *Watson v. Bioren*, 1 S. & R. 227; *Kirkham v. Sharp*, 1 Whart. 333; *Jamison v. McCredy*, 5 Watts & Serg. 129; *Van Meter v. Hankinson*, 6 Whart. 307; *Ebrier v. Stichter*, 7 Har. 19. But, contends the counsel for the plaintiff in error, with great ingenuity, the grant to Whisler, of one half of the water, is an implied covenant that the grantor will not take the other half. True, it is so, in popular language, but that does not constitute a technical covenant. In the grant of a right of way or common in the grantor's land, there is the same implied covenant by the grantor that he will not disturb its enjoyment. But that, as we have seen, does not prevent the plaintiff from resorting to an action on the case to recover damages for its disturbance. Judgment affirmed.

If the owner of the easement "increase the servitude," the owner of the fee or servient estate "may maintain a common-law action for damages, to be assessed up to the time of trial, or, it seems, he may sue for the permanent damage, if any, which has been inflicted upon his property," and

by so doing confer upon the defendant a right to the increased servitude. If the defendant be acting under the right of eminent domain, he can pursue either the statutory remedy, if any be provided, or the common-law remedies here pointed out. If a street be dedicated or condemned, the owner of the fee may recover if the servitude be increased by building a steam railroad in the street. *White v. R. R.*, 113 N. C. 610, 622, 18 S. E. 330; *Staton v. R. R.*, 147 N. C. 428, 61 S. E. 455. As to what additional burdens can be rightfully placed upon property condemned, etc., for streets, see *Smith v. Goldsboro*, 121 N. C. 350, 28 S. E. 479. See further as to the appropriate remedy for injuries resulting from increasing the servitude in case of streets, *Griffin v. R. R.*, 150 N. C. 312, 64 S. E. 16. See "Actions," Century Dig. § 234; Decennial and Am. Dig. Key No. Series, § 30; "Action on the Case," Cent. Dig. §§ 7, 36; Dec. and Am. Dig. Key No. Series, § 1.

HOGWOOD v. EDWARDS, 61 N. C. 350. 1869.

Trespass on the Case and Trespass vi et armis for Injuries to Real Estate.

[Trespass vi et armis. Verdict and judgment against defendant, and he appealed. Reversed.]

A boundary ditch separated the lands of Hogwood from those of Mrs. Patterson. By Mrs. Patterson's consent Hogwood placed an obstruction in this ditch. Edwards owned land on both sides of the ditch and above the obstruction put in by Hogwood. By permission of Mrs. Patterson, Edwards removed part of the obstruction, thereby causing injury to Hogwood's land. In what he did Edwards was prompted by a desire to benefit his own land, and had no intention to injure Hogwood. The judge charged that the plaintiff could recover *actual damages* and, if there were no actual damages sustained, then he could recover nominal damages. The verdict was for sixpence damages.]

BATTLE, J. We are unable to perceive any ground upon which the action of trespass vi et armis can be sustained upon the facts of the case. The defendants did not go upon the land of the plaintiff, nor, in any way, wilfully send down water and sand upon it. It is therefore unlike the case of *Kelly v. Lett*, 35 N. C. 50, where the defendant, who owned a mill on the same stream and above one belonging to the plaintiff, wilfully, and with intent to injure plaintiff, frequently shut down his gates, so as to accumulate a large head of water, and then raised them, whereby an immense volume of water ran with great force against the plaintiff's dam, and washed it away. In that case, it was properly held that an action of trespass vi et armis was the proper remedy, but in the present case, the facts are that the defendants neither acted wilfully nor with intent to injure the plaintiff; and if any damage were sustained by him, *it was altogether consequential to the acts of the defendants*, and therefore, the action of trespass on the case would have been the proper remedy.

Under the Act of 1858, ch. 37, the plaintiff might have joined the action of trespass on the case with that of trespass vi et armis, but he has not thought proper to do so; and, if he had, it would not have availed him in this particular case, because the jury did not find that he had sustained any actual damages. The nominal damages were given upon the mistaken supposition of the judge that

there was a trespass with force and arms. There was error, and this judgment must be reversed.

In *Reynolds v. Clark*, 2 Ld. Raymond, 1399, plaintiff brought trespass *vi et armis* for an injury caused by the defendant's placing a spout so as to discharge rain water into plaintiff's back yard. Defendant pleaded a right, derived from his predecessors in the ownership of the premises adjoining the plaintiff's, to turn the rain water from his premises into the back yard of the plaintiff's premises. It appeared that defendant had a right to enter upon plaintiff's premises for certain purposes, and it also appeared that the spout complained of was upon defendant's premises although the water discharged thereby ran into plaintiff's back yard. The plaintiff insisted that the right of the defendant to have the rain water flow from his premises into plaintiff's premises did not give defendant the right to collect the water and discharge it through a spout so as to make it flow in a large body into plaintiff's lot.

Objection was made to the form of the action—it being insisted that, as there was no unlawful entry, and the injury was not the immediate, but merely the *consequential*, result of the acts complained of, trespass *vi et armis* would not lie. This objection was sustained. The opinion says on this subject:

"This Trinity term 1725, upon the second argument, my brothers Fortescue and Reynolds (Powys being absent) and myself were unanimous of opinion, that the plaintiff could not maintain an action of trespass *vi et armis* for the damage he sustained by the rain water flowing out of this spout, but ought to have brought an action on the case. And that as to the entry into the backside, and fixing the spout that was sufficiently justified. The distinction in law is, *where the immediate act itself occasions a prejudice*, or is an injury to the plaintiff's person, house, land, etc., and where the act itself is not an injury, but a consequence from that act is prejudicial to the plaintiff's person, house, land, etc. In the first case trespass *vi et armis* will lie; in the last, it will not, but the plaintiff's proper remedy is by an action on the case."

In *McKee v. D. & H. C. Co.*, 125 N. Y. 353, 26 N. E. 305 (1891), it is held that where one discharges water upon his own land in such quantities that the natural drains cannot carry it off before injury is caused to the adjoining land, such conduct is the subject of an action for damages and for injunctive relief. See *Davis v. Smith*, 141 N. C. 108; *Clark v. Guano Co.*, 144 N. C. 64; *Greenwood v. R. R.*, *Ib.* 448. See "Action," Century Dig. § 244; Decennial and Am. Dig. Key No. Series § 30; "Action on the Case," Century Dig. § 34; Decennial and Am. Dig. Key No. Series § 1.

SEC. 14. REMEDY IN EQUITY TO RESTRAIN TRESPASSES.

CHALK v. WYATT, 3 Merivale, 688. 1810.

Irreparable Injury. Establishing Right at Law.

[Hall moved, upon certificate of bill filed, and affidavit, for an injunction to restrain the defendant from digging or removing any earth, stones, shingles, or beach, from or immediately under a bank belonging to the plaintiff which protected his lands from the inundations and irruptions of the sea. The land was situated in the parish of Minster, in the island of Sheppy. It appeared that the defendant had, sometime since, removed some land or stones from this bank, whereupon the plaintiff brought an action of trespass against him; the defendant justified in the action, as lord of the manor; but the jury found a verdict with damages for the plaintiff. The affidavit further stated, that the defendant, nevertheless, had again begun to remove earth and stones from the bank; and

that if he was permitted to continue so to do, the plaintiff's lands would be exposed to inevitable inundation, as this bank formed their only protection from the sea.]

The Lord Chancellor: Granted the application, in consideration of *the irreparable injury* the plaintiff was likely to sustain. He added, that he would not, however, have granted it, if the plaintiff had not previously established his right at law.

"Injunction awarded to restrain defendant, his agents, servants, and workmen, and all other persons employed or concerned for, or on the part of the defendant, from removing, etc., any further quantities of, etc., from off the said premises, or any part thereof, until answer or further order." Reg. Lib. A. 1869, fo. 794.

See "Injunction," Century Dig. § 85; Decennial and Am. Dig. Key No. Series, § 37.

ERHARDT v. BOARD, 113 U. S. 537, 5 Sup. Ct. 565. 1885.

Irreparable Injury. Establishing Right at Law.

[Bill in equity to enjoin trespass and waste. Decree against plaintiff dismissing the bill. Plaintiff appealed. Reversed.]

The plaintiff having brought an action at law against the defendants to recover the possession of certain mineral lands, brought this bill in equity as ancillary to that action. The bill set forth that defendants had intruded upon the land, ousted the plaintiff, and were mining and carrying off great quantities of valuable ore from the locus in quo. The prayer was for an injunction against further acts of waste, etc., until the final determination of the action at law pending between the parties. The court granted a preliminary injunction but dissolved it after judgment had been rendered against plaintiff in the action at law, notwithstanding the fact that plaintiff had carried the case to the Supreme Court by writ of error.]

Mr. Justice FIELD. . . . It was formerly the doctrine of equity, in cases of alleged trespass on land, not to restrain the use and enjoyment of the premises by the defendant when the title was in dispute, but to leave the complaining party to his remedy at law. A controversy as to the title was deemed sufficient to exclude the jurisdiction of the court. In *Pillsworth v. Hopton*, 6 Ves. 51, which was before Lord ELDON in 1801, he is reported to have said that he remembered being told in early life from the bench "that if the plaintiff filed a bill for an account and an injunction to restrain waste, stating that the defendant claimed by a title adverse to his, he stated himself out of court as to the injunction." This doctrine has been greatly modified in modern times, and it is now a common practice in cases where irremediable mischief is being done or threatened, going to the destruction of the substance of the estate, such as the extracting of ores from a mine, or the cutting down of timber, or the removal of coal, to issue an injunction, though the title to the premises be in litigation. The authority of the court is exercised in such cases, through its preventive writ, to preserve the property from destruction

pending legal proceedings for the determination of the title. *Jerome v. Ross*, 7 Johns. Ch. 315, 332; *LeRoy v. Wright*, 4 Sawy. C. C. 530, 535, Fed. Cas. No. 8,273.

As the judgment in the action at law in favor of the defendants has been reversed, and a new trial ordered, the reason which originally existed for the injunction continues. The decree of the court below must therefore be reversed, and the cause remanded, with directions to restore the injunction until the final determination of that action; and it is so ordered.

See "Injunction," Century Dig. §§ 82-84; Decennial and Am. Dig. Key No. Series § 36.

COOPER v. HAMILTON, 8 Blackford, 377, 378. 1847.

Ordinary Trespass Without Irreparable Injury.

[Bill in chancery for an injunction and for an account. Decree against the plaintiff dismissing the bill. Plaintiff appealed.

The bill charged that Hamilton had removed seven hundred rails from a fence on Cooper's land "and was persisting in a determination to carry away the remainder" of the rails in the fence. The prayer was for an injunction against removing the remainder of the rails and that defendant be made to account for those theretofore removed.]

SMITH, J. . . . The interference by injunction, in restraint of waste, was originally founded on privity of title, and the courts were for a long time extremely strict in confining their relief to such cases. The rigour of this rule has been very much relaxed, and, indeed, it is now held that an injunction will lie for a mere trespass, but only in cases of great and irreparable mischief. 6 Johns. Ch. 46; 7 Ib. 315, 332; 2 Story. Eq. 207. No precise rule can be laid down as to the cases in which an injunction will be granted against a stranger, to prevent the commission of a trespass, but it is always expected that a strong case of destruction or irreparable mischief will be made out—of irreparable mischief which may be effected before any trial can be had as to the controverted right. *Eden on Inj.* 233; 7 Ves. 308. But an injunction will not be allowed, in order to prevent the repetition of a trespass, where the plaintiff has an adequate remedy at law. 1 Johns. Ch. 318. We do not think the facts alleged in the bill of complaint in this cause, admitting them to be true, present a case which calls for the interposition of a court of chancery. The plaintiff had an adequate remedy at law and the bill was properly dismissed. Decree affirmed.

Equity courts did not enjoin a mere trespass until the time of Lord Thurlow, because the remedy at law was deemed adequate. That it is now granted, both in England and America, where irreparable injury will result from the trespass, is settled. See note to principal case in 8 Blackf., at p. 379, and authorities there cited. See "Injunction," Century Dig. § 98. Decennial and Am. Dig. Key No. Series, § 46.

SHARPE v. LOANE, 124 N. C. 1, 32 S. E. 318. 1899.

Ordinary Trespass Without Irreparable Injury.

[Action to restrain trespass and cutting timber. Judgment against plaintiff. Plaintiff appealed. Affirmed. The facts appear in the opinion.]

FAIRCLOTH, C. J. The plaintiffs and defendants claim to be the owners of certain lands in Hertford county, called "Cow Island," and in this action the plaintiffs ask for an injunction against the defendants to prevent trespassing on said lands. The alleged trespass consists in cutting timber trees and removing them to defendant's mill, and converting them into lumber for marketable purposes. It is conceded that defendants are solvent, and able to respond in damages for any injury the plaintiffs may sustain. After reading affidavits and hearing the arguments, his honor required the defendants to enter into sufficient bond to protect the plaintiffs, and to render and file a statement of the trees, etc., removed, with the clerk at stated periods, and dissolved the restraining order theretofore granted, from which the plaintiffs appealed.

No special or irreparable damage is alleged,—only such as above stated. Will a court of equity enjoin an ordinary trespass? The rule has ever been that it will not, unless insolvency is shown, or that the injury will be irreparable and incapable of a just compensation in money value. The plaintiffs admit that the authorities are against them, and cite *Gause v. Perkins*, 56 N. C. 177; *Lumber Co. v. Wallace*, 93 N. C. 22, and *Lewis v. Lumber Co.*, 99 N. C. 11, 5 S. E. 19, but insist that the principles announced in those cases are unjust and inequitable. They cite no authority in support of their view, and the argument fails to satisfy us that their proposition is true. The case of *Gause v. Perkins*, supra, is an exhaustive review of the subject, referring to many decided cases prior thereto, and the decisions since have simply repeated the principle of that case. While this court is always ready to correct any error, it would hesitate to overrule a long and uniform list of decided cases, in harmony with all the text writers, unless it should feel a strong and clear conviction that an unjust rule had prevailed. The present case fails to produce such a conviction. Affirmed.

Protection of cemetery property by injunction, see *Wormley v. Wormley*, 69 N. E. 865, 3 L. R. A. (N. S.) 481, and note; protection of oyster beds in navigable waters, *Cain v. Simonson*, 39 So. 571, 3 L. R. A. (N. S.) 265, and note. "If a court of equity interfered to prevent an alleged trespasser from doing ordinary acts of ownership—such as cultivating the land, clearing and opening new fields, etc.—a bill for an injunction would accompany a declaration in ejectment almost as a matter of course, causing not only much private loss, but great detriment to the public. Fields already cleared would lie idle; woodland that, in a country like ours [then was], ought to be cut down and cultivated, would stand wild and unproductive; and the valuable products of our forests would no longer swell the tide of trade." *Pearson, J.*, in *Gause v. Perkins*, 56 N. C. 177, cited in the principal case. The opinion proceeds to explain and illustrate those acts of trespass and waste which are deemed irreparable, and

hence proper to be enjoined by equity, and those acts which, while detrimental are not irreparable, and hence will not be restrained. See also *Frick v. Stewart*, 94 N. C. 484, where it is ruled that a *general allegation* that acts complained of will work "irreparable injury," will not do. The facts must be set forth in the complaint or affidavits, that the court may judge from such facts whether or not the injury is such as equity deems irreparable and proper to be restrained. See "Injunction," *Century Dig.* § 105; *Decennial and Am. Dig. Key No. Series*, § 52.

ELLIS v. BLUE MOUNTAIN FOREST ASSOCIATION, 69 N. H. 385, 41 Atl. 856, 42 L. R. A. 570. 1898.

Continuous and Repeated Trespasses. Trespasses by Wild Animals Owned by Hunting Club.

[Plaintiff sued for injunction and other relief. The court granted the injunction against permitting the wild animals in defendant's game preserve to roam over plaintiff's premises. The facts appear in the opinion.]

WALLACE, J. . . . The plaintiff asks that the defendants be compelled to keep their animals upon their own land, and be restrained by injunction from permitting them to go upon his land. Although equity will not interfere in the case of a trespass which is temporary in its nature and effect, and for which a legal remedy of an action at law is adequate, yet if the trespass is a continuous one, or if repeated acts of wrong are done or threatened, although each act by itself may not be destructive or cause irreparable injury, and for which, if it stood alone, an action at law might be an adequate remedy, the entire wrong may be prevented or stopped by injunction on the ground of preventing a multiplicity of suits and the inadequateness of the legal remedy. 3 Pom. Eq. Jur. s. 1357; Beach, Mod. Eq. Jur. s. 721; Story, Eq. Jur. s. 925; *Coe v. Winnepisiogee Lake Cotton & W. Mfg. Co.*, 37 N. H. 254, 261; *Burnham v. Kempton*, 44 N. H. 78, 95; *Wheelock v. Noonan*, 108 N. Y. 179, 15 N. E. 67.

[FACTS.] The plaintiff's premises being wholly surrounded by the defendants' land, they have enclosed the whole tract with a fence 10 feet high, and have published a notice stating that they have "purchased, laid out, devoted and dedicated, for the purpose of maintaining a private park for the propagating and protecting of fish, birds, and game," this very tract of land, describing it by metes and bounds. They have placed in the park a great variety of wild animals some of whom at times are dangerous, and suffered them to roam at will over the whole enclosure, including the plaintiff's land, which has been more or less occupied in this manner. The defendants have in this way had the actual possession of the plaintiff's land, and the possession is of such a character that he cannot safely avail himself of the offer of the defendants to let him at any time pass through their gates, and go upon his land, and recover the possession. If, by taking a sufficient force with him, he should go there, and regain the possession, he could not hold it except by a continual retention of a force there to drive

off these wild beasts as they should again come upon his land. The act of the defendants in thus appropriating the use of the plaintiff's land to the purposes of their game preserve is a trespass. From the nature of things, this trespass will be continuous so long as the defendants use their park as they do now; and the facts indicate they intend to continue the use permanently. Repeated actions of law would furnish no adequate remedy to the plaintiff. In an action of trespass, only damages to its date could be recovered, and for the subsequent continuance of the trespass repeated actions would have to be maintained. The defendants might pay the damages, and, if there is no other adequate remedy, continue the occupation permanently, in spite of their wrong, making of themselves, in effect, tenants who could not be dispossessed. The wrong is the continued unlawful occupation, and any remedy that does not end it is inadequate to redress the injury or restore the injured party to his rights. To refuse the injunction asked for would allow a wrongdoer to compel an innocent person to perpetually lease his property for such damages as he might be able to recover in repeated actions of trespass, and deprive him of the right to enjoy his estate himself. It is unnecessary for the plaintiff to establish his right at law, as the defendants admit they have no right in his land. *Burnham v. Kempton*, 44 N. H. 78, 95.

An injunction will issue restraining the defendants from suffering or permitting their animals to go upon the plaintiff's land.

For injunction against continued and repeated trespasses, see *De Paux v. Oxley*, 100 N. W. 1028, 13 L. R. A. (N. S.) 173, and note; *Cragg v. Levinson*, 87 N. E. 121, 21 L. R. A. (N. S.) 417 and note; 22 Cyc. 836 et. seq. See "Injunction," Century Dig. § 101; Decennial and Am. Dig. Key No. Series, § 48.

SEC. 15. REMEDY AGAINST TRESPASSES COMMITTED IN EXERCISE OF RIGHTS CLAIMED UNDER EMINENT DOMAIN.

PORTER v. RAILROAD, 148 N. C. 563, 62 S. E. 741. 1908.

Remedy of One Whose Land is Taken Under Eminent Domain.

[Action for damages against defendant for entering and occupying land. Judgment against plaintiff dismissing the action. Plaintiff appealed. Reversed.]

It appeared on the trial that plaintiff owned certain land and that defendant entered upon it and occupied it in the exercise of its right of way; that after such entry plaintiff, John Porter, conveyed the locus in quo to his sons, C. B. and H. B. Porter—which conveyance was made before this action was brought; that the sons reconveyed to plaintiff after this action was brought. The sons were joined as co-plaintiffs, but they filed no complaint and, consequently, the action was dismissed as to them.]

HOKE, J. While the facts are not fully developed, we think from a perusal of the pleadings and the evidence stated in the case on appeal it appears by fair intendment that in 1902 the defendant company entered on the lands in question, claiming the

right to do so, and have constructed their railroad, and are operating the same, under and by virtue of a legislative charter, and on facts substantially similar we have held in *Beasley v. Railroad*, 147 N. C. 362, 61 S. E. 453, that, under the circumstances indicated, a railroad company cannot be ousted from the land by action of ejectment on the part of the owner, nor subjected to successive and repeated actions of trespass; but the remedy for the wrong, if one has been committed by the entry and occupation of the land, is to be redressed by an award of permanent damages. On a former appeal in that same cause, reported in 145 N. C. 272, 278, 59 S. E. 60, 62, Connor, J., speaking to this same question, delivered the opinion of the court as follows: "The plaintiff is entitled to recover of defendant a fair compensation for the injury done his land by entering upon it and constructing the railroad. When this is fixed and paid, the defendant will acquire the easement to use the land in the same manner, for the same purpose, and to the same extent as if it had acquired the easement by condemnation." It was formerly held as indicated in *Beasley's* second appeal, reported in 147 N. C. 362, 61 S. E. 453, that where the damages suffered by the owner would be included under an assessment in condemnation proceedings, and such a method of redress was provided by the charter or the general law, such method should be pursued. This was so held chiefly for the reason that it was considered unwise and improper that an enterprise of this character, in which the public as well as the stockholders had a vital interest, should be harassed and hindered, and have its success jeopardized by numerous and repeated actions, when full redress could be afforded in one and the same proceeding. At the time of those decisions, such a result could only be reached by condemnation proceedings, provided usually by charter or the general law. Since the same result is now accomplished by confining the owner, when suit is brought for the injury done to recovery of permanent damages for the entire wrong, there is no longer any reason why either method of redress should not be pursued. The intimations to the contrary therefore in *Beasley's* second appeal may be considered as withdrawn. Again, it was held in *Beasley's* second appeal that, while the term "permanent damages" includes damages for the entire injury done the property, present, past, and prospective, there is no good reason why this amount should not be ascertained by a verdict on different issues, when occasion requires that such a course should be taken. And it is further a well-recognized position with us that when there has been a wrongful entry and trespass on an owner's land, and such owner afterwards conveys the land to another, the right to recover for this wrong is personal to him who owned the land when the same was committed, and does not pass to the grantee. *Liverman v. Railroad*, 114 N. C. 692, 19 S. E. 64; *Drake v. Howell*, 133 N. C. 168, 45 S. E. 539.

A proper application of these principles to the facts presented requires that the order made by the judge below, dismissing the action as to H. B. and C. B. Porter for want of a complaint, and dismissing the action of John Porter as on judgment of nonsuit,

should both be reversed. The court having decided that permanent damages, including recovery for the entire wrong, past, present, and prospective, should be had in one action; and that on payment of such recovery, an easement should pass to the road as in proceedings in condemnation, all who have an interest in the recovery, and whose presence is necessary to protect the railroad from other and further recoveries for the same cause, should be made and retained as parties. John Porter has an interest in such a recovery, and is a necessary party, both as being owner and in possession at the time of the original and wrongful entry and as present holder of the title, and H. B. and C. B. Porter are entitled to share in such recovery for the portion of the injury suffered while they were owners. The court will not require them to file a complaint if they do not care to insist on their claim, but their presence in the suit is necessary to protect the defendant road from other and further litigation. When the road pays the permanent damages, the easement should pass, and, as stated, all whose presence is necessary to insure this result and protect the company from further action concerning it should be parties. The order dismissing the action as to C. B. and H. B. Porter is reversed, and these persons will again become parties of record; and the order dismissing the action as on judgment of nonsuit is reversed, and the cause will be proceeded with in accordance with law. Reversed.

In *McIntire v. R. R.*, 67 N. C. 273, it was held that where the charter of a railroad corporation prescribed the remedy, that remedy alone must be pursued; because the charter provision takes away, by implication, the common-law remedy by action of trespass on the case. In *Jones v. Commissioners*, 130 N. C. at p. 453, 42 S. E. 145, it is said: "It has been often held by this court that in cases involving the right of eminent domain, the common-law remedy is superseded by the statutory remedy, and that aggrieved parties must, therefore, seek redress under the statutory remedy. *McIntire v. R. R.*, 67 N. C. 278; *Gilliam v. Canady*, 33 N. C. 106; *Gillett v. Jones*, 18 N. C. 339; *Dargan v. R. R.*, 131 N. C. 623, 42 S. E. 979." "When a railroad corporation has entered on the land of another and constructed its road and is operating the same, and, having the power of eminent domain, has not exceeded the ultimate rights of appropriation contained in the power, nor violated the restrictions imposed upon it by its charter or the general law, such company cannot be ousted from the land by action of ejectment instituted by the owner, nor subjected to successive and repeated actions of trespass by reason of the user and occupation of the property." [The remedy is as indicated in the principal case.] *Beasley v. R. R.*, 147 N. C. 364, 61 S. E. 453. See also 15 Cyc. 980, 981, and notes; *Abernethy v. R. R.*, 150 N. C. 97, 63 S. E. 180. It will be observed that the later cases change the practice in North Carolina from that established by the older cases. See "Eminent Domain," *Century Dig.* §§ 694-705; *Decennial and Am. Dig. Key No. Series*, §§ 266, 309.

RAILROAD v. LUMBER CO., 116 N. C. 924, 20 S. E. 964. 1895.

Injunction in Cases of Eminent Domain.

[This was a proceeding by the plaintiff corporation to condemn land for a right of way. The defendant answered and, among other things, asked for an injunction against plaintiff's constructing its road through defendant's property. The injunction was issued but afterwards dissolved

upon plaintiff's giving bond in one thousand dollars to pay any damages that the defendant might sustain. The defendant appealed from the order dissolving the injunction. The case was decided against the defendant at a former term, see 114 N. C. 690, 19 S. E. 646, and defendant filed a petition to rehear.]

AVERY, J. . . . It is contrary to the policy of the law to use the extraordinary powers of the court to arrest the development of industrial enterprises or the progress of works prosecuted apparently for the public good, as well as for private gain. *Lewis v. Lumber Co.*, 99 N. C. 11, 5 S. E. 19. On the other hand, this court has given its sanction to the practice of granting restraining orders till the hearing against a party who by force was impeding the prosecution of such enterprises, on the ground that a trespass was being committed on his premises, when apparently he could be compensated in damages for the injury of which he complained. *Navigation Co. v. Emry*, 108 N. C. 130, 12 S. E. 900. The plaintiff is proceeding, as was said in the former opinion of this court, under a charter authorizing it to appropriate land for its use upon just compensation, and the question of the necessity for taking a proper right of way is not before us. Pending the proceeding for condemnation, ample provision has been made to compensate the defendant for any loss sustained by a wrongful entry on the part of plaintiff; and if it be admitted that the plaintiff is not authorized to enter till after the appraisal, and the payment into court, in accordance with the provisions of the Code (section 1946) "the sum appraised," the plaintiff is still, in the worst aspect of its conduct, committing a trespass, for which it is answerable in damages, the ultimate payment of which is secured in advance by a sufficient bond. The defendant has not only failed to show that he has or will sustain but even that he may suffer irreparable injury. The petition is dismissed.

That courts act with very great caution in restraining public works and alleged trespasses and nuisances incident to the prosecution of such enterprises, see *Vickers v. Durham*, 132 N. C. 880, 44 S. E. 685; *Griffin v. R. R.*, 150 N. C. 312, 64 S. E. 16. See "Eminent Domain," *Century Dig.* § 776; *Decennial and Am. Dig. Key No. Series*, § 279.

For practice in condemnation proceedings, see *State v. Jones*, 139 N. C. 613, 52 S. E. 240, 2 L. R. A. (N. S.) 313, and note; *R. R. v. Aubuchon*, 97 S. W. 67, 9 L. R. A. (N. S.) 426, and note. For how far the question of necessity is one for the court, see *Hayford v. Bangor*, 66 Atl. 731, 11 L. R. A. (N. S.) 940, and note. For damages and off-set of benefits, see *Petoria T. Co. v. Vace*, 80 N. E. 134, 9 L. R. A. (N. S.) 781 and note; *Sargent v. Merrimac*, 81 N. E. 970, 11 L. R. A. (N. S.) 996, and note. For question of public or private use, see *Walker v. S. P. Co.*, 160 Fed. 856, 19 L. R. A. (N. S.) 725 and note (electric power); *Jacobs v. C. W. S. Co.*, 69 Atl. 870, 21 L. R. A. (N. S.) 416 and note (water power for manufacturing); *Wis. Riv. Co. v. Pier*, 118 N. W. 857, 21 L. R. A. (N. S.) 538, and note (mixed public and private use); *Sutter Co. v. Nichols*, 93 Pac. 872, 15 L. R. A. (N. S.) 616, and note (water for mining operations); *Howard Mills v. S. Lumber Co.*, 95 Pac. 559, 18 L. R. A. (N. S.) 356, and note (grist mills). For exhaustive treatment of judicial power over the right of eminent domain, see 22 L. R. A. (N. S.) 1-171.

SEC. 16. REMEDY OF LICENSEE WHO IS EVICTED.

McCREA v. MARSH, 12 Gray 211, Finch's Cases, 807. 1858.

Exclusion and Ejection from Theatres, Market Stalls and the Like.

[Action for tort for forcibly excluding plaintiff from a theatre in Boston. Plaintiff submitted to a verdict against himself, in deference to intimations from the judge, and alleged exceptions. Exceptions overruled.

Plaintiff was a colored person. He was refused admittance to the theatre on account of his color, although he had duly purchased a ticket. The judge ruled that the refusal to admit the plaintiff was good ground for an action on the contract created by the sale of the ticket, but was no ground for an action in tort.]

METCALF, J. It was correctly ruled at the trial, that the plaintiff could not maintain this action, and that his remedy, if any, was by an action of contract. We therefore need not express an opinion concerning any of the other rulings.

Assuming that the plaintiff, by purchase of the ticket from the defendant, obtained permission to enter the family circle in the Howard Athenaeum, in his own person, and occupy a place there during the exhibition, yet it was "only an executory contract." It was a license legally revocable, and was revoked before it was in any part executed. After it was revoked, the plaintiff's attempts to enter were unwarranted, and the defendant rightfully used the force necessary to prevent his entry.

According to the decision in Wood v. Leadbitter, 13 M. & W. 838, even if the plaintiff had been permitted to enter the family circle, the defendant might have ordered him to leave it, at any time during the exhibition, and, upon his refusal, might have removed him, using no unnecessary force. The doctrine of revocable licenses was there thoroughly discussed, and the authorities analyzed, by Mr. Baron Alderson, and the case of Taylor v. Waters, 7 Taunt. 374, and 2 Marsh. 551, was overruled. See also Adams v. Andrews, 15 Ad. & El. N. R. 296; Bridges v. Purcell, 18 N. C. 492; Foot v. New Haven & Northampton Co., 23 Conn. 214; Jamieson v. Millemann, 3 Duer. 255; Roffey v. Henderson, 17 Ad. & El. 574.

The plaintiff is doubtless entitled to recover, in an action of contract, the money paid by him for the ticket, and all legal damages which he has sustained by the breach of the contract implied by the sale and delivery of the ticket. Exceptions overruled.

For right of innkeeper to change guest's room, see 9 L. R. A. (N. S.) 297. "Where a guest in a hotel, a passenger on a railway train, or a ticket holder at a theatre creates a disturbance, though either has a right under his contract to remain so long as he acts with due regard to the rights of others, the proprietor, conductor or manager or their agents may use the amount of force necessary to expel." Hutchins v. Durham, 118 N. C. at p. 479, 24 S. E. 727. That the holder of a stall in a market is only a licensee and an occupant at the pleasure and discretion of the licensor, see the same case at p. 469, and cases cited. For distinction between innkeepers, carriers, and other public service corporations, and those engaged in mere private business, in the matter of refusing to accommodate those who apply for their services, etc., see Bowlin v. Lyon, 56 Am. Rep.

355; *Faulkner v. Solazzi*, 65 Atl. 947, 9 L. R. A. (N. S.) 601, and note; *Buenzle v. N. Amusement Assn.*, 68 Atl. 721, 14 L. R. A. (N. S.) 1242, and note. For the form of action against carriers of passengers in such cases, see *Hutch. on Car.* 1403-1408; 6 Cyc. 588. For the right of common carriers to separate passengers on account of race, see *Chiles v. R. R.*, 101 S. W. 386, 11 L. R. A. (N. S.) 268, and note. See "Theatres and Shows," *Century Dig.* § 4; *Decennial and Am. Dig. Key No. Series*, § 4.

SEC. 17. REMEDIES ON COVENANTS FOR TITLE

ETHERIDGE v. VERNON, 70 N. C. 713. 1874.

Caveat Emptor.

[Action to recover balance due on a bond and mortgage. Defendant claimed an abatement of the amount contracted to be paid by the terms of the bond. Judgment against the plaintiff allowing the abatement claimed, and plaintiff appealed. Reversed.

Plaintiff sued on a bond and mortgage made by the defendant to L. T. Bond and by Bond assigned to plaintiff, bona fide, for value, etc. The bond was given in payment for lands sold by Bond to the defendant, and defendant claimed an abatement because there were not as many acres in the tracts of land sold to him as was represented by Bond. There was a shortage, but it was admitted that no fraud was intended in representing the number of acres to be greater than it really was.]

BYNUM, J. In contracts for the sale of land, it is the duty of purchasers to guard themselves against defects of title, quantity, encumbrances and the like; if they fail to do so, it is their own folly, for the law will not afford them a remedy for the consequences of their own negligence. But if representations are made by the bargainor, which may reasonably be relied on by the purchaser, and they constitute a material inducement to the contract, and are false within the knowledge of the party making them, and they cause damage and loss to the party relying on them, and he has acted with ordinary prudence in the matter, he is entitled to relief. *Walsh v. Hall*, 66 N. C. 233.

The maxim of caveat emptor is a rule of the common law, and applies as well to contracts of purchase of real as personal property, and is adhered to in courts of equity as well as of law, in the absence of fraud. The purchaser's only right of relief is to be found in the covenants in his deed where there is no fraud. *Rawle*, 459. If he has taken no covenants and there is no fraud vitiating the contract, he has no relief for defects in quantity, quality or encumbrances, for it was his own folly to accept such a deed when he could, and it was his duty to protect himself by covenants. In *Lytle v. Bird*, 48 N. C. 222, it was held that an action of deceit would not lie for a fraudulent representation upon the sale of a tract of land, as to where certain lines ran, and as to particular lands being included in the deed. There *Nash, C. J.*, says: "If the plaintiff, by using reasonable diligence, could have ascertained the truth, it was his own folly to trust to the representations of the vendor." The same principle is announced in *Fagan v. New-*

son, 12 N. C. 20, and in *Saunders v. Hatterman*, 24 N. C. 32. Another case in point is *Credle v. Swindell*, 63 N. C. 305, where it was held that an action for deceit would not lie for the vendee against the vendor for false representations by the latter, as to the quantity of land sold. There he falsely asserted the tract to contain four hundred and ten acres, when in fact there were two hundred and eighteen acres only. In delivering the opinion of the court, Settle, J., says: "If the plaintiff has sustained loss, it is by his own negligence; he has not exercised that diligence which the law expects of a reasonable and careful person, but was wilfully ignorant of that which he ought to have known. He might have ascertained the fact by an actual survey or taken a covenant as to quantity. *Vigilantibus non dormientibus jura subveniunt.*" It is thus seen that even fraud in the misrepresentation will not entitle the vendee to relief, unless that fraud is such that the plaintiff could not have reasonably provided against it under the maxim *caveat emptor*.

It is admitted in our case that no fraud was intended or used, but that the vendor fully believed his statements as to the quantity of land to be true. So, according to the entire current of decisions in our state, the defendant is entitled to no abatement in the price for a deficiency in quantity. There must be fraud and damage. *Adams*, Eq. 176; 2 *Kent*, Com. 486, 487.

Bond, the vendor in this case, at the time the contract of sale was made, stated that the quantity of land in each tract was a thousand acres, and the trade was made on that basis. It turned out, according to the finding of the jury, that one tract contained 1 124 acres, and the other 714 acres, and the two tracts together showed a deficiency of 162 acres. It is not set up in the answer or shown by any evidence that quantity was the material or any inducement to the trade, and the fact that the defendant occupied and used the lands, without complaint or inquiry, for eight years succeeding his purchase, and until he was sued for the purchase money, affords a strong presumption that the quantity was not the material consideration with him. As we hold that the defendant is not entitled to the abatement and sum found by the jury, it is unnecessary to consider the other questions presented in the exceptions. The judgment is reversed and judgment rendered here for the plaintiffs. . . .

For a full discussion of *caveat emptor* and of the rights and remedies of one who buys land to which the title fails—when such defect in title is a defense to an action for the price, etc., see 21 *L. R. A.* (N. S.) 363. The principal case is approved in *Foy v. Haughton*, 85 N. C. 168, where it is said: "If there be on the part of the vendor any actual misrepresentation or other positive fraud, in regard to a material matter reasonably relied on, then the purchaser will be afforded relief; otherwise, the maxim *caveat emptor* applies in all courts, whether of law or equity." What is said in the principal case with regard to the application of the doctrine of *caveat emptor* to sales of chattels, must be taken *cum grano salis*. See *McIntosh* *Cont.* 559-560; *Benj. on Sales*, § 627; *Tiffany on Sales*, 165 166; *Mordecai's L. L.* 784, 798; *Clavenger v. Lewis*, 95 *Pac.* 230, 16 *L. R. A.* (N. S.) 410, and note. See "Vendor and Purchaser," *Century Dig.* § 36; *Decennial and Am. Dig. Key No. Series*, § 31.

SLATER et al. v. RAWSON, 1 Metcalf (Mass.), 450, 455. 1840.

Actions on Covenants of Seizin, Right to Convey, and Warranty.

[Action of covenant to recover damages for breach of covenants of seizin, right to convey, and warranty. The verdict was for five hundred dollars against the defendant. The judgment, by arrangement between the parties, was to be in favor of the plaintiff or a new trial was to be ordered, as the court should direct. New trial ordered.]

Rawson made a deed of conveyance of certain lands to Tyson et al., who afterwards conveyed the same to plaintiffs. Elisha Jacobs ousted plaintiffs from twenty-two acres of the land. Plaintiffs submitted to such ouster because Jacobs showed title in himself as assignee under mesne conveyances from William Sears. The conveyance by Rawson to Tyson et al. contained covenants in the usual form, of seizin, right to convey, against incumbrances, and warranty. The breach alleged was that Elisha Jacobs ousted plaintiffs because of his having an older and better title. It appeared in evidence that, at the time Rawson conveyed the lands to Tyson et al., he was not seized of the twenty-two acres taken from the plaintiffs by Jacobs. In other words, Rawson, having no title and no seizin, made a deed for the land, which deed contained the covenants above mentioned. The persons to whom such deed was made conveyed to plaintiffs, and they sued on the covenants. The questions presented are: (1) Can the plaintiffs recover on the covenants of *seizin and right to convey*—they not being the *original covenantees, but the assignees of such covenantees*? (2) Can plaintiffs recover on the covenant of *warranty, being only assignees*?]

DEWEY, J. . . . Upon the argument before us, upon the case as stated by the parties, the defendant insists, that as he was not seized of the land, which is now the subject of controversy, at the time he executed the deed to Slater and Tyson, and so nothing passed by his deed to his immediate grantees, and they therefore could pass no estate, nor any covenants, to an assignee, which would authorize an action in his own name, he is not liable to the plaintiffs, to any extent, on his covenants.

The distinction as to the legal effect of the different covenants usually introduced into our conveyances, however little it may have been understood or regarded prior to the cases of *Marston v. Hobbs*, 2 Mass. 433, and *Bickford v. Page*, 2 Mass. 455, is now very well settled. The covenants of *seizin and right to convey* are to all practical purposes synonymous covenants; the same fact, viz. the seizin in fact of the grantor, claiming the right to the premises, will authorize both covenants, and the want of it is a breach of both. But upon these covenants no action can be maintained in the name of an *assignee* or subsequent purchaser, for if broken at all, they are necessarily broken at the moment of the execution of the deed; and not running with the land, they do not pass by a subsequent conveyance of the land. The covenant of *warranty, on the other hand, is a covenant running with the land*, and may be made available to a subsequent purchaser, however remote, if the conveyances are taken with proper words to pass the covenant. But to support an action by an assignee, on the covenant of warranty, it is necessary that the *warrantor should have been seized of the land*; for, by a conveyance without such seizin, the grantee acquires no estate, and has no power to transfer

to a subsequent purchaser the covenants in his deed, because, as no estate passes, there is no land to which the covenants can attach. If, therefore, the defendant, at the time of making his deed to Slater and Tyson, was not seized, then the covenant of warranty did not pass to the plaintiffs as assignees, and the only liability of the defendant is upon his covenant of seizin, which covenant, for the reasons already stated, is wholly unavailable to the plaintiffs.

It is to be taken as established by the finding of the jury, and is also in accordance with the pleadings on the part of the plaintiff, that the defendant, at the time of making his conveyance, had no legal title to the twenty-two acres of land, which the plaintiff has yielded up to the claim of Jacobs; but that the title to the same was then, and had been for a long period previously, in William Sears and those claiming under him. The further inquiry then is, whether the defendant was seized in fact of these premises, claiming right thereto, at the time of executing the deed to Slater and Tyson.

The case, as stated by the parties, in the report, finds that the premises, which are the subject of this controversy, were a part of a large tract of woodland uninclosed by fences, and of which there had been no actual occupation by any of the parties. Taking these facts to be correctly stated, there was clearly no seizin in fact in the defendant, acquired by an entry and adverse possession. The rule as to lands that are vacant and unoccupied, that the legal seizin follows the title, seems to be applicable here; and having ascertained in whom is the legal title, that also determines in whom the seizin is. But the plaintiffs have alleged in their declaration, and established by their evidence, the fact that the legal title to the land surrendered was not in the defendant at the time of the execution of the deed by him, but was in those who claim under William Sears. It being thus shown that there was no seizin in fact, nor any legal title to the premises, in the defendant, it necessarily follows that the covenants of seizin and right to convey were broken, and that nothing passed to Slater and Tyson, which they could transfer to the plaintiffs as the foundation of an action in their own name. The covenant of seizin was broken at the moment of the execution of the deed, and became a mere chose in action not transferable; and the covenant of warranty is wholly ineffectual, as no land passed to which it could be annexed; and the result, therefore, from this view of the case, is, that the plaintiff cannot maintain his action.

It was said in the argument, that the defendant should be estopped to deny his seizin, and thus avoid the covenant of warranty, because by his own deed he has affirmed it, and that should be conclusive against him. Without deciding whether such estoppel might or might not, under any circumstances, be interposed where there are various covenants in a deed, and the party be thus subjected, at the election of the covenantee, to damages different from those which the law has prescribed for the covenant which is actually broken; or, in the case of an assignee, to allow

him to recover for the breach of a covenant which is shown in fact never to have passed to him; it seems to us clear, that in the present case no such objection can avail, as the plaintiff, in his declaration, and by his own showing, has established the fact that the defendant had neither the seizin nor the legal title to the land conveyed. . . . New trial ordered.

The rule of the common law that the conveyance by one who was dis-seized was void, has been abolished in North Carolina. Mordecai's L. Lect. 646-649. That a covenant of seizin is broken, if at all, as soon as it is made, and hence not assignable under the common-law rules; and that the same is true of covenants of right to convey, and against incumbrances, see *Chapman v. Holmes*, 10 N. J. L. 20. In a declaration or complaint for breach of covenant of seizin and of right to convey, it is sufficient to allege the breach by negating the words of the covenant,—thus, after setting out the covenants, the plaintiff alleges that the said covenantor was not (at the time, etc.) seized in fee of said premises; nor had he then good and lawful right to sell and convey the same. *Floom v. Beard*, 8 Blackford, 76. But while this is true of these covenants, it is not true as to covenants against incumbrances, for quiet enjoyment, and warranty, for as the covenantor does not covenant against all interruptions of the covenantee's possession nor against all possible incumbrances, the complaint should set out specifically the nature of the incumbrance and interruption complained of; and as the covenant of warranty is not against all claims and ousters, there must be an allegation of an ouster by an older title. *Marston v. Hobbs*, 2 Mass. 433. See *Williams v. Shaw*, 4 N. C. 630, inserted post in this section, and notes thereto. See "Covenants," *Century Dig.* §§ 59, 60, 64; *Decennial and Am. Dig. Key No. Series*, §§ 62, 63, 67.

GRAGG v. WAGNER, 71 N. C. 316. 1874.

Covenants Against Incumbrances.

[Action for damages for breach of covenant against Incumbrances. Judgment against defendant, and he appealed. Affirmed.]

Plaintiff and defendant exchanged lands, and each covenanted against any and all incumbrances. There were incumbrances on the lands conveyed by the defendant to the plaintiff. Plaintiff alleged the covenant and that there were certain specified incumbrances on the land at the time the covenant was made. Defendant answered admitting the existence of the incumbrances, but set up as a defense, that plaintiff *had notice* of their existence when he accepted the conveyance. Plaintiff demurred to the answer, and the demurrer was sustained.]

BYNUM, J. A conveys to B a tract of land with a covenant against incumbrances, both parties having at the time full knowledge of the existence of valid outstanding incumbrances upon the land conveyed. Can B recover upon the covenant? There is no allegation of fraud or mistake in procuring the covenants, and therefore any oral evidence offered in the case would fall under the general rule that it shall not be admitted to contradict, alter or vary the written agreement of the parties. If there are known incumbrances and it is the object of the vendor to except them from the operation of the covenant, it is always in his power to make it appear so on the face of the deed; and if he fails to do

so it is his own folly, and he will not be allowed to repair the error at the expense of the settled rules of construction which have become a part of the laws of property.

The principle is *caveat emptor*, and, therefore, if the vendee fails to investigate the title or take covenants, he is bound by the defect of title and must bear the loss; but if he, with ordinary prudence, protects himself by proper covenants, the vendor is then bound to indemnify. Thus the vendor must take care of the covenants he enters into and notice of the incumbrance can make no difference, as was decided in *Levett v. Witherington*, *Lutwych*, 317. There, in an indenture reciting a lease, where the party covenanted that the original lease was good and unincumbered, on an action of covenant alleging an incumbrance, notice of it was pleaded by the defendant, and on demurrer the plaintiff had judgment. The current of decisions is uniform to the same purpose. *Townshend v. Wald*, 8 Mass. 146; *Harlow v. Thomas*, 15 Pick. 70; 11 Serg. & Rawle, 112; 10 Conn. 533; *Dun v. White*, 1 Ala. 646.

And on the same principle it is held that mere notice does not prejudice the covenantee from relief in a court of equity, by way of detaining the purchase money to the amount of the incumbrance when it is one covenanted against. *Stockton v. Cook*, 3 Munf. 68. So in *Collingwood v. Irwin*, 3 Watts, 309, the covenantor offered to show that at the time of the execution of the deed it was agreed that the assignment of a certain judgment should be the only security of the covenantee and that the former was not to be held liable on his covenant, it was held that to admit such proof would not only be admitting evidence to contradict, but to alter and change the character and effect of the deed materially.

If the vendee fails to take a warranty of title, in the absence of fraud, the whole loss will fall upon him, why then should not the loss fall upon the warrantor when he enters into a warranty? The very fact of the purchaser having notice of an incumbrance is the best reason why he should take a covenant of protection against it. The purchaser consents to take a defective title because he relies for his security upon the covenants of the vendor, and it may not be unwise in the vendor to make the covenant, for it must be presumed that he expects to discharge the incumbrance out of the purchase money or other available means, and not allow it to be enforced upon the specific land.

If a deceit was practiced upon the vendor, or any false representation in the nature of a fraud on which a court of equity could take hold, that court would not permit the party to take advantage of his own wrong, but would, on a proper case, rescind the contract and restore the parties to their original state, or refuse the vendee any aid or relief upon a covenant thus obtained. But such is not the case before us. Nothing now appears upon which the equitable jurisdiction of this court can fix itself and interpose between the parties. In short, when the contract is that the purchaser takes the land *cum onere*, it must be expressly mentioned, and the incumbrance excepted from the operation of the covenant, in which case the covenantor will not be liable. But here it is

otherwise denominated in the deed, and that instrument must be its own interpreter.

The question of damages is not now presented, and the amount will depend upon the issues which may arise on the future pleadings, provided for by the agreement of the parties and entered of record. The rule, however, is *indemnity, which may be less, but cannot exceed the sum of the purchase money*. *White v. Whitney*, 3 Met. 89; Rawle, 130, 140. There is no error. Judgment affirmed.

In *Prescott v. Trueman*, 4 Mass. bot. p. 629, it is said: "We are of opinion that every right to, or interest in, the land granted, to the diminution of the value of the land, but consistent with the passing of the fee by the conveyance, must be deemed in law an incumbrance. We say consistent with the passing of the fee by the conveyance, because, if nothing passed by the deed, the grantee cannot hold the estate under the grantor. Thus a right to an easement of any kind is an incumbrance. So is a mortgage. So also is a claim of dower, which may partially defeat the plaintiff's title by taking a freehold in one third of it. And for the same reason, a paramount right which may wholly defeat the plaintiff's title, is an incumbrance. It is a weight on his land which must lessen the value of it." See elaborate note to *Browne v. Taylor*, 4 L. R. A. (N. S.) 309. See "Covenants," Century Dig. § 40; Decennial and Am. Dig. Key No. Series § 39.

PRICE v. DEAL, 90 N. C. 290. 1884.

Quiet Enjoyment and Seizin. Measure of Damages.

[Action for damages for breach of covenants of quiet enjoyment and of seizin. Verdict and judgment against defendant, and he appealed. Reversed as to measure of damages, and affirmed as to other rulings.]

Plaintiff purchased sixty acres of land from defendant. The deed from defendant to plaintiff contained two covenants—quiet enjoyment and seizin. Plaintiff acquired no title to nine acres of the locus in quo, and would have been ousted from another parcel of twenty-four acres thereof had he not bought off the adverse claimant by paying him one hundred dollars. These facts were set up in the complaint. On the trial the defendant admitted "that there was a title paramount as to the twenty-four acres and also as to nine acres." It was shown that plaintiff had bought off the claimant of the twenty-four acres after action brought against him therefor; but there had been no actual ouster of plaintiff from the nine acres. The judge charged, that, as the defendant had admitted having no title to the twenty-four acres and the nine acres at the time he conveyed to plaintiff, the covenants in the deed were broken, and plaintiff was entitled to recover that proportion of the amount he paid for the land, that the value of the two parcels of twenty-four and nine acres bore to the value of the whole tract of sixty acres. Defendant excepted. The opinion discusses the remedy on covenants of seizin and quiet enjoyment, the necessary proof, measure of damages, etc.]

ASHE, J. The defendant's counsel insisted that, as the demand for judgment in the complaint was for damages for a breach of the covenant of quiet enjoyment, the plaintiff could not recover, because *no eviction under a paramount title had been shown*, and the plaintiff was not entitled to recover the amount paid by him to remove the incumbrance, because it was a *voluntary* act on his part. But the plaintiff alleged breaches of the covenant of *seizin*

as well as of that of quiet enjoyment, and prayed for general relief. In such a case the courts will look to the allegations and proofs and give the plaintiff such relief as the justice of his case demands, consistently with the facts set out in the complaint and not disputed.

The plaintiff alleged that two parcels of the sixty acres purchased by him from the defendant, the one consisting of twenty-four acres, and the other of nine acres, had been claimed by persons having paramount titles, and that he had had to pay one hundred dollars to remove the incumbrance from the twenty-four acre tract. The defendant admitted he had no title to either of these parcels of land.

As a general rule a plaintiff cannot recover in an action for a breach of covenant for *quiet enjoyment*, without showing an eviction from the possession under a paramount title, and the measure of damages in such cases is the price paid for the land, with interest. *Williams v. Beeman*, 13 N. C. 483. But in an action upon a covenant of *seizin*, all the plaintiff need show is that the defendant had no title or no right to convey. *Wilson v. Forbes*, 13 N. C. 30; *Rawle on Cov. for Title*, 66; *Brant v. Foster*, 5 Iowa, 287.

The reason of the distinction is, that a covenant for quiet enjoyment is a covenant for *possession*, and that of seizin is a covenant for *title*, the word being used as synonymous with *right*. In an action upon the former covenant, an eviction must be alleged in the complaint or declaration, but on the latter, it is only necessary to negative the words of the covenant and to allege that the grantor had no seizin or title to the land. 4 Kent, Com. 479; *Richest v. Snyder*, 9 Wend. 416. And, as a general rule, the measure of damages is the same for a breach of covenant of seizin as for a breach of covenant of quiet enjoyment. *Wilson v. Forbes*, *supra*. This rule of damages is applicable to those cases where there is an eviction from the *whole* of the land conveyed, or a want of title to the same. But where there is an eviction from, or a want of title to, *only part* of the land conveyed, and the plaintiff has been put to the necessity, as in this case, to advance money to remove an incumbrance, the measure of damages is more difficult to be fixed.

We think his honor very properly refused to give the instructions asked for by the defendant, upon the question of damages, but we are also of the opinion that there was misdirection in the instruction which he did give to the jury.

It is well settled that a party who purchases land with covenants for seizin or quiet enjoyment may protect himself by buying in the outstanding title. *Faucett v. Woods*, 5 Iowa, 460. When that is done, the measure of damages, according to the best lights we have been able to obtain on the point, is, that the damage in such a case would be limited to, or measured by, not the value of the land, but by the amount reasonably paid for that purpose, provided it did not exceed the purchase money. *Faucett v. Woods*, *supra*; *Brant v. Foster*, 5 Iowa, 287; *Wood's Mayne on Damages*, sec. 255; *Bank v. Glenn*, 68 N. C. 35. It will be seen from the rule laid down by these authorities that the price paid to extinguish the outstanding

title must not exceed the purchase money, and to determine whether it exceeded that amount it becomes necessary for a jury to ascertain the relative value of that parcel, and in doing so the rule for their guidance is not the proportion in *quantity*, as held by his honor in the court below, but such proportion as the *value* of land covered by the paramount title bears to the value of the whole land, estimated by the consideration. *Cornell v. Jackson*, 3 Cush. 506; *Morris v. Phillips*, 5 Johns. 49. But if the amount paid to extinguish the outstanding title to the twenty-four acres shall be found to be more than the assessed value of that part, then the amount so assessed shall be the measure of damages, and this latter measure applies as well to the nine acres.

Being of the opinion that the justice of the case was not reached by the jury, in consequence of the misdirection of his honor, the case must be remanded to the superior court of Alexander county, that proper issues may be submitted to the jury upon the question of damages only, with instructions as to the measure of damages in accordance with the principle announced in this opinion. Remanded.

In *Blackwell v. Justices of Lawrence County*, 2 Blackford, at p. 147, it is said: "Where a title is made that afterwards proves defective, a distinction has been sometimes drawn between the measure of damages in covenants of *warranty* and in covenants of *seizin*. In Massachusetts, Connecticut, and South Carolina, the measure of damages in covenants of *warranty*, is the value of the land at the time of the eviction. *Gore v. Brazier*, 3 Mass. 543; *Horsford v. Wright*, Kirby, 3; *Liber v. Parsons*, 1 Bay, 19; *Guerard v. Rivers*, Ib. 265. In New York, Virginia, Pennsylvania, and Kentucky, the measure of damages in such cases, is the purchase money and interest. *Staats v. Ten Eyck*, 3 Caines, 111; *Pitcher v. Livingston*, 4 Johns. 1; *Lowther v. Commonwealth*, 1 H. & M. 201; *Nelson v. Matthews*, 2 H. & M. 164; *Bender v. Fromberger*, 4 Dall. 436; *Harland v. Eastland*, Hard. 590; *Cox v. Strode*, 2 Bibb, 273; *Cosby v. West*, Ib. 568; *Booker v. Bell*, 3 Bibb, 173. The same doctrine is supported by the cases of *Morris v. Phelps*, 5 Johns. 49; *Caulkin v. Harris*, 9 Johns. 324; *Bennet v. Jenkins*, 13 Johns. 50; *Davis v. Hall*, 2 Bibb, 590. But in covenants of *seizin* the decisions have been uniform, that the purchase money and interest is the measure of damages. This rule is either directly or indirectly recognized in all the foregoing cases. See also the cases of *Marston v. Hobbs*, 2 Mass. 433; *Bickford v. Page*, Ibid. 455. When there is a covenant to convey, and an inability to perform, unless the inability arises from fraud in the covenantor the measure of damages is the same as in covenants of *seizin*. The reason that runs through all the cases of covenants of *seizin*, applies with full force to covenants to convey. See also the cases of *Rutledge v. Lawrence*, 1 Marsh. 396; *Rankin v. Maxwell*, 2 Marsh. 488, and the above cases of *Cox v. Strode* and *Davis v. Hall*, where this rule is expressly recognized. We therefore consider it well settled, that in a breach of contract to convey, the measure of damages is the consideration, or purchase money, with interest." See "Covenants," *Century Dig.* §§ 231-236, 243; *Decennial and Am. Dig. Key No. Series* §§ 125, 128.

WILLIAMS v. SHAW, 4 N. C. 630, 631. 1816.

Warranty and Quiet Enjoyment. Eviction.

[Action to recover damages for breach of covenant of warranty. Judgment against defendant in the supreme court, which had jurisdiction of the case.]

Shaw sold a tract of land to plaintiff. The deed contained this clause: "And the said John Shaw, for himself, his heirs and executors, will forever warrant and defend the said land against the lawful claims of all persons whatsoever." One McKeithan sued the plaintiff, Williams, in trespass q. c. f. for entering upon the locus in quo. Williams notified Shaw of such suit. Williams resisted McKeithan's suit but was defeated. Williams then brought this action against Shaw on the warranty, and alleged the covenant, the recovery by McKeithan, and that McKeithan owned the land by title paramount; but there was no allegation of an eviction under lawful title. Defendant filed a general demurrer.]

DANIEL, J. It is contended in support of the demurrer, that the covenant contained in the deed is nothing more than a covenant for quiet enjoyment, and as there is no allegation in the declaration of an entry and eviction under a lawful title, *by legal process*, the plaintiff is not entitled to maintain his action. It is a well settled rule that under a covenant of warranty, the plaintiff must show a lawful eviction in order to maintain his action. 2 Johns. 4; 3 Johns. 473; 7 Johns. 258; 11 Johns. 122. And the plain reason is this, if the eviction is not lawful, by some person having a better right to the possession, the covenantee would always be able, through the medium of the courts of justice, to maintain his possession and recover damages for the interruption; but if the eviction is lawful, the covenantee has no other remedy but on his covenant for quiet enjoyment. Ibid. 34, 35; Cro. Eliz. 914; Cro. Jac. 425. If the parties had inserted a covenant of *seizin* in the deed, and a breach had been assigned on that covenant, the case would have been very clear. We are now called on to say whether there does not appear sufficient in this case to authorize the plaintiff to recover on the covenant contained in the deed, under the circumstances attending it; or, in other words, whether it was necessary for the plaintiff to allege and prove that he had been evicted by a legal title in an *action of ejectment*. It appears by the case, that the plaintiff by virtue of the deed entered upon the land and had some timber cut and carried away; and the declaration states that McKeithan, by a better title, entered and held him out of possession. On an examination of the British authorities, it does not appear to be necessary for the plaintiff to show an eviction, in consequence of an action brought against him, and a recovery; it is sufficient, that he state in his declaration, that he was turned out of possession by one who had the legal title. 4 Term, 617, 620; 2 Wms. Saunders, 181. n. 10. In the present case the title was fairly tried, the defendant (Shaw) had notice to defend; whether he did or not, does not appear from the case. The land being woodland, and no actual possession, the possession then followed the title, and that the court and the jury said was in Mc-

Keithan. This is equivalent to an eviction under legal process. Demurrer overruled.

That it is necessary to allege and prove eviction under title paramount, or what is equivalent to such eviction, see *Herrin v. McIntire*, 8 N. C. 410; *Mizzell v. Ruffin*, 118 N. C. 69, 23 S. E. 927; *Webb v. Wheeler*, 114 N. W. 636, 17 L. R. A. (N. S.) 1178, and note; *Re Hanlin*, 113 N. W. 411, 17 L. R. A. (N. S.) 1189, and note. In *Wilder v. Ireland*, 53 N. C. 85, head-note 3, it is said: "A covenant of quiet enjoyment in a deed conveying a fee, is not broken if the covenantor had the title to a life estate, though his title failed as to the remainder;" and at p. 90: "As Mrs. Cook, the covenantor, had the legal estate for life, which passed to the covenantee, it follows there is no defect of title. . . . It is true there is a defect of title in respect to the remainder; but that does not amount to a breach of the covenant of quiet enjoyment—which is the only covenant the plaintiff covenantee had the precaution to take for his protection. It is his misfortune that he did not have the deed drawn by a lawyer, who would also have inserted a covenant of seizin—i. e., that the defendant covenantor had a title in fee simple and could convey in fee. Such a covenant is broken whenever there is a defect in the title; and its office is, to provide for a case like ours where the defect is in respect to the remainder or reversion." "The covenant of quiet enjoyment is a substitute for the old real warranty, the remedy upon which was by voucher, and if the demandant recovered, the tenant had judgment against the vouchee for other lands of equal value. This remedy could only be used in real actions, where the land was demanded. After the action of ejectment took the place of those actions, the courts, to give effect to the warranty, were obliged to construe it into a covenant of quiet enjoyment; but allowed the new action to retain some of the peculiarities of the remedy for which it was substituted—among others, that of considering the price as the rule of damages in lieu of 'other land of equal value.' *Williams v. Beeman*, 13 N. C. 483." *Nichols v. Freeman*, 33 N. C. at p. 104. See "Covenants," *Century Dig.* §§ 130-137, 157-168; *Decennial and Am. Dig. Key No. Series* §§ 97, 102.

RICKETS v. DICKENS, 5 N. C. 343, 347. 1810.

Form of Action on a Warranty.

[Action of covenant on a warranty of title. The case was sent to the supreme court upon this point (among others): "Will an action of covenant lie upon the warranty contained in the deed mentioned in the second count?" Dickens and Wait were the defendants. In the second count the plaintiff declared on the following clause in a deed: "And the said Dickens and Wait and their heirs . . . shall and will warrant and defend the said premises . . . to the said Rickets and his heirs forever."]

TAYLOR, J. . . . By the warranty, which is the foundation of the second count, it must be admitted that an obligation is created, which in England is enforced by a writ of *warrantia chartae*, or by voucher. The first has never been used in this state; the second is permitted only in real actions, which have never been resorted to here. Unless then an action of covenant is sustained, the party who has an acknowledged legal right is without remedy. The reason why an action of covenant lies not in England on a warranty is, that the party has a higher and better rem-

edy, which the law always compels a person to use. But even there, if that remedy cannot be afforded him, the law permits him to bring covenant; as if a term for years only be recovered out of an inheritance which has been warranted to him, as in this case, he could not vouch, for that is permitted only in real actions; nor could he bring a warrantia chartae, for that is where some person demands or claims the fee of him. Of necessity it gives a lesser remedy. This doctrine is exemplified in Yelverton's Reports, 139, *Pencombe v. Rudge*. We therefore think that the action of covenant will lie upon the warranty contained in the second count in the declaration. . . .

See "Covenant, Action of," Century Dig. § 2; Decennial and Am. Dig. Key No. Series § 2.

GRIST v. HODGES, 14 N. C. 198, 201. 1831.

When the Heir, and when the Personal Representative, of a Deceased Covenantee Must Sue for Breach of Covenant.

[Action for damages for breach of covenant of quiet enjoyment. Verdict and judgment against defendant, and he appealed. Affirmed.]

The action was brought by the administrator of the covenantee against the executor of the covenantor. The defendant contended that the action ought to have been brought by the heir of the covenantee and not by the personal representative. *The breach complained of took place before the covenantee died.* This point was ruled against the defendant.]

RUFFIN, J. . . . The last exception stated in the record is, that the action ought not to have been brought by the administrator, but belongs to the heir. This is contrary to well settled law. The case of *Lucy v. Livingston*, 2 Lev. 26, and 1 Ventris, 175, established, that for a breach in the testator's lifetime the executor and not the heir is to sue; because as no estate in the land descends to the heir, there is nothing in him to which the covenant can attach itself; and the demand had become a personal thing in the testator, and so goes to the executor, who represents the person. The case of *Kingdon v. Nottle* (1 M. & S. 355, 4 Ib. 53), has been cited to the contrary. It is to be observed that it is directly opposed to the cases of *Hamilton v. Wilson*, 4 Johns. 72, and *Bennet v. Irwin*, 3 Ib. 363. But if it were not, it is distinguishable from the case at bar. This is an action on a covenant for quiet possession, where there has been an eviction and the possession lost in the lifetime of the bargainee. Everything then was gone before either the heir or the executor could claim, except the right in one of them to recover damages—which right for the reasons given in *Lucy v. Livingston* comes to the personal representative. *Kingdon v. Nottle* was on covenants of seizin and of a right to convey. It is true this is broken as soon as made, if the covenantor had no title; and for that reason it would seem that the executor ought to sue. And so I should think he certainly ought, if that be the only covenant in the deed, and there be a total defect of title, so that

nothing passed under the deed. But if there be other covenants, as for example, for quiet possession, and some estate or interest did pass, it may make a difference. For the bargainee may choose to keep the estate, such as it is, and rely upon his title becoming good by matter subsequent, rather than treat his own title as defective, while he is enjoying under it. And where the ancestor has not himself elected to treat his title as bad, but on the contrary to depend on the other covenants, and to let it descend, or devise it as good, it would seem reasonable that the executor should not be permitted to interfere with the claims of the heir or devisee, without showing a special damage to the personal estate. This is what I suppose Lord Ellenborough might have meant by saying the declaration by the executor ought to show some special damage to the testator in his lifetime. It then becomes a personal demand to the extent of that damage. But if the testator treats it as an estate in possession, and will not consider the breach of covenant as destructive of his estate, nor give the latter up for the damages which he might claim on the former, I do not see that the executor can exercise that power against the heir or devisee, or (for it would go thus far) even against an alienee. The executor ought not to make that personalty for his own benefit, which the testator disposed of as realty, unless there be no method by which those who claim it in the latter character could obtain redress for the final loss of the estate. But here, in a case of covenant for quiet possession, broken in the testator's lifetime, the whole loss is then incurred, and there can be nothing but damages, and they of course attach to the person. . . . Affirmed.

In *Martin v. Baker*, 5 Blackford, 232, it is held that covenants of seizin, against incumbrances, and of quiet enjoyment, run with the land, and actions on them may be maintained by the assignee, devisee, or heir, of the covenantee; and that the personal representative cannot maintain an action thereon, unless he show some special damage to have accrued to the covenantee in his lifetime. The opinion admits that there are authorities to the contrary as to the covenant of seizin. The opinion is by Blackford, J., and is an able discussion of the question and review of the authorities and reasons pro and con. The case of *King v. Jones*, 5 Taunton, 418, inserted immediately post, is fully approved. See "Executors and Administrators," Century Dig. § 303; Decennial and Am. Dig. Key No. Series § 49.

KING v. JONES, 5 Taunton, 418, 427-428. 1814.

When the Heir and when the Personal Representative Must Sue for Breach of Covenants. Covenants of Further Assurance.

[Action by the heir of the covenantee for breach of a covenant for further assurance. Verdict against defendant, and he moved in arrest of judgment. Motion denied. The facts appear in the opening of the opinion.]

HEATH, J. This is a motion in arrest of judgment. This action appears to have been brought by the plaintiff as heir of his father, against the defendant as executor of Richard Griffith, upon the

covenant of the testator; and the pleadings disclose these facts: By lease and release of the 6th and 7th of October, 1794, T. Worge and Griffith and his wife conveyed certain premises to J. King; and Griffith covenanted with J. King that he and Mary, his wife, would do all reasonable acts for the further conveyance of the premises. The pleadings further disclose, that there was a request made by J. King, the ancestor, to Griffith, to levy a fine; that no fine was levied; that J. King the ancestor died; and the premises descended to the plaintiff as the heir of J. King, and that the plaintiff has since been evicted; and the question is, whether the plaintiff can sustain this action. It was admitted that this is a covenant which runs with the land. Under this covenant the heir might call for further assurances, even to levy a fine; he certainly might have called for the removal of a judgment, or other incumbrances. It appears that J. King, the ancestor, was a willing purchaser; he paid his purchase money, relying on the vendor's covenant; he required him to perform it, but gave him time, and did not sue him instantaneously for his neglect, but waited for the event. It was wise so to do, until the ultimate damage was sustained; for otherwise he could not have recovered the whole value; the ultimate damage, then, not having been sustained in the time of the ancestor, the action remained to the heir (who represents the ancestor in respect of land, as the executor does in respect of personalty), in preference to the executor. These are the principles of the case: how are the authorities? There are few old authorities directly in point, but there is one recent case that is directly applicable. The old authorities are, Fitzherbert, N. B. Writ of Covenant, p. 341, C. "if a man make a covenant by deed to another, and his heirs, to enfeof him and his heirs of the manor of D. etc., now, if he will not do it, and he to whom the covenant is made dieth, his heir shall have a writ of covenant upon that deed:" he cites the case of Sir Anthony Cook, Dy. 337, also reported in Anders. 53. (Here his lordship read the case.) The recent decision is that of *Kingdon v. Nottle*, last Easter term, 1 Maule & Selwyn, 355, wherein the court of King's Bench held that the executor could not recover upon a breach of defendant's covenant with the testator, that he, the defendant, had a good title to convey, the testator having sustained no damage in his lifetime, therefore it follows that the heir might so recover. The court there follow the doctrine of *Lucy v. Livingston*, and they advert to the circumstance which differs that case from this, that there the ultimate damage was sustained in the time of the ancestor, and therefore the land did not descend to the heir; consequently the covenant, which runs with the land, did not descend to the heir. The consequence is, that this judgment ought not to be arrested, and that the rule must be discharged.

This case is approved by later English authority and in *Martin v. Baker*, 5 Blackford, 232, cited in the note to the next preceding case. See "Executors and Administrators," Century Dig. §§ 301-305; Decennial and Am. Dig. Key No. Series §§ 49-51.

TUITE v. MILLER, 10 Ohio, 382, 383. 1841.

Remedy in Equity on Covenants. Further Assurance.

[Bill in chancery asking for relief against the covenantor in a covenant of warranty. Bill dismissed.]

LANE, C. J. There is a well established chancery jurisdiction over certain covenants. The chancellor will exercise a restraining power where the covenantor, contrary to his stipulation, disturbs the tenant by his own act; and he will enforce the specific performance of the covenant for further assurance. But we find no case of interference on this side the court, in relation to the covenant of warranty. This absence of precedent, although not conclusive, is a strong argument against the plaintiff's right to relief. . . .

See "Covenants," Century Dig. § 170; Decennial and Am. Dig. Key No. Series § 104.

SEC. 18. MORTGAGEE'S REMEDIES.

SLAUGHTER, Assignee, v. FOUST et al., 4 Blackford, 379, 381. 1837.

Mortgagee's Remedies at Law and in Equity. Foreclosure. Parties.

[Bill in equity to foreclose a mortgage. Bill dismissed. Plaintiff appealed. Reversed.]

Plaintiff purchased two notes secured by mortgage, and brought this bill against the widow, heirs at law, and administrator of the deceased mortgagor. The point was made (among others not necessary to consider), that the *personal representative* was improperly joined as a defendant. That portion of the opinion which discusses this point is inserted. The remedies afforded a mortgagee are explained.]

DEWEY, J. . . . The demurrer should have been allowed, for another reason, as to one of the defendants—the administrator: he should not have been a party to the suit.

A mortgagee has three modes of enforcing satisfaction of his demand, to which he may resort concurrently, or separately, at his election: he may bring ejectment and thus acquire the rents and profits of the mortgaged premises until his debt be satisfied; or he may sue at law on the evidence of his claim, in which case he looks, in the first instance, to the personal property of the mortgagor; or he may, by a proceeding in chancery, enforce his lien on the land. The result of this latter process, in England, is generally a strict foreclosure of the equity of redemption of the mortgagor, and the investment of an absolute estate in the mortgaged premises in the mortgagee. Under the law of this state the equity of redemption is also foreclosed; but the land is *sold* for the satisfaction of the debt, and the overplus arising from the sale, if any, is returned to the mortgagor. This difference in the result, however, does not change the character of the proceeding; which, in both countries, is *in rem*, and has in view the satisfaction of the debt from the land. If the mortgagor be dead, the remedy is still

against the land and seeks not to meddle with the personal assets. It is, therefore, well settled by the English practice, that the heir, in whom is the equity of redemption, is the only proper defendant in a bill of mere foreclosure. 3 Powell on Mort. Rand's Ed. 969; Bradshaw v. Outram, 13 Ves. 239; Duncombe v. Hansley, 3 P. Will. 333, n.

It is true that, in England, there are some exceptions to this rule of strict foreclosure; as, for instance, when in consequence of the inadequacy of the security arising from the mortgage, the mortgagee, in his bill, prays an account of the personal estate as well as a sale of the land. To such a bill the executor should be a party with the heir; but the reason of joining them as defendants is not because a sale of the land may be decreed, but because, in addition to the land, the bill seeks to appropriate the personal assets, of which the executor is the representative, to the satisfaction of the debt. 3 Powell on Mort. Rand's Ed. 969; Daniel v. Skipwith, 2 Bro. C. C. 155; Fell v. Brown, *Ib.* 276. It has also been held that where the bill contained an averment, that the executor had been in the receipt of the rents and profits of the mortgaged premises, and had paid the interest and part of the debt, it was necessary to make him a party. Cholmondeley v. Clinton, 2 Jac. & Walk. 135. The case before us does not come within the reasons of these exceptions. They aimed at the personalty as well as the pledged land. This bill affects only the latter.

In Virginia and Maryland, the law respecting the sale of mortgaged premises on a bill of foreclosure is similar to ours. In each of those states, it has been held that it is not proper to join the personal with the real representative of a deceased mortgagor, in proceedings to enforce the lien. Graham v. Carter, 2 Hen. & Munf. 6; David v. Grahame, 2 Harr. & Gill, 94.

It has been urged that our probate act, by enabling the executor or administrator to convert the real estate of a decedent into assets, when the personal property is insufficient to pay his debts, has rendered it necessary to make the personal representative a party to a bill of foreclosure and sale. There would be strength in this position, if that law destroyed the lien of a mortgagee upon the land mortgaged, or compelled him first to look to the personal estate. In our opinion it does neither; but on the contrary, we think the object of its provisions on this subject, was to guard and protect specific liens on the real estate of a deceased person. Nor do we conceive that the right of the mortgagee to proceed to foreclosure and sale, without making the personal representative a party, can interfere with the contingent right of the latter to convert the estate into assets for the payment of debts, whenever he may discover the inadequacy of the personalty for that purpose.

It not being necessary or proper to make the administrator a party to the bill, this suit is not embraced in that provision of the statute, which forbids an action to be brought against an executor or administrator until after the lapse of one year from the date of his appointment. Under this view of the subject the plea is a nullity.

Per Curiam. The decree is reversed with costs, etc. Cause remanded, etc. The demurrer, except as to the administrator, to be disallowed, and the plea set aside.

"The jurisdiction of equity in mortgages is simply to decree redemption or foreclosure. To that end, the court directs accounts to be taken of the sum due, in order that it may be known how much the mortgagor must pay to entitle him to a reconveyance, or to prevent his equity of redemption being foreclosed. Of late years a beneficial practice has gained favor, until it may be considered established in this country, not absolutely to foreclose in any case, but to sell the mortgaged premises and apply the proceeds in satisfaction of the debt; if the former exceed the latter, the excess is paid to the mortgagor; if it fall short, the creditor then proceeds at law on his bond or other legal security, to recover the balance of the debt. *Gillis v. Martin*, 17 N. C. 470. In *Lansing v. Goelet*, 9 Cowen, 346, Chancellor Jones treats the subject much at large and with great learning." *Fleming v. Sitton*, 21 N. C. at p. 623. As to making the personal representative of the deceased mortgagor a party, see note to the next succeeding case, and *Mebane v. Mebane*, 80 N. C. 34, inserted post in this section. See "Mortgages," *Century Dig.* § 1244; *Decennial and Am. Dig. Key No. Series* § 419

GAMMON v. JOHNSON, et al., 126 N. C. 64, 35 S. E. 185. 1900.

Parties to Foreclosure Proceedings. Disposition of Surplus.

[Action to foreclose a mortgage. Order allowing a creditor, having a lien by docketed judgment, to be made a party. Plaintiff excepted and appealed. Affirmed and appeal dismissed.]

CLARK, J. In general, all incumbrancers, whether prior or subsequent incumbrancers, as well as the mortgagor, should be parties to a proceeding for foreclosure; and judgment creditors as well as mortgagees. *Hinson v. Adrian*, 86 N. C. 61; *Le Due v. Brandt*, 110 N. C. 289, 14 S. E. 778. This is because the liens, by the sale, are transferred from the corpus to the fund into which it is converted, with their respective priorities preserved, and to be asserted in the decree for distribution. *Cannon v. Parker*, 81 N. C. 320. "In effect, the lien of a docketed judgment is in the nature of a statutory mortgage" (*Manufacturing Co. v. Wilcox*, 111 N. C. 42, 15 S. E. 885), though the judgment conveys no estate in the land (*Baruch v. Long*, 117 N. C. 509, 23 S. E. 447). The lien of the judgment creditor being transferred to the proceeds of sale, subject only to the priority of the plaintiff's mortgage, the judgment creditor was a proper party, as against the defendant, to receive the amount due him out of the surplus after the payment of plaintiff; else, such surplus would go into the hands of the defendant, to the destruction of the lien of the judgment creditor, who was also a proper party, as against the plaintiff, that he might assert the credits which should be charged against the plaintiff by reason of timber cut on the land, since by so doing the surplus to be applied to the judgment, as the second lien, will be swollen. This is not bringing a new cause of action, but it is a necessary step in the just and proper distribution of the fund according to the priorities

of the liens upon the land, whose sale produced the fund. The petition set out the judgment creditor's ground for asserting a credit to be charged against the plaintiff, and, if denied, an issue is presented for settlement before the fund is distributed. It is not a debt against the plaintiff, which would be an alien cause of action, but a claim of a larger share in the fund because of a credit which should be charged against the first lien.

The petition to be made an additional party does not controvert the cause of action set up in the plaintiff's complaint, and hence is not required to be verified. Code, §§ 189, 273. Indeed, upon the facts being made known to the court in any satisfactory manner, it could and should, *ex mero motu*, have ordered the judgment creditor made a party, that there should be a full and complete settlement of the rights of all parties holding liens upon the fund. *Pitt v. Moore*, 99 N. C. 85, 5 S. E. 389; *Kornegay v. Steamboat Co.*, 107 N. C. 115, 12 S. E. 123, and *Williams v. Kerr*, 113 N. C. 306, 18 S. E. 501, relied upon by the plaintiff, hold that subsequent incumbrancers, while proper parties, are not necessary parties in all cases.

The appeal is premature, for the facts as to the alleged credit should have been passed upon, and the party against whom it was found might not have appealed. The plaintiff should have entered his exception to the interlocutory order, and have brought up his appeal only from the final judgment distributing the fund, if the disputed credit was found against him. The point involved in this appeal, however, has been passed upon, as has sometimes been done. *Milling Co. v. Finlay*, 110 N. C. 411, 15 S. E. 4; *Clark's Code* (3d ed.), § 548. But it must be entered. Appeal dismissed.

For disposition of the surplus after the satisfaction of the mortgage debt, see *Kitchens, v. Jones*, 113 S. W. 29, 19 L. R. A. (N. S.) 723, and note; *Harrington v. Rawls*, 136 N. C. 65; *Horr v. Herrington*, 98 Pac. 443, 20 L. R. A. (N. S.) 47, and note; 27 Cyc. 1767.

"It would seem on reason and principle, if not on authority," that the personal representative of a deceased mortgagor is a necessary party to an action of foreclosure, *McGowan v. Davenport*, 134 N. C. mid. p. 533, 47 S. E. 27; so is the heir of the mortgagee, *Hughes v. Gay*, 132 N. C. 50, 43 S. E. 539. The personal representative of a deceased mortgagee cannot recover the land in ejectment. *Ibid.* If the bill of foreclosure seeks a sale of the mortgaged property, the personal representative of the deceased mortgagor is a necessary party. *Mebane v. Mebane*, 80 N. C. 34, inserted post in this section. See "Mortgages," *Century Dig.* §§ 1268-1291; *Decennial and Am. Dig. Key No. Series* §§ 426-438.

CREDLE v. AYERS, 126 N. C. 11, 35 S. E. 128. 1900.

The Several Remedies of Mortgagee. Cumulative Remedies. Ejectment. Rents and Profits.

[Action to recover possession of land. Judgment against defendant, and he appealed. Affirmed.]

Ayers bought the locus in quo from Credle and agreed to pay for it in installments. The first installment being due and unpaid, Credle brought this action. The defendant gave the bond required of defendants in actions of ejectment. Afterwards the judge ordered this bond to be in-

creased to \$5,000. The plaintiff contended for judgment for the possession of the land and for the actual rental value thereof. The defendant insisted that plaintiff was not entitled to any rents, but could only recover the balance of the purchase money and have an order for the sale of the land for the payment thereof. By agreement entered of record the inquiry as to rents was limited to the year 1895.]

CLARK, J. The vendee having defaulted in payment of the first installment of the purchase money, due November, 1894, the vendor and their mortgagee, Makely, who had joined in the contract of sale) brought an action of ejectment in December, 1894, at the end of 30 days thereafter, under the terms of the contract. The plaintiffs could have brought their action either (1) for possession of the land; (2) for sale and foreclosure; or (3) in personam, for judgment for the debt; or for all three. They elected to take the first, and have sued for possession and damages for withholding. *Allen v. Taylor*, 96 N. C. 37, 1 S. E. 462; *Silvey v. Axley*, 118 N. C. 959, 23 S. E. 933.

The defendant contends that he is not liable for mesne profits, and relies upon *Killebrew v. Hines*, 104 N. C. 182, 10 S. E. 159, 251; *Carr v. Dail*, 114 N. C. 284, 19 S. E. 235; and *Hinton v. Walston*, 115 N. C. 7, 20 S. E. 164. Those cases hold that a vendee or mortgagor, before or after breach, who is permitted to retain possession, is entitled to the rents and profits (unless there is an express stipulation in the contract or mortgage to the contrary, as in *Crinkley v. Egerton*, 113 N. C. 444, 18 S. E. 669; *Jones v. Jones*, 117 N. C. 254, 23 S. E. 214); but here the withholding by the defendant, after action brought in December, 1894, was wrongful, and he became liable, like any other defendant in ejectment, for the mesne profits. For what other purpose than to secure such mesne profits is the defense bond required, under Code, § 237? Had the bond not been given, or not been raised to \$5,000, as required by the court (*Rollins v. Henry*, 77 N. C. 467), the plaintiffs would have had possession by default (Code, § 390; *Norton v. McLaurin*, 125 N. C. 185, 34 S. E. 269, and cases cited); or if the defendant had been allowed to defend without the bond, by reason of poverty, a receiver would have been appointed to secure the rents and profits (*Horton v. White*, 84 N. C. 297). This case differs from *Leach v. Curtin*, 123 N. C. 85, 31 S. E. 269, in that possession is here sued for and demanded in the complaint. The defendants surrendered possession to Makely in May, 1896. That did not release the defendant's liability for rents and profits for 1895, during the wrongful withholding, unless there had been a stipulation to that effect. Otherwise, any tenant in possession could wrongfully withhold possession of land after action brought, and enjoy the rents and profits till forced to trial, and then release himself and bond from liability for mesne profits by abandoning possession. In such case the plaintiffs take judgment for the mesne profits till they got possession, and for the title, but not for the possession. *Woodley v. Hassell*, 94 N. C. 157; *Clark's Code* (3d ed.), § 384. Under the former practice, in actions of ejectment, damages were recoverable only up to the time action was begun, but under the present system they are

recoverable up to the trial. *Pearson v. Carr*, 97 N. C. 194, 1 S. E. 916; *Arrington v. Arrington*, 114 N. C. at page 120, 19 S. E. at page 279; 10 Am. & Eng. Enc. Law (1st ed.), 537; *Suth. Dam.* § 848. Here, up to surrender of premises, and by agreement in the order of reference, these are restricted to the rents and profits for the year 1895. . . . Affirmed.

See *Allen v. Taylor*, 96 N. C. 37, 1 S. E. 462, inserted at sec. 20, post. See also note to *Doe v. Mace*, 7 Blackford, 2, 3, inserted ante, at sec. 3. See "Vendor and Purchaser," *Century Dig.* §§ 832-843; *Decennial and Am. Dig.* Key No. Series §§ 296-300; "Mortgages," *Century Dig.* § 482-491; *Decennial and Am. Dig.* Key No. Series § 213.

HARSHAW v. McKESSON, 66 N. C. 266. 1872.

Foreclosure when the Debt Secured is Payable in Installments.

[Action to foreclose a mortgage. Judgment against defendant, and he appealed. Reversed.]

The mortgage debt was payable in installments. The action was brought before all the installments were due, but after one installment was due. The mortgage provided that if the mortgagor chose to pay a part of the debt at any time, he could do so; but there was no clause providing that all the installments should fall due upon default in the payment of any one thereof.]

DICK, J. The mortgage executed by the defendant, William F. McKesson to Jacob Harshaw, fixes the time of payment of the debts secured, at three, four and five years in equal installments. This action was commenced before the time of redemption had expired, and one of the questions presented for our consideration is, whether this action can be maintained?

A court of equity will never decree a foreclosure until the period limited for payment of the money be passed, and the estate in consequence thereof forfeited to the mortgagee, for it cannot shorten the time given by the express covenant and agreement between the parties, as that would be to alter the nature of the contract to the injury of the party affected. 3 *Powell on Mort.* 965.

If this mortgage had expressly stipulated that the estate should be forfeited on the failure to pay the specified installments of the debts, then on said failure the mortgagee might have called for his money, or proceeded immediately to foreclose. 2 *Eden*, 197. The time of payment being delayed was evidently the inducement which caused the mortgagor to enter into the contract, and the security thus furnished was satisfactory to the mortgagee. The fact that the mortgagee did not commence his proceedings to foreclose upon the failure of the first payment shows that he understood the agreement as is insisted upon by the defendants. If the agreement of the parties was, that the estate should be forfeited upon the failure of the first payment, it could easily have been inserted in the contract.

The plaintiffs, if they had seen proper, might have proceeded, in an action at law, to recover the installments as they became due,

but they could not have proceeded to foreclose until the day of redemption was passed, and the decree of his honor in this respect is erroneous. As this action was commenced before the plaintiffs were entitled to foreclose the mortgage, the proceedings must be dismissed. Judgment reversed.

See *Brame v. Swain*, 111 N. C. 540, 15 S. E. 938, inserted at sec. 20, post, sustaining the principal case. See 15 L. R. A. (N. S.) 590; 12 Ib. 1190; 37 L. R. A. 737; *McIntosh on Cont.* 588 and note. See "Mortgages," *Century Dig.* § 1162; *Decennial and Am. Dig. Key No. Series* § 397.

MEBANE v. MEBANE, 80 N. C. 34. 1879.

The Judgment in Foreclosure. Sale. Report. Confirmation. Married Woman's Land Mortgaged for Husband's Debt. Parties.

[Action to foreclose a mortgage. The court ordered a sale of the mortgaged property. The property belonged to the wife of the mortgagor, but the debt secured was the debt of the husband. The judgment of foreclosure gave no time for redemption; no report of the sale was required, but the sale was left to the uncontrolled discretion of the commissioner appointed to make the sale; the husband was dead, but his personal representative was not made a party to the action. After the sale had been made and the land conveyed by the commissioner to the plaintiff, who was the purchaser at the sale, the defendant moved to set aside the sale and for leave to answer the complaint. She had not answered at the proper time, and the judgment of sale had been rendered by default. She offered excuses for her neglect to answer, and showed to the satisfaction of the court that she had a meritorious defense. The judge vacated the judgment of foreclosure and the sale made thereunder. The plaintiff appealed. Affirmed.]

SMITH, C. J. The mortgage on its face shows the debt to be that of the husband alone, and for which defendant was in no manner liable, and contains a clause vesting, on the debtor's default, a power of sale in the mortgagee. The aid of this court, while not necessary for the plaintiff's relief, is nevertheless invoked to give effect to this provision. In directing and controlling the exercise of the power, the court will be guided by those rules of equitable proceedings, not inconsistent with the deed, which are observed in decrees of foreclosure and sale of property conveyed in mortgages without such power. The judgment in this case does not conform to those rules.

1. The foreclosure is absolute and no time is allowed the mortgagor to pay the debt and redeem. This is not in accordance with the established practice in courts of equity. "The usual course pursued on foreclosure," says an eminent writer on the law of mortgages, "is for the mortgagee to file his bill praying that an account may be taken of principal and interest, and that the defendant may be decreed to pay the same with costs by a short day to be appointed by the court, and in default thereof he may be foreclosed his equity of redemption." And this time is usually six calendar months. *Cont's Law of Mort.* 492

In *Clark v. Reynolds*, 8 Wallace 318, a bill for foreclosure was

filed in the circuit court of the United States for the district of Kansas, and a decree was entered giving no time to pay and redeem, and making the foreclosure unconditional and absolute at once. In delivering the opinion in the supreme court, Mr. Justice Swayne says: "The settled English practice is for the decree to order the amount due to be ascertained and the costs to be taxed, and that upon the payment of both within six months the plaintiff shall reconvey to the defendant, but in default of payment within the time limited, that the said defendant do stand absolutely debarred and foreclosed of and from all equity of redemption of and in said mortgaged premises. We have been unable to find any English case where in the absence of fraud, a time for redemption was not allowed." And he adds: "In the light of these authorities we are constrained to hold the decree in the case before us fatally defective." The judgment under consideration is in almost identical words and falls under like condemnation. So in this state, Pearson, C. J., says: "The decree of sale is always after reasonable notice of the decree, say three months, in order to give the mortgagor an opportunity to raise the money and prevent a sale." *Capehart v. Biggs*, 77 N. C. 261.

2. No report of sale is required to be made to the court, in order that it may be set aside or confirmed and the title ordered, but this is left to the uncontrolled discretion of the commissioner. This is entirely at variance with the nature of judicial sales. The commissioner acts as the agent of the court and must report to it all his doings in execution of its order. The bid is but a proposition to buy, and, until accepted and sanctioned by the court, confers no right whatever upon the purchaser. The sale is consummated when that sanction is given and an order for title made and executed. This power will not be delegated to the agent who exposes the property to public biddings. 2 Jones' Mort. secs. 1608, 1637; Rorer on Jud. Sales, 55, 58.

3. The debt being due from the defendant's husband alone, his personal representative would seem to be a proper if not a necessary party. It is true it has been held in *Averett v. Ward*, 45 N. C. 192, that the personal representative of the mortgagor and debtor is not a necessary party in a bill to foreclose, or for sale of the premises. But the court adds: "In this state the personal representative of the mortgagor may be made a party, but is not a necessary party." The rule is somewhat differently stated by others. In *Fisher on Mort.* 84 Law Lib. 159, it is said: "The personal representative of the mortgagor is not a necessary party for foreclosure simply, or redemption; but if the object of the suit be to obtain a sale under the mortgage by way of trust for sale, or on the bill of an unpaid vendor of real estate or otherwise, . . . the personal representatives of the mortgagor are necessary parties because they are interested in the proceeds of the sale or in the taking of the accounts." So it is declared that when a wife joins her husband in a mortgage of *her own estate*, and the money is applied for the husband's benefit, the personal estate of the husband will be first applied in payment of the mortgage. 1 Greenl. Cruise, 648.

It would seem to be peculiarly appropriate that the personal representative of the only person owing the debt and interested in reducing its amount should be before the court and be bound by its decree, and thus the measure of his liability to the plaintiff, whose property may be sold to pay it, be definitely ascertained and determined.

We have examined the judgment and pointed out some of its departures from the established usage and practice in courts where the relief here sought is afforded, as bearing upon the question of power and propriety of setting it aside. In form the judgment is *self-executing and final*, leaving nothing further to be done by the court. But if it had been drawn in the usual form, it would have been an *interlocutory order which is always subject to revision and control*. We see no reason why under such circumstances it may not be dealt with and corrected as if it were what it should have been. The power to modify, change or vacate an interlocutory order made in the progress of a cause is well settled both upon principle and authority. Unlike a judgment at law, it may be moulded and shaped to meet the exigencies of each particular case. *Ashe v. Moore*, 6 N. C. 383; *Worth v. Gray*, 59 N. C. 4.

4. But a case not unlike ours was before the court at last term, *Shinn v. Smith*, 79 N. C. 310. The facts so far as necessary to the elucidation of the point we are now considering are these: Smith being indebted, he and his wife united in the execution of a deed conveying lands belonging to her as well as to him to secure the indebtedness. Shinn, an outside creditor, brought his suit against the parties to the mortgage to compel a foreclosure, so that the surplus of the proceeds of sale might be applied to his claim. An order was obtained directing a sale, *and that the wife's land should be sold first*. The manifest effect and purpose of the order were to have the property of the wife, a surety only, applied in exoneration of the lands of the principal debtor, and that his might be subjected to the payment of Shinn's judgment. The wife on being advised of the nature of this order applied to the court and was made a codefendant. The order of sale was then modified, but, as Shinn alleged, still leaving her property in the front rank of responsibility for the debt due to King. On the proper construction of this modified order Reade, J., delivering the opinion of the court says: "If the modified order in unmistakable terms directed the sale of the wife's land to pay the plaintiff's debt for which neither she nor the land was bound, it would have been erroneous."

Affirmed.

The judgment may, and probably should, be in personam for the mortgage debt, and should also order a sale for foreclosure. The judgment so rendered in personam now becomes a lien on *other lands* of the mortgagor from the date of its being properly docketed. It was otherwise under the practice before the Code. *McCaskill v. Graham*, 121 N. C. 190, 28 S. E. 264. The judgment in personam for the debt is a *final* judgment, while the judgment for the sale under foreclosure is *interlocutory*. *McCaskill v. McKinnon*, *Ibid.* 192, 28 S. E. 265. The old practice in equity was to decree a strict foreclosure; but afterwards that was dropped and a sale was ordered and the proceeds applied to the mortgage debt. If a balance

was left after such application, the mortgagee proceeded in a court of law to recover such balance. *Fleming v. Sitton*, 21 N. C. 621. See "Mortgages," Century Dig. §§ 1282, 1423, 1436; Decennial and Am. Dig. Key No. Series §§ 427, 488, 491.

PRITCHARD v. ASKEW, 80 N. C. 86. 1879.

Foreclosure Sale. Raising the Bid.

[Motion in the supreme court to open the biddings and resell land sold by a commissioner under a judgment of that court. The sale was reported and the confirmation recommended by the commissioner. Resale ordered. The other facts appear in the opening of that part of the opinion which is here inserted.]

DILLARD, J. . . . At this term of the court the plaintiff moves to be allowed to put in an advance bid of ten per cent. upon the price at which the purchasers bought the land, and offers to secure the same with his bond and approved security, and in case the biddings are opened by this court, he agrees at the resale to start the biddings at the advance now offered; and at the same time, the said purchasers oppose the motion to open the biddings and move on their part for a confirmation of the sale which has been had. The parties support their respective motions by affidavits, and it now becomes our duty to consider the matter submitted to our decision, and thereon to decide, as we may be authorized in view of justice to the parties interested, and in accordance with the rules observed in our courts in the case of judicial sales.

In sales of the character of the one under consideration, the bidder is never considered a purchaser until the sale is reported and confirmed. He is to be taken as becoming the best bidder, subject to the understanding in all cases that the court may confirm the sale or set it aside and order a resale, as in the exercise of a sound discretion it may determine to be right and proper. *Wood v. Parker*, 63 N. C. 379; *Ex parte Bost*, 56 N. C. 482; *Ashbee v. Cowell*, 45 N. C. 158. The court has the power to set aside sales made in pursuance of its authority, either for the owner, or at the instance of the purchaser; but as a matter of policy it is slow to do so and is careful not to open biddings unless there be some special circumstances, such as unfairness in the conduct of the sale, want of proper notice of the time and place of sale, fraud in the purchaser, and palpable inadequacy of price, and similar grounds. *Rorer on Jud. Sales*, ch. 10, secs. 394-441.

In this case it appears that the sale was advertised for the 4th of January, and afterwards changed to the 6th, and that plaintiff had arranged with Mr. Hinton to attend and buy the land, and allow him to have it on reimbursing him, but the inclemency of the weather was very great, and so much ice in the roads and streams as to prevent the attendance of said Hinton and disable plaintiff to reach the place of sale although he endeavored to do so. From the facts and circumstances, we think it may fairly be presumed that the sale came off without a fair attendance of bidders, and certainly without the presence of Hinton in person, or the plaintiff as

his agent, who was prepared to give, and is yet willing to give ten per cent. advance, and perhaps more, on the bid of the purchasers that day, *and hath secured the payment in case a resale is ordered.*

We recognize it as good policy in the courts to maintain judicial sales, and to that end, not to open the biddings unless for some cause palpably sufficient; but in this case the purchaser ought to be content to get the debt he represents, and to allow the plaintiff the benefit of any excess the land may bring at another sale more favorable to a better competition of bidders. Justice should not be sacrificed to policy.

There is no intimation of anything unfair at the sale by the purchaser or any other person, but the plaintiff had the purpose to be present with a friend, and to buy in the property at a sum in excess of that at which the property was struck off. And he attempted to be present and failed without default imputable to him, and it being reasonably to be inferred from the extreme severity of the weather that others were thereby hindered from attending the sale, it is ordered that the sale reported to this term be set aside, and the release of the bonds executed by the purchaser, and the money paid in by him be returned; and that the clerk do resell the land on the terms prescribed in the original decree, *opening the biddings at the advance bid of the plaintiff*, and that he report to the next term of this court. Resale ordered.

See "Judicial Sales," Century Dig. § 79; Decennial and Am. Dig. Key No. Series § 41.

FRONEBERGER v. LEWIS, 79 N. C. 426, 435, 436. 1878.

Mortgagee's Purchasing at Foreclosure Sale.

[In the course of an opinion discussing the legal and equitable status of a fiduciary who purchases the trust property at a sale made by himself, is the following:]

READE, J. . . . At law a trustee cannot buy at his own sale, because to constitute a sale, there must be two persons, a vendor and a vendee. So at law when there are two persons, that is, when a second person is substituted to make the sale or to buy, the legal requirement is supplied and the sale is valid. And therefore it is, that a trustee designing a personal advantage substitutes or procures to be substituted such second person, when, like the ostrich, having hid his own head, he thinks he cannot be seen. But equity is clear sighted and looks at the substance, and the substitution of the second person makes not the slightest difference, although it does make the sale valid at law.

There is a class of cases which have to be distinguished from the general rule as follows: Wherever the trustee has a personal interest in the trust property, there, of course, he must have the right to protect it, and if to bid for and buy it be *necessary* to protect it, he must be allowed to do it for that purpose. The case stated by

Judge Boyden was an instance of this. There, the trust property, land, belonged not to the wards alone, but to the wife of the guardian, and, as Judge Boyden says, he had the right to bid to keep the land from being sacrificed. The same is true where a mortgagee sells land to pay his debt, and the property is likely to be insufficient, and he will lose his debt unless he bid for the property. In these cases, and the like, it is usual and perhaps necessary for "the trustee and beneficiary to obtain leave of the court to bid, or else to have a confirmation with full knowledge of all the facts appearing."

The only other exceptions are where the cestuis que trust consent or ratify with full knowledge of all the facts. In the case before us there is not a single favorable circumstance for the defendant. No necessity is shown for having a third party to make the sale. No reason why the officer of the court was not appointed. No evidence as to what was reported to the court, or that it was made known that the administrator had bought. The price was one-third of the value. No offer to surrender the land or to account for its value. It is suggested that the defendant ought to be allowed to surrender the land instead of being charged with its value. Doubtless that is usual at the *election* of the cestui que trust. But there is nothing to show the condition of the land. It may have been spoiled or it may have been improved. There can be no injustice to the defendant in making him pay the simple value of the land with interest, especially as he has never offered to surrender. Indeed his motion is to hold the land, not at the value ascertained already, but at a value to be ascertained by a reference.

For the proper form and substance of judgments in foreclosure suits, see *Hyman v. Devereux*, 63 N. C. 624; *Nimrock v. Scanlin*, 87 N. C. 119; *Ellis v. Husseg*, 66 N. C. 501; *Flinn v. Smith*, 79 N. C. 310; *Whiting v. The Bank*, 13 Peters (U. S.) at p. *15; *McQueen v. Smith*, 118 N. C. 569, 24 S. E. 412; Rev. § 469(7). See "Executors and Administrators," Century Dig. § 1500; Decennial and Am. Dig. Key No. Series § 365; "Mortgages," Century Dig. § 1518; Decennial and Am. Dig. Key No. Series § 516.

SEC. 19. REMEDIES OF THE MORTGAGOR AND HIS ASSIGNS.

KEMP v. MITCHELL, 36 Ind. 249, 254, 255. 1871.

Bill for Redemption. Form, etc.

[This was an action to foreclose a mortgage. Kemp was made a party defendant because he had originally made the mortgage in question; had sold the mortgaged property subject to the mortgage; and then had repurchased it, the mortgage still being unpaid. Kemp filed a cross bill (which the court treats as a Bill for Redemption), and the plaintiffs, Mitchell et al., demurred thereto. Demurrer sustained. Judgment against Kemp, and he appealed. Affirmed.]

DOWNNEY, J. . . . We are inclined to regard the cross complaint as one to redeem the mortgage, and regarding it as such, the question is, is it sufficient? What are the essentials of such a

complaint? As it is equitable relief which is sought, we must, in the absence of any statutory provision on the subject, look to the approved authorities on the subject of equity pleading for an answer to these questions. If the deed was but a mortgage, as claimed by Kemp, then he was bound to pay the money at the time stipulated, or, according to the doctrine of the courts of law, his right to pay off the debt and have his land back was gone. But in equity the rule was different. There he might come afterward with the money and interest, and, on paying, have a return of the pledge. If the mortgagee refused to accept it, he might file his bill to redeem, and, praying the court to take the account, and offering to pay what might be found due, the court would take jurisdiction, ascertain the amount, and compel the mortgagee to accept it and give up his claim upon the mortgaged property. But though it was not necessary that the party filing such a bill should actually bring the money into court, in the first instance, it was necessary that he should offer to pay the amount which he acknowledged to be due, or which the court should find to be in arrear.

"It is a uniform requirement in regard to bills to redeem, that the bill should contain a formal offer to pay whatever sums the plaintiff admits to be due; and the prayer, that upon payment of whatever sums might be found due upon taking the accounts between the parties, the mortgagee or other incumbrancer might be decreed to reconvey the property, is not sufficient. Such a bill was held bad upon demurrer, and leave granted to amend by inserting a formal offer to pay. It is not important that the offer to pay should name any sum which the plaintiff admits to be due, although in point of practice a definite sum is commonly tendered in such cases, in order to recover costs, if the sum found due falls below the sum tendered. But the bill must contain a formal offer to redeem, by paying whatever sum shall be found due upon taking the account." Story, Eq. Pl. s. 187 (a); *Harding v. Pingey*, 10 Jur. (N. S.) 872

"A bill in equity must state a case upon which, if admitted by the answer, a decree can be made; therefore a bill to redeem from sale upon execution of a right of redemption, which contains no averment of readiness to pay and an offer to pay, is bad on demurrer, for want of equity." *Perry v. Carr*, 41 N. H. 371. . . . The judgment is affirmed, with costs.

As to who is entitled to redeem, see 2 L. R. A. (N. S.) 627; 3 Ib. 1068; 4 Ib. 1039; 27 Cyc. 1804.

That there must be a tender of the money, or an offer in the bill to pay what is due, see *Jones on Mort.* sec. 1095. See "Mortgages," *Century Dig.* § 1833; *Decennial and Am. Dig.* Key No. Series § 616.

SOWELL v. BARRETT, 45 N. C. 50. 1852.

Bill to Have a Deed Absolute Declared to be a Mortgage, and to Redeem.

[Bill for redemption of property transferred to the defendant by the plaintiff by a deed absolute in form. Answer, replication and proofs. Cause transferred to the supreme court for trial. Judgment against

plaintiff dismissing the bill for defects pointed out in the opinion. The property embraced in the deed was a tract of land and a negro.]

PEARSON, J. Since the case of *Streator v. Jones*, there has been a uniform current of decisions, by which these two principles are established in reference to bills which seek to correct a deed, absolute on its face, into a mortgage or security for a debt: 1. It must be alleged, and of course proved, that the clause of redemption was omitted by reason of ignorance, mistake, fraud or undue advantage; 2. The intention must be established, not merely by proof of declarations, but by proof of facts and circumstances, dehors the deed, inconsistent with the idea of an absolute purchase. Otherwise, titles evidenced by solemn deeds would be, at all times, exposed to the "slippery memory of witnesses." These principles are fully discussed in *Kelly v. Bryan*, 41 N. C. 283, and it is useless to elaborate them again.

The plaintiff has failed in both particulars. He gave no satisfactory account of the fact that the deed is absolute on its face; and he proves no facts and circumstances dehors the deed, inconsistent with the idea of an absolute purchase. It is true he proves declarations of the defendant, which render it highly probable that there was some understanding between the parties, that the defendant would take back his money and reconvey the negro; but this does not bring the case within the two principles above announced. . . . Bill dismissed.

For the general legal effect of deeds absolute intended as mortgages, see 5 L. R. A. (N. S.) 387; 11 Ib. 209, 825, and notes.

"A deed absolute on its face will not be converted into a mortgage, unless upon allegation and proof that the clause of defeasance was omitted by reason of ignorance, mistake, fraud, or undue advantage taken of the mortgagor." *Sprague v. Bond*, 115 N. C. 530, 20 S. E. 709, headnote. But in *Fuller v. Jenkins*, 130 N. C. 554, 41 S. E. 706, it is held that an absolute deed may be declared to be a mortgage when the parties, at the time of its execution, agreed that it should be so considered, without allegations of mistake or fraud. See *Jones on Mort.* sec. 282 et seq.; 3 *Pom. Eq. Jur.* sec. 1196. See "Mortgages," *Century Dig.* §§ 60-111; *Decennial and Am. Dig. Key No. Series* §§ 31-38.

JOYNER v. FARMER, 78 N. C. 196. 1878.

Bill to Redeem Property Purchased by Mortgagee at His Own Sale.

[The plaintiff mortgagor sued the mortgagee for the purpose of setting aside a sale of lands made by the mortgagee under a power in the mortgage. Judgment against the defendant, and he appealed. Affirmed.]

The land was sold by the mortgagee June 20, 1873, and purchased by himself through an agent. Deed made to the agent who immediately conveyed to the mortgagee. By agreement after the sale the mortgagor retained possession until he harvested the crops. The property brought more than was due on the mortgage, and the excess was paid to the mortgagor less three hundred dollars deducted for rent. This action was brought January 25, 1875, soon after plaintiff gave up the land. The defendant mortgagee insisted that by accepting this excess and giving up possession of the property the sale was ratified and the mortgagor estopped to attack it. The judge ruled that the whole transaction made

no change in the relation of the parties, but that the relation of mortgagor and mortgagee still existed, and ordered the land to be sold and the proceeds to be applied to the balance of the debt, if any, due on the mortgage, and the residue paid to the plaintiff mortgagor.]

RODMAN, J. It is not doubted that a mortgage of land with a power of sale in the mortgagee upon default in payment, is lawful. And if the mortgagee sell under such a power, a stranger who purchases bona fide will acquire a good title free of the trust. Coot on Mort. 125, n. A, 130; Paschal v. Harris, 74 N. C. 335. It is equally clear in this state, and generally, but not universally, that if the mortgagee himself purchases at his sale, whether he does it directly or by an agent, he nevertheless holds the legal estate subject to an equity in the mortgagor to redeem, unless in some way he releases or loses that equity." Wash. on Real Prop. 448, Book 2, ch. 3, sec. 20.

In Massachusetts it appears to be established that if the mortgage contains a provision authorizing the mortgagee to purchase at his own sale, he may do so, if his proceedings are fair and honest. 14 Allen (Mass.), 369; Hall v. Bliss, 118 Mass. 554. It may be that the language of the opinion in Whitehead v. Hellen, 76 N. C. 99, is somewhat too strong to be universally applicable; for the deed from the mortgagee to his agent conveys the full legal estate to the latter, and in a court of law makes him the owner, thus divesting the mortgagor of his equity of redemption, which is considered even after forfeiture as an estate, although enforceable only in equity, and liable to sale under execution by the act of 1812, Bat. Rev. ch. 44, § 5, and turning the equitable estate into a mere right of action, which could not be sold under that act. But as between the mortgagor and mortgagee, the right of the former in equity after such a sale cannot be held to differ essentially from what they were before, unless they have been lost in some of the ways presently to be mentioned.

The sale of the mortgagee is not void, but voidable, and can be avoided only by the mortgagor or his heirs or assigns. Wash. ante. The estate of the mortgagee acquired by the sale, being voidable only, may be confirmed by any of the means by which an owner of a right of action in equity may part with it: (1) By a release under seal, as to which nothing need be said; (2) Such conduct as would make his assertion of his right fraudulent against the mortgagee, or against third persons, and which would therefore operate as an estoppel against its assertion; (3) Long acquiescence after full knowledge, and probably this method may be classed with the second, unless it has continued for so long a time that a statute of limitations operates, or there is a presumption of a release. Wash. ante; 8 Rich. Eq. 112; 4 Minn. 25; 16 Md. 508; Lewin on Trusts, 651.

What length of time would suffice for such a purpose, is left uncertain upon the authorities. White's L. C. in Eq. 158-168; Mitchell v. Berry, 1 Mete. (Ky.) 602; Jenkins v. Hogford, 7 Pick. 1. Perhaps it may be that the statute of three years on a parol promise may furnish a proper rule.

In the present case the plaintiff was present at the sale by the

mortgagee and did not object. He afterwards retained possession of the land as the tenant of the defendant for a year; and apparently after the end of the year, although the date is not given, received from the defendant the residue of the sum for which the land was sold, after deducting the rent. This action was brought on the 25th of January, 1875, soon after the expiration of his term as tenant. The sale was on the 20th of June, 1873. No case holds that a mere acquiescence for so short a time bars an action. There is nothing in the case from which it can be inferred that the conduct of the plaintiff or his delay to sue, has induced the defendant to put himself in any worse position than he was in immediately after the sale. The defendant says that the plaintiff deteriorated the land during his occupancy of it. But it was still an ample security for the debt, and if that deterioration occurred during the tenancy, we must assume that it was guarded against in the lease, as it might have been. The rights of no third persons have intervened, and the lapse of time is too short to raise any presumption of a release or abandonment of the right.

No fraud or ill conduct is imputed to the defendant. It is not alleged that it was known at the sale, that the purchaser was bidding for him, or that the price was diminished by such bidding. But the interest of a vendor and a purchaser are so antagonistic, that the same man cannot safely be allowed to fill both characters. *Van Epps v. Van Epps*, 9 Paige Ch. 241. No doubt there are exceptional cases in which a mortgagee may sell with perfect fairness and to the advantage of the mortgagor, and buy. But a court can never know with certainty, that it has been so in any particular case, and is obliged to act upon the general rule for the prevention of unfair dealing. The defendant cannot be injured by having the value of the land ascertained by a public sale, under the order, and by an officer of a court, and an adjustment of the account between him and the plaintiff, after such sale. Judgment below affirmed and case remanded.

As to what is said in the principal case, concerning the length of time that will bar the mortgagor's right to redeem under the circumstances before the court, see *Jones v. Pullen*, 115 N. C. at p. 471, 20 S. E. 624, which substitutes ten years for three years as the statutory period. See "Mortgages," *Century Dig.* §§ 1083, 1101; *Decennial and Am. Dig. Key No. Series* §§ 362, 370.

SEC. 20. REMEDY FOR BREACH OF CONTRACT TO PURCHASE. CONVEY, OR DEVISE LAND.

GARRARD v. DOLLAR, 49 N. C. 175, 178-180, 67 Am. Dec. 271. 1856.

Contract to Purchase Land. Remedy of Vendor, at law. Damages.

[Plaintiff sued at law for damages for breach of contract by which defendant obligated himself to purchase certain lands from the plaintiff. There was a judgment by default and inquiry, and upon the inquiry there was a special verdict. Judgment against the defendant for six-

pençe. Plaintiff, not being satisfied with such a small sum, appealed. Reversed.

The verdict of the jury was that the vendor, Garrard, had no title to the land when he sold it to Dollar, nor at the time Dollar failed to pay for it; but acquired the title during the term of court at which the inquiry was had; and if that fact ought to be considered in mitigation of damages, they assessed the damages at sixpence; otherwise the damages were fixed at \$2,872.50. The judge being of opinion that the facts with regard to the title should mitigate the damages, rendered judgment for sixpence and costs. The supreme court, after holding that the judgment by default cut off any defense growing out of the want of title in the plaintiff set out in the special verdict, proceed to declare the law as to the measure of damages in case a vendee wrongfully refuses to accept the land and pay the price agreed.]

BATTLE, J. . . . On an inquiry of damages, upon a default, all the material allegations of the plaintiff's declaration are to be considered as admitted by the defendant to be true, and the only question will be, what is the rule of damages in the particular case? If the damages be, in their nature, uncertain, as in many of the forms of action they will be, then the amount will have to be ascertained by the proofs which each party may be able to produce. If they are certain, or, by computation, capable of being reduced to a certainty, then there will be little or no room left for the proof. In the case before us, the defendant covenanted to pay a certain price per acre for a tract of land, the number of acres of which was to be ascertained by a survey. It was so ascertained, and the sum agreed on to be paid was thus reduced to a certainty. That sum the plaintiff is entitled to recover as damages, unless it be the rule that a vendor of land, after doing everything he can towards the fulfilment of his part of the contract, can recover from the defaulting purchaser nominal damages only. This is an important practical question, and upon it the decisions of the courts in different countries do not seem to be uniform. In England, it is said that when the vendee refuses to perform, the measure of damages is held to be the difference between the price fixed in the contract and the value at the time fixed on for the delivery of the deed; so that if the property does not fall in value, the vendor can get nothing but nominal damages. Thus, in the case of *Laird v. Pim*, 7 M. & W. 474, where an eminent judge, Baron Rolfe (who is now the Lord Chancellor Cranworth), had, at the trial, restricted the vendor to nominal damages, the court of Exchequer, on the argument of a rule to show cause why the damages should not be increased to the amount of the purchase money, said: "The question is, how much worse is the plaintiff by the diminution in the value of the land, or the loss of the purchase money in consequence of the non performance of the contract? It is clear he cannot have the land and its value too." There are, indeed, some prior English cases which seem to have held a contrary doctrine. *Goodisson v. Nunn*, 4 T. R. 761; *Glazebrook v. Woodrow*, 8 T. R. 366. In Vermont, the rule as laid down by the court of Exchequer was recognized. *Sawyers v. McIntire*, 18 Vt. 27. A different rule prevails in Maine (*Aland v. Plummer*, 4 Green, 258) and in New York. *Shannon v. Comstock*, 21 Wend. 457; *Williams v. Field*, stated

shortly in a note to page 192 of Sedgwick on Damages). Mr. Sedgwick says, that "the question is evidently not free from perplexity. On the one hand, it is said that the vendor, by making a tender, has performed his contract so far as it lies in his power; that his right is complete to the performance of the contract by the vendee, and that this performance is the payment of the purchase-money. But on the other side, it is replied with great force, that the recovery cannot pass the fee in the land; that the legal seizin still remains as at first; that the vendor has not parted with his property; that, if the land has not fallen in price, he has lost nothing; that the common law gives damages for none but actual loss; and it is insisted that the true measure of damages in such a case is the difference between the stipulated price and the actual value at the time of the breach, or, perhaps, at the time of the trial." Sedg. on Dam. 191, 192. The author, in a note to the page last referred to, expresses his preference for the latter rule, though he admits that it is different with respect to the sale of personal chattels. See page 281.

The counsel have not referred us to any case in our court where the rule has been settled. In the absence of an express adjudication, we feel at liberty to adopt the rule that gives to the vendor the contract price with interest thereon, when he shows he has done all in his power to complete the contract on his part, by making and tendering a deed to the vendee. If a court of law cannot take into consideration the fact, that upon payment of the purchase-money the court of equity will compel the execution of a deed by the vendor, it can enforce its own salutary principles, that no person shall take advantage of his own wrong, and will thus prevent an unscrupulous vendee from mocking his innocent vendor by refusing to perform his solemn engagement, and submitting to a judgment for a penny damages.

The judgment given in the court below, in favor of the plaintiff, for sixpence damages, is reversed, and the judgment will be entered in this court in his favor, upon the special verdict, for \$2,872.50, and also for costs. Judgment reversed.

See "Vendor and Purchaser," Century Dig. §§ 953-956; Decennial and Am. Dig. Key No. Series § 330.

GRISWOLD v. SABIN, 51 N. H. 167, 12 Am. Rep. 76. 1871.

Contract to Purchase Land. Remedy of Vendor, at law. Damages.

[Griswold contracted to sell land to Sabin, and Sabin contracted to purchase the land and pay \$6,000 for it. Griswold tendered a deed in due form as stipulated for in the contract, but Sabin refused to accept the deed and pay the price. Thereupon Griswold sold the land for \$5,500 and sued Sabin for damages for breach of the contract. The judge charged that the measure of damages was the difference between the contract price of \$6,000 and the value of the land at the time Sabin broke the contract by refusing to accept the deed and pay the price. Verdict and judgment against the defendant for \$100, and he appealed. Affirmed.]

SARGENT, J. . . . As to the rule of damages in this case. . . . The rule in England is understood to be well settled in cases of contract for the sale of real estate, and is this: "Where the vendee refuses to perform, the measure of damages is held to be the difference between the price fixed in the contract, and the value at the time fixed on for the delivery of the deeds." *Laird v. Pim*, 7 M. & W. 474, and cases cited.

It has been said to follow from this rule that if the property does not fall in value, the vendor can recover nothing but nominal damages. But that would be assuming that the price agreed on by the parties was the true value, which would ordinarily be the case where the trade was made in good faith.

The same was settled to be the law of Massachusetts, after several rulings the other way, in *Old Colony Railroad v. Evans*, 6 Gray, 25, where the court say: "Upon more full consideration of the measure of damages, in an action at law where the defendant has refused to receive the deed tendered him, the court are of opinion that the proper rule of damages in such a case is the difference between the price agreed to be paid for the land, and the salable value of the land at the time the contract was broken."

In Maine a different rule was established, in *Alan v. Plummer*, 4 Greenl. 258, and in numerous cases in New York, cited in *Richards v. Edick*, 17 Barb. 260-265, where it is held that in this class of cases "the vendor is entitled to recover the full purchase price." But in the opinion, Gridley, J., admits that this rule is not equitable, and that, if it were a new question in that state, "there would be great reasons for adopting the principle which is now held to be the law of the English courts." But he felt bound by the precedents in that state, on the ground that the rule had there become so well established that it ought not to be disturbed; though the rule is there held to be different in regard to contracts for the sale of personal property.

In this state the rule is well settled in regard to contracts for the sale of personal property. *Stevens v. Lyford*, 7 N. H. 360; *Woodbury v. Jones*, 44 Id. 209; *Gordon v. Norris*, 49 Id. 376, and cases cited, 385, 386; *Haines v. Tucker*, 50 Id. 307-317. And we think the same rule should and must be applied in cases of contracts for the sale of real estate, where the vendee refuses to receive the deed and pay the price according to the contract.

In this case the defendant objects that the instructions he requested were not given, viz., that if the defendant had broken the covenant, and the plaintiff afterward sold and conveyed the property without defendant's consent, the plaintiff is entitled to recover only nominal damages. The defendant having broken his contract, the plaintiff might have brought his bill in chancery to compel a specific performance, or he might bring his suit at law for damages on account of its breach. Under the instructions given, it made no difference whether the plaintiff had sold the land or not; its real value at the time when the defendant broke his contract was the only question. If the plaintiff had sold the land at public auction, and notified the defendant, he might have been es-

topped to say that the price obtained was not its true value. But as the case stands, the plaintiff having sold the land at private sale, he cannot claim that the price obtained was the true value; but as we have seen, upon the instructions given, which we hold to be correct, it became entirely immaterial whether the plaintiff had sold the land or not, or for what price. And least of all could he be required to obtain the defendant's consent to the sale, which he might never have been able to do. Upon this general subject of the rule of damages in this class of cases, limited to contracts for the purchase of real estate, see Sedgwick on Dam. 203, and cases; Parsons on Cont. and cases cited. Judgment on the verdict.

The principal case is sustained by *Hallett v. Taylor*, 177 Mass. 6, 58 N. E. 154; *Warvelle on Vendors*, sec. 937; 2 *Sutherland on Damages*, ss. 568-571; 29 Am. & Eng. Enc. Law, 719; *Sedgwick on Damages* (Students' Ed.) 319. See "Vendor and Purchaser," Century Dig. §§ 953-956; Decennial and Am. Dig. Key No. Series § 330.

NICHOLS v. FREEMAN, 33 N. C. 99, 103, 104. 1850.

Contract to Sell Land. Remedy of Purchaser, at Law. Damages.

[Action for damages for refusal or failure of defendant to convey certain land to plaintiff pursuant to a contract between plaintiff and Sutton, the defendant being surety for Sutton. Judgment of nonsuit against the plaintiff, and he appealed. Reversed.]

Sutton and Freeman made their bond to plaintiff in the penal sum of \$10,000, with a condition to be void if Sutton should convey the locus in quo to the plaintiff. Sutton did not convey the land, and this action is brought for the penalty of the bond—the judgment to be discharged upon the payment of the damages claimed. It was agreed that, if the judge considered the proper measure of damages to be the difference between the value of the property at the time it became impossible for Sutton to convey it to the plaintiff (because of a sale thereof by the sheriff under an execution against Sutton) and the balance of the purchase money due by the plaintiff, judgment should be entered fixing the damages at \$207.80; but if the judge considered the measure of damages to be the amount which the plaintiff had paid to Sutton on the land, less the rent while the plaintiff was in possession, the judgment should fix the damages at \$8,060.25. Plaintiff contracted to pay \$8,000 for the property. He had paid \$6,552.78 when the sheriff sold the land. The value of the property at the time the sheriff sold it was only \$2,500.

The judge being of opinion that the action could not be maintained because of matters not germane to the subject under investigation, nonsuited the plaintiff. Only that part of the opinion which discusses the measure of damages for breach of contract to convey the land, is here inserted.]

PEARSON, J. . . . The second question is, as to the measure of damages. We cannot yield our assent to the position assumed by the plaintiff, that he has a right in this action against one of the obligees for a breach of the bond for title, to recover as damages the amount of the purchase money which had been paid, in the same way as if the plaintiff had repudiated the contract and sued the vendor for money "had and received to his use."

In this action the plaintiff does not repudiate the contract, but

seeks to recover compensation in damages for its nonperformance; and the question is, what damage has been suffered? What sum will put him in as good a condition as if the contract had been performed? In that event, he would have got a property which is worth \$2,500, but he would have been forced to pay the balance of the purchase money and interest. He has not paid this latter amount, and his damage is the difference between that sum and the value of the property: which, by the case agreed, is \$207.80, with interest from the 8th of May, 1843. This gives the plaintiff his redress at law, by compensation in damages, which he has elected to pursue as his remedy. He had the right to file a bill in equity for a specific performance, and the decree would have been for a conveyance of the property, upon his paying the balance of the purchase money with interest. He would not have been entitled to a decree for the amount of the purchase money which he had paid, and there is no principle upon which he can recover it, in this action upon the bond.

The only difference between his remedy at law and in equity upon the contract is, that in the one court he gets the property by paying for it; in the other, he gets compensation in damages, which is the difference between the value of the property and the amount of the purchase money remaining unpaid. . . . Judgment reversed.

See "Vendor and Purchaser," Century Dig. §§ 1047-1058; Decennial and Am. Dig. Key No. Series § 351.

HOPKINS v. LEE, 6 Wheaton (U. S.), 109, 117. 1821.

Contract to Sell Land. Remedy of Purchaser, at Law. Damages.

[Lee brought this action of covenant against Hopkins, to recover damages for not conveying certain tracts of land which he had contracted to convey to Lee. Verdict and judgment against Hopkins, who carried the case to the supreme court by writ of error. Affirmed.]

Hopkins failed to convey the lands according to his contract and insisted that the measure of damages was the value of the lands as fixed by the price which Lee had contracted to pay; but the judge directed the jury to take the value of the lands at the time they should have been conveyed, by the terms of the contract, as the measure of damages. Only that portion of the opinion which discusses the measure of damages is here inserted.]

LIVINGSTON, J. . . . In the assessment of damages, the counsel for the plaintiff in error prayed the court to instruct the jury that they should take the price of the land, as agreed upon by the parties in the articles of agreement upon which the suit was brought, for their government. But the court refused to give this instruction, and directed the jury to take the price [value] of the lands at the time they ought to have been conveyed, as the measure of damages. To this instruction the plaintiff in error excepted. The rule is settled in this court, that in an action by the vendee for a breach of contract, on the part of the vendor, for not delivering

the article, the measure of damages is its price [value] at the time of the breach. The price being settled by the contract, which is generally the case, makes no difference, nor ought it to make any; otherwise the vendor, if the article have risen in value, would always have it in his power to discharge himself from his contract, and put the enhanced value in his own pocket. Nor can it make any difference in principle whether the contract be for the sale of real or personal property, if the lands, as is the case here, have not been improved or built on. In both cases the vendee is entitled to have the thing agreed for at the contract price, and to sell it himself at its increased value. If it be withheld, the vendor ought to make good to him the difference. This is not an action for eviction, nor is the court now prescribing the proper rule of damages in such a case. Judgment affirmed.

That there is no difference in the measure of damages whether the subject matter of the sale be realty or personalty, according to the prevailing rule in the United States, see 3 Sedg. on Dam. (8th ed.) 197; Ibid. Students' Ed. 321; 2 Sutherland on Dam. sec. 578 et seq.; 29 Am. & Eng. Enc. Law, 619, 724. See "Vendor and Purchaser," Century Dig. §§ 1047-1058; Decennial and Am. Dig. Key No. Series § 351.

LOVE v. CAMP, 41 N. C. 209. 1849.

Contract to Convey Land. Remedy of Purchaser, in Equity. Specific Performance.

[Bill for specific performance of a contract to convey land. Answer, replication, and proofs. Cause transferred to supreme court for trial. Decree against defendant.]

Camp contracted to convey the locus in quo to the plaintiff, and was paid the price agreed on. The land increased in value and Camp refused to make the conveyance, and set up as an excuse for not doing so and as a defense against a decree that he specifically perform his contract, the fact that he had only a share in the land and was unable to purchase the other shares "after reasonable exertion" so to do.]

PEARSON, J. We think the plaintiffs are entitled to a specific performance of the contract. The defendant says he owns one sixth part in fee, and a life estate in another sixth part, and this he is willing to convey; but he says he does not own the other shares, and, "after reasonable exertion, since he made the contract, has been unable to procure the title of the other tenants in common, who are unwilling to sell," and he is therefore unable to comply with his contract. The question is, under these circumstances, will a court of equity decree a specific performance, or decline to interfere and leave the plaintiffs to their remedy at law. One, who for a valuable consideration enters into an agreement, is bound in conscience to perform it. A court of law can only give damages for a breach—this remedy is in many cases inadequate. A court of equity will do full justice, and, addressing itself to the conscience of the party, will require a specific performance of the agreement. This jurisdiction forms one of the great heads of equity, and in the

opinion of Lord Hardwicke, "the most useful one." *Penn v. Lord Baltimore*, 1 Ves. 446. Nothing should prevent the exercise of this most useful and well established jurisdiction, but the strongest and most controlling considerations. If a husband agrees to procure his wife to join with him in a conveyance of her land, and the wife refuses to do so, it seems by the modern cases, that a court of equity will not decree a specific performance. 1 Madd. ch. 311; Sugden on Vendors, 151. There are cases in which the husband has been confined to the Fleet, until his wife agreed to join him in the conveyance; and in one case, the husband, after being confined for many years, was discharged, it appearing that his wife could not be induced to make the conveyance; 5 Ves. 548, and 8 Ves. 848. These cases show, with what reluctance courts of equity stand by and permit a party to deprive another of the benefit of his contract. But it has recently been held, that the court will not interfere, upon two considerations. The vendee knew, at the time of the contract, that the husband did not own the land, and might not be able to perform his agreement; he, therefore, has no right to complain, if he is left to his remedy at law, upon its appearing that, after a bona fide effort, the husband is not able to procure the wife's consent. And, in the second place, because, if the husband be decreed to perform, he will compel the wife, who is under his control, to convey; and the wife ought not to be exposed to this compulsion on the part of her husband. It may be, but upon this we give no opinion, that where the vendee knows that the vendor has not the title, and takes a bond or covenant that a *third person* will be procured to make a conveyance, equity will not decree a specific performance, if it appears that the vendor has made proper exertions to procure the conveyance from such third person; because the first consideration above referred to, applies with full force. As if a father, seized as tenant by the curtesy sell in fee simple, and covenants that he will procure conveyances from his children, when they come of age. If they refuse after proper efforts on the part of the father, equity may decline to decree a specific performance and leave the vendee to his remedy at law, this being a state of things which he might have expected and as to which he took the chances. This result would seem to follow from the reason of the thing, but in respect to that we give no opinion. No case makes such an exception to the general jurisdiction to decree specific performance, and it is only adverted to for the purpose of illustrating the next proposition, upon which this case turns. *Oliver v. Dix*, 21 N. C. 158. If the vendee does not know that the vendor has not the title, there is then no reason why he should not be decreed to perform his agreement; and if he is put to great inconvenience and expense to enable him to obey the decree, it will be the consequence of his own act, and he will not be allowed to offer such an excuse for not doing justice. When a vendee seeks to rescind a contract, because of a defect in the title in the vendor, the latter is allowed time to complete his title, until the hearing. *Clanton v. Burgess*, 17 N. C. 13. As a defect of title will not excuse a vendee, provided it can be made good; upon ground of

mutuality it should not excuse a vendor. As the vendee cannot discharge himself, should the land depreciate in value, so the vendor should not be allowed to discharge himself, if the value is enhanced. In this case it does not appear that the plaintiff, Love, knew that the defendant did not have title. The bill avers that the defendant did have title, or did have full authority from his cotenants to sell. The defendant denies that he had title to the whole, and insists that the plaintiff had notice of his want of title; but he offers no proof of fact and his covenant is to convey or cause to be conveyed the whole in fee, and he admits that he has received the price of the whole. As to the averment that he had authority from his cotenants to sell, the defendant is entirely silent, leaving the inference that he either had such authority, or was guilty of a fraud in receiving the price of the whole. But if it be conceded, for the sake of argument, that this court will not make a decree, requiring a party to do that which it is clearly out of his power to do, as it may amount to perpetual imprisonment, there is, in this case, no sufficient allegation and no proof whatever, to raise the question. The defendant avers generally, that after reasonable exertion (and what amounts to it, he chooses to decide for himself), he is unable to procure his cotenants to convey. A conscientious man would not consider this a sufficient apology for the breach of an agreement creating no legal obligation [a fortiori it is no excuse] when offered as a reason why a court of justice should not compel the performance of a legal obligation. It is mere mockery. The defendant should have set out what he had done—what price he had offered to pay—so that the court might judge whether his exertions had been "reasonable," especially as the averment in the bill, that the value of the land had greatly enhanced since the contract, by the location of the town of Shelby on adjoining land, creates against him the strongest suspicion, and impeaches his motives by the suggestion, that if he has title, he refuses to perform his agreement for the sake of gain—or if the title is outstanding, he is unwilling to offer his cotenants what is now a fair price. A man of proper feelings would be unwilling to avail himself of the gain, and would be willing to submit to much loss rather than violate his solemn agreement. A court of equity acts upon the conscience, and enforces a specific performance, and will require this unconscionable gain to be given up, or this loss to be incurred, if it be necessary to enable him to do that which he has undertaken to do, and for which he has received the full consideration. There must be a decree for a conveyance to the plaintiff, Homesby, who is the assignee of the other plaintiff, Love, and the defendant must pay the costs.

For specific performance when the land lies in another state or when the defendant is a nonresident, see 23 L. R. A. (N. S.) 924, 1135, and notes.

The ruling in the principal case as to coercing a defendant to acquire a title in order to perform his contract, has been greatly modified by later decisions—see *Swepson v. Johnston*, 84 N. C. 449. That specific performance of a contract to buy or sell real estate will be decreed as a matter of course in plain cases, but only in the discretion of the court when

hardship would result from such a decree, see *Rudisill v. Whitener*, 146 N. C. 403, 59 S. E. 995, 15 L. R. A. (N. S.) 81, and note; *Boles v. Caudle*, 133 N. C. 528, 45 S. E. 835. In headnote 2 of *Weed v. Terry*, 2 Doug. (Mich.) 344, it is said: "Equity will not compel the specific performance, by a husband, of his agreement to procure his wife to join him in a conveyance of real estate." In *Fortune v. Watkins*, 94 N. C. at bot. p. 315 is this: "A recent author, referring to a demand of the vendee for specific performance of a contract to convey land, uses this language: 'If the vendee knows that the vendor is a married man, he knows that his wife is entitled to dower and that she cannot be compelled to release her dower right. Entering into the contract with such knowledge, he is not entitled, within the doctrine well established, to ask anything more than the husband can give. It is the vendee's knowledge, and not any notion of making a new contract for the parties, which prevents the purchaser from obtaining compensation [for a defect in title caused by the wife's refusal to release her dower right]. On the other hand, if the vendee entered into the contract in ignorance that the vendor was married, and under the supposition that the vendor could convey an uncumbered title, then he ought to have a specific performance with an abatement from the price.' Pomeroy on Spec. Perf. s. 461." In *Rodman v. Robinson*, 134 N. C. at top p. 516, 47 S. E. 23, it is said: "The decree should have directed the defendant to make reasonable effort to get his wife to sign the deed. *Swepson v. Johnston*, 84 N. C. 449; *Welborn v. Sechrist*, 88 N. C. at p. 292."

See further on this subject, *Ames' Cases on Equity Jurisdiction*, Parts I-VI, p. 65, note. For full discussion of the remedy by specific performance, see *Seymour v. Delancy*, 3 Cowen (N. Y.), 439, 8 N. Y. Com. Law Rep. (Lawyers' Ed.) 183, and note. See 19 L. R. A. (N. S.) 178, and note (essentials to complaint); 6 Ib. 585-597, and elaborate note (specific performance of contract to give a mortgage on realty or chattels); 12 Ib. 232, and note (contract to provide for intended spouse); 2 Ib. 210, and note (effect of agreement for stipulated damages upon right to specific performance). See "Specific Performance," *Century Dig.* § 31; *Decennial and Am. Dig. Key No. Series*, § 13.

JOHNSTON v. GLANCY, 4 Blackford, 94, 98, 99. 1835.

Oral Contract to Convey. Remedy in Equity. Part Performance. Betterments put on by Vendee. Price Paid by Vendee.

[Bill to compel defendants to convey a lot of land, filed by Johnston et al. against Glancy. Decree against plaintiff dismissing the bill, and plaintiff appealed. Reversed.]

Johnston was in possession of the locus in quo as tenant of one who was seized in fee. This owner orally sold the land to Johnston, while he was such tenant, for forty or forty-five dollars paid in work. Johnston put betterments on the lot, after his purchase, worth between twenty-five and eighty dollars. The owner conveyed the lot to the defendants, one of whom was his brother, who had notice of Johnston's claim to it. The defendants rested their defense on the statute of frauds. The plaintiff relied upon the doctrine of "part performance" to defeat the plea of the statute of frauds, and as ground for his prayer that the defendants be decreed to convey to him. The only question of any weight in the case is whether, under all the facts presented by the record, a specific execution of this parcel contract between the owner in fee and the complainant, can be enforced against the plea of the statute of frauds insisted on by the defendants.²⁰¹

STEVEN J. Courts of equity have determined, and it seems now to be the settled rule of decision, that parcel agreements can be enforced if the agreement has been in part performed, pro-

vided such part performance be admitted by the party charged, or be satisfactorily proven. What acts amount to such part performance as will take a parol contract out of the statute, is not entirely clear of doubt. It was for a while held, that the payment of part or all of the purchase-money was such part performance; but that doctrine is now entirely rejected. Payment in whole or in part is a strong auxiliary fact in establishing part performance, but it is not of itself sufficient. The ground upon which relief is granted in these cases is fraud; and the great leading principle by which courts are governed, is, that there must be some act of performance done, that is palpable and evident to the senses of all,—an act that can be relied on as certain, about which there can be no misunderstanding, and which does not rest solely in the recollection, understanding, or belief of witnesses, such as absolute and visible possession of the premises, the actual building of houses, or the making of other lasting improvements. But even these acts of part performance must be done with a direct view of the agreement being performed, and be such acts as could be done with no other view, or the agreement will not be taken out of the statute.

If the purchaser was not previously in possession of the premises, and after the parol purchase he enters upon the estate with the assent of the vendor, such possession is always held as part performance, and takes the case out of the statute, and much more so, if after he enters he makes valuable and lasting improvements. But the taking of such possession without the knowledge, consent, or will of the vendor, will not do. *Butcher v. Stapely*, 1 *Vernon*, 363; *Lacon v. Mertins*, 3 *Atk.* 1; *Wills v. Stradling*, 3 *Ves. Jun.* 378; *Bowers v. Cator*, 4 *Ves. Jun.* 91; *Gregory v. Mighell*, 18 *Ves. Jun.* 328; *Kine v. Balfie*, 2 *Ball & Beat.* 343; *Wilber v. Paine*, 1 *Ohio*, 251; *Wetmore v. White*, 2 *Caines' Cas.* 87; *Givens v. Calder*, 2 *Des.* 171, 190; *Sugden on Vend.* 77–80; *Tibbs v. Barker*, 1 *Blackf.* 58; *Morphett v. Jones*, 1 *Swanst.* 181; *Buckmaster v. Harrop*, 13 *Ves. Jun.* 474. But possession by a tenant, who was in possession of the premises as a tenant at the time of the purchase, and who remains in possession, is not considered a part performance; for a tenant, of course, may continue in possession until he has notice to quit; and therefore the mere act of his continuing in possession amounts to nothing, and will not take the case out of the statute. *Wills v. Stradling*, 3 *Ves. Jun.* 378; *Savage v. Carroll*, 1 *Ball & Beat.* 265; *Anthony v. Leftwich*, 3 *Rand.* 238; 2 *Hovend. on Fr.* 3; *Sugd. on Vend.* 80.

In this case, the complainant, at and long before the time of making the purchase, was in possession of the lot as tenant to the vendor; therefore, his continuance in possession cannot be considered as a part performance of the contract. There is some fluctuation in the decisions on this subject, and some contradiction in the books, as to how far courts of equity may go in taking parol contracts out of the statute; and some cases have gone further than the principles stated above would warrant. We, however, are not disposed to carry such cases beyond the clear medium of the chain of decisions, which may be safely relied on: at that point we stop.

In the case now before us, we are satisfied that a specific execution of the contract should not be decreed; yet we think that the circuit court did wrong in dismissing complainant's bill: he is entitled to relief, and justice requires us to grant it to him without further expense or delay. When the specific execution of a parol contract cannot be decreed, by reason of the vendor's pleading the statute of frauds in bar of such decree, it is the duty of the court to decree compensation to the complainant, to the amount of the purchase-money by him paid and interest thereon; and also for all beneficial and lasting improvements, which he may have made on the premises. 2 Hovend. on Fr. 4; Sugd. on Vend. 78, and n.; Anthony v. Leftwich, *supra*; Parkhurst v. Cortlandt, 1 Johns. Ch. 273; King v. Bardeau, 6 Id. 38; Kelly v. Bradford, 3 Bibb. 317; Phillips v. Thompson, 1 Johns. Ch. 131; Forster v. Hale, 3 Ves. 713; Greenaway v. Adams, 12 Ves. 395. In this case, it is certain that the plaintiff has sustained an injury by the acts of the defendants, and his claims are sufficient to authorize the interference of the court in securing adequate compensation.

Per Curiam. The decree of the circuit court is reversed with costs; and it is ordered, etc., that the complainant recover of Joseph Glancy, one of the defendants, the sum of ninety dollars, etc.; and that the complainant retain possession of the premises till the said sum of ninety dollars and the costs be paid, etc.

For a full review of the doctrine of Part Performance, see elaborate note at pp. 790-817 of 3 L. R. A. (N. S.); 3 Ib. 852; and Ames' Cases on Equity Jurisdiction, Parts I-VI, pp. 279-281. This doctrine is repudiated in North Carolina. Barnes v. Teague, 54 N. C. 277; McIntosh on Cont. 134. See "Frauds, Statute of," Century Dig. §§ 301-326; Decennial and Am. Dig. Key No. Series § 137; "Specific Performance," Century Dig. §§ 120-139, 417; Decennial and Am. Dig. Key No. Series §§ 40-47, 128.

ALBEA v. GRIFFIN, 22 N. C. 9. 1838.

Oral Contract to Convey. Remedy of Purchaser. Betterments. Purchase Money.

[Bill for specific performance. Statute of frauds pleaded. Decree in supreme court for certain relief against defendant, but specific performance is refused.]

The defendant's ancestor contracted orally to convey the locus in quo to the plaintiff; collected part of the price, and put plaintiff in possession. The plaintiff built a house on the land. Defendants, to whom the land descended, refused to carry out the oral contract of their ancestor.]

GASTON, J. It is objected on the part of the defendants, that by our act of 1819 all parol contracts to convey land are void, and that no part performance can, in this state, take a parol contract out of the operation of that statute. We admit his objection to be well founded, and we hold, as a consequence from it, that the contract being void, not only its specific performance cannot be enforced, but that no action will lie in law or equity for damages because of non-performance. But we are nevertheless of the opinion that the

plaintiff has an equity which entitles him to relief, and that parol evidence is admissible for the purpose of showing that equity. The plaintiff's labor and money have been expended on improving property which the ancestor of the defendants encouraged him to expect should become his own, and, by the act of God or by the caprice of the defendants, this expectation has been frustrated. The consequence is a loss to him and a gain to them. It is against conscience that they should be enriched by gains thus acquired to his injury. *Baker v. Carson*, 21 N. C. 381. If they repudiate the contract, which they have a right to do, they must not take the improved property from the plaintiff without compensation for the additional value which these improvements have conferred upon the property.

The court therefore directs that it be referred to the clerk of this court, to inquire and report what is the additional value conferred on the land in question by the improvements of the plaintiff, and that he state an account between the parties, charging the plaintiff with a fair rent since the death of Andrew Griffin, and crediting him with what has been advanced towards payment for said land and with the amount of the additional value so conferred upon it.

"It was also contended for the defendant that the right to have pay for improvements only exists while the bargainee is in possession, and *Albea v. Griffin* and *Pass v. Brooks*, 125 N. C. 129, 34 S. E. 228, were cited as authority for this position. But neither of these cases, nor any other case that has been called to our attention, supports this contention. In these cases and other like cases, the bargainee being in possession, the court said that such bargainee should not be turned out until the bargainor paid for the improvements. This was only a means resorted to by the court to enforce the bargainee's recovery, and not as the ground of plaintiff's equity, which was made distinctly to rest upon the fraud of the bargainor; and it would be just as fraudulent and unconscionable for the bargainor to take profit by means of such fraud, if the bargainee was out of possession, as if he was still in possession. *It is the fraud that gives the right of action, and not the possession.* But the cases of *Tucker v. Markland*, 101 N. C. 422, 8 S. E. 169; *Pitt v. Moore*, 99 N. C. 85, 5 S. E. 389; *Thomas v. Kyles*, 54 N. C. 302, and other cases, seem to settle the contention against the defendant. It is true that it is said in *Pass v. Brooks* that the contract is admitted, and, defendants being in possession, the case of *Albea v. Griffin* was followed as to the judgment; and the statement that the contract was admitted is only a statement of the facts of the case. There is nothing in the case of *Pass v. Brooks* that conflicts with what is said in this opinion. The doctrines announced in this case, or many of them, are held in the recent case of *North v. Bunn*, 122 N. C. 766, 29 S. E. 776, in which case it is held that the bargainee was entitled to an account, and that if anything should be found in her favor, it should be a lien on the land." *Luton v. Badham*, 127 N. C. 96, 103, 37 S. E. 143. See further on the subject of the principal case, *Wilkie v. Womble*, 90 N. C. 254; *Ford v. Stroud*, 150 N. C. 362, 64 S. E. 1; *McIntosh on Cont.* 111-114, 128-135. See *Doty v. Doty*, 80 S. W. 803, 2 L. R. A. (N. S.) 713, and note. See "Frauds, Statute of," *Century Dig.* § 333; *Decennial and Am. Dig. Key No. Series* § 138.

WILSON v. BRUMFIELD, 8 Blackford, 146. 1846.

Contract to Convey. Specific Performance with Compensation for Defects.

Per Curiam. A purchaser of real estate cannot be compelled to take only a part of the land for which he has contracted. If he cannot get the whole, he has a right to rescind the contract; but he has also a right, generally, to insist that the vendor shall perform the contract so far as he is able, and make compensation in damages for the breach of that part of it which he cannot perform. 2 Story's Eq. § 779; Paton v. Rogers, 1 Ves. & B. 351; Todd v. Gee, 17 Ves. 273; Waters v. Travis, 9 Johns. 450; 1 Sugd. Vend. 319.

See "Vendor and Purchaser," Century Dig. §§ 201, 329; Decennial and Am. Dig. Key No. Series §§ 113, 165.

SHAW v. VINCENT, 64 N. C. 690, 693, 694. 1870.

Right to Rescind and Recover in Assumpsit. Compensation for Defects.

[Assumpsit for money had and received. Judgment against defendant for one hundred dollars, but plaintiff being dissatisfied with the amount of the verdict, appealed. The action was commenced before the Code practice was adopted and was an action of assumpsit.

Vincent contracted to sell certain lands to Shaw. Shaw paid part of the price, but, upon the ground that Vincent had no title to part of the locus in quo, he notified Vincent that he abandoned the contract and demanded repayment of the two hundred dollars paid thereon. He then brought this action for that sum and for other relief. The question presented is: Did Shaw have a right to rescind the contract and recover what he had paid on it, simply because the title to part of the land was defective.]

RODMAN, J. . . . The plaintiff rests his case principally on the first count which is founded on the idea that as soon as he discovered that the defendants were unable to make him a title, he had a right to rescind the contract, and recover the money he had paid under a mistake.

There is also another objection [to plaintiff's claim of a right to rescind the contract]. In Franklin v. Miller, 4 A. & E. 599 (31 E. C. L.), Littledale, J., said: "It is a clearly recognized principle that if there is only a partial failure of performance by one party to a contract for which there may be a compensation in damages, the contract is not put an end to." In this case the defendants did own an undivided part of the lands contracted to be sold; and the inability to perform is only partial. The doctrine of a court of equity is, that where the vendor can convey only an insignificant and immaterial part of what is bargained for, it will not compel a vendee to take that, even at a corresponding reduction of the price; but if he can substantially perform his contract, and the part as to which he cannot perform is of such a character as to admit of compensation being made to the vendee for the failure, there the court will enforce the specific performance of the contract so mod-

ified. But this is an equity which cannot be applied in a court of law. . . . Venire de novo.

For a full discussion of the doctrine announced in the principal case see *Sutton v. Davis*, 143 N. C. 474, 55 S. E. 844. See "Specific Performance," *Century Dig.* § 250; *Decennial and Am. Dig. Key No. Series* § 94; "Vendor and Purchaser," *Century Dig.* §§ 199-201, 965-972; *Decennial and Am. Dig. Key No. Series* §§ 112, 113, 334.

THOMPSON v. DEANS, 59 N. C. 22. 1860.

Specific Performance of Award of Arbitrators.

[Bill in equity to enforce specific performance of the award of arbitrators relative to a controversy affecting the title to real estate. Cause heard in the supreme court upon bill, answer, and proofs. Specific performance was decreed.]

Plaintiff and defendant owned adjoining lands. A dispute arose as to the dividing line, which was submitted to arbitrators by a written submission, and the parties gave bond to each other to abide the award. The award was duly made. Plaintiff offered to make a deed for such part of the land in his possession as the award gave to the defendant, and demanded that the defendant do the like. Upon defendant's refusal so to do the plaintiff brings this bill.]

MANLY, J. The bill is to enforce an award by compelling a specific execution. The submission appears to be by agreement in pais, and by reference to it, it is found the arbitrators are authorized to make lines and settle the dispute then existing between the parties in regard to their dividing lines; and they bind themselves to abide by such lines as shall be made and laid down by such referees, and to allow each other peaceably to enjoy the same as allotted. The referees laid down a line of division, and the parties thereupon adjusted their respective possessions in conformity with the same. After two or three years acquiescence by all concerned, the defendant, Deans, took possession again of a parcel of land which he had abandoned under the award, and this bill is brought to compel him to abide by the lines established, and to allow each peaceably to enjoy the part allotted to him.

We do not perceive why this object may not be accomplished by the bill. By the submission, the parties contracted to do what the arbitrators might direct. When the latter, therefore, made their decision, the submission and award, together, amounted to an agreement; and as this agreement is plainly executory in its nature, it is, in substance, the case of an executory agreement under a penalty. The enforcement of such an agreement specifically is a familiar subject of equity jurisdiction. In *Russell on Arbitrators*, 525, it is said, a bill will lie to enforce a specific performance of an award whenever the matter directed by it is such that it would be enforced by the court as an agreement or contract—especially when the award be to do anything in respect to lands. This is confirmatory of our view. . . . Decree made.

See "Specific Performance," *Century Dig.* § 215; *Decennial and Am. Dig. Key No. Series* § 81.

PARSELL v. STRYKER, 41 N. Y. 480. 1869.

Specific Performance of Contract to Devise.

[Bill for specific performance of an agreement to devise real estate Decree against defendant, and he appealed. Affirmed.

David Parsell contracted to devise the locus in quo to the plaintiff, David C. Parsell. The contract was based upon a valuable consideration. David Parsell conveyed the land to the defendant for a valuable consideration, but defendant took with notice of the former contract to devise the land to the plaintiff.]

JAMES, J. . . . As to plaintiff's equities, it made no difference whether the agreement was to deed the farm at a future day, on performance by plaintiff, or to devise the farm by a will made in the lifetime of the party, a court of equity will decree the specific performance of the latter agreement after death, where otherwise unobjectionable, equally with a contract to convey while living.

This question was fully considered and properly decided in *Johnson v. Hubbell*, 10 N. J. Eq. 332. On this branch of the case Chancellor Williamson said: "There can be no doubt but that a person may make a valid agreement, binding himself legally to make a particular disposition of his property by last will and testament. The law permits a man to dispose of his own property at his pleasure; and no good reason can be assigned why he may not make a legal agreement to dispose of his property to a particular individual, or for a particular purpose, as well by will as by conveyance, to be made at some specified future time, or upon the happening of some future event. It may be unwise for a man to embarrass himself as to the final disposition of his property, but he is the disposer by law of his own fortune, and the sole and best judge as to the manner and time of disposing of it. A court of equity will decree the specific performance of such an agreement, upon the recognized principles by which it is governed in the exercise of this branch of its jurisdiction." *Rivere v. Rivere*, 3 Desau, 195; *Jones v. Martin*, 3 Ambler, 882; 19 Ves. 66; 3 Ves. 412; *Podmore v. Gurnsey*, 7 Simons, 644-654. The validity of an agreement to devise land by will was recognized by this court in *Stephens v. Reynolds*, 6 N. Y. 458. . . . Judgment affirmed.

The case in 10 N. J. Eq., cited in the principal case, discusses the question fully and cites a great number of authorities which fully sustain the ruling in the principal case. See to same effect, 26 Am. & Eng. Enc. Law, 91; *East v. Dolihite*, 72 N. C. 562; *Price v. Price*, 133 N. C. bot. p. 503, 45 S. E. 855. See "Specific Performance," Century Dig. §§ 223, 224; Decennial and Am. Dig. Key No. Series § 86.

ALLEN v. TAYLOR, 96 N. C. 27, 1 S. E. 462. 1887.

Contract to Convey Realty. Cumulative Remedies of Vendor.

[Action of ejectment by vendor against vendee. Judgment against defendant, and he appealed. Affirmed.]

Plaintiff contracted in writing to convey the locus in quo to the defendant, who, in turn, contracted to pay the price agreed on. Defendant

failed to meet his payments. Plaintiff gave him six months' notice to vacate the premises, and at the expiration of that time sued him for the possession. The statutes of North Carolina require the defendant to file a bond to secure the rents and profits, etc., to the plaintiff, as a condition precedent to being allowed to defend an action of ejectment (provision being made for defending in forma pauperis). The defendant having failed to comply with this statute, there was a judgment against him for want of an answer.]

MERRIMON, J. The plaintiff alleges, in substance, that she contracted to sell to the defendant the tract of land described in the complaint; that she executed to him her bond for title thereto, conditioned that it should be made to him when and as soon as he should pay sundry promissory notes, running to maturity at different times, given by him to her for the purchase money thereof; that the defendant failed to pay these notes as they matured, and has only paid a small part of the money due upon them; that the defendant is and has been in possession of the land ever since the contract of purchase was made; that he is utterly insolvent; that the plaintiff gave him more than six months' notice to quit the possession thereof, and to surrender the same to her, which he refused to do. This action is brought to recover such possession. At the appearance term the plaintiff filed her complaint, and, this being an action to recover the possession of land, she insisted that the defendant should not be allowed to answer the same until he should give a proper undertaking as required by the statute (Code, § 237) in such cases. This he refused to do, contending that the statute does not apply to and embrace cases like this. The court held otherwise; and, the defendant having failed to give the undertaking, it gave judgment for the plaintiff, from which the defendant appealed to this court. It is well settled that the purchaser of land, when let into possession under the contract of purchase, is simply an occupant of it at the will of the vendor, and he so continues until the purchase money shall be paid. The vendor may at any time put an end to such occupancy by demanding possession after reasonable notice to quit; and, if it be not surrendered, then he may at once bring and maintain an action to recover the possession. The occupancy is by permission, and therefore lawful, and hence the occupant is entitled to reasonable notice to quit. It has been held in one case that three weeks is sufficient notice. This, however, may depend on the circumstances. *Carson v. Baker*, 15 N. C. 220; *Love v. Edmonston*, 23 N. C. 153; *Butner v. Chaffin*, 61 N. C. 497. . . . The vendor has two remedies that he may adopt to collect his debt,—one *in personam*, to compel the vendee to pay it, the other *in rem*, to subject the land to its payment,—and he may prosecute both these remedies at the same time, and in the meantime he is entitled to have possession, and can maintain an action to recover the same under the present method of civil procedure, just as he might have done under that formerly prevailing. We cannot conceive of any just reason why this may not be so, and this court has repeatedly declared that it may be done. *Jones v. Boyd*, 80 N. C. 258; *Thompson v. Justice*, 88 N. C. 269. As between the vendee and vendor, the latter is on

the footing of a mortgagee, and a mortgagee may maintain an action, now as formerly, against the mortgagor for the possession of the land mortgaged. *Ellis v. Hussy*, 66 N. C. 501; *Green v. Wilbar*, 72 N. C. 592; *Hemphill v. Ross*, 66 N. C. 477.

The plaintiff states such a cause of action as obviously entitles her to the possession of the land described in the complaint, in the absence of an answer and any defense pleaded. She is entitled to the judgment granted by the court below, as the defendant failed to answer. There is not the slightest reason why he could not be required to give the undertaking before being allowed to answer as required by the statute. Code, § 237. He comes within its letter and spirit. Such undertaking is intended to secure such costs and damages as the plaintiff may recover in the action, including damages for the rents and profits. Nothing to the contrary appearing, the plaintiff was entitled to recover costs and damages. The complaint contains unnecessary and redundant matter, but nothing appears that hinders the plaintiff's recovery. The judgment must be affirmed.

See *Credle v. Ayers*, 126 N. C. 11, 35 S. E. 128, inserted at sec. 18, ante. See "Costs," Century Dig. § 422; Decennial and Am. Dig. Key No. Series § 107; "Vendor and Purchaser," Century Dig. §§ 837-842; Decennial and Am. Dig. Key No. Series § 299.

BRAME v. SWAIN, 111 N. C. 540, 15 S. E. 938. 1892.

Contract to Convey Realty. Cumulative Remedies of Vendor.

[Action for the price of realty and specific performance of the contract of purchase. Judgment against the plaintiff dismissing the action, and he appealed. Affirmed as to refusing specific performance, and reversed as to refusing judgment for the debt.

Brame contracted to convey land to Swain, and Swain contracted to pay the price in four installments. This action was commenced after two installments were past due but before the other two were due. The plaintiff demanded judgment (1) in personam for all the installments; and (2) that the land be sold for the satisfaction of his claim. The judge denied any relief to the plaintiff.]

SHEPHERD, J. Where a contract is made for the sale of land, the purchase money to be paid in annual installments, and the vendee is let into possession, the vendor cannot maintain an action for specific performance until the last payment is due. The relation between such parties is substantially that subsisting between mortgagee and mortgagor, and governed by the same general rules (*Jones v. Boyd*, 80 N. C. 258); and, in the absence of a stipulation to that effect, a mortgage cannot be foreclosed until the maturity of all of the notes which it is given to secure (*Harshaw v. McKesson*, 66 N. C. 266). These authorities fully sustain his honor in declining to decree a sale of any part of the land. We think, however, there was error in refusing the plaintiff's a personal judgment on the notes actually due at the commencement of the action. There is nothing in the contract of sale which either

expressly or by implication amounts to an agreement to suspend the personal remedy; and in *Harshaw's Case*, supra, in which a foreclosure was denied, the court explicitly declared that "the plaintiffs, if they had seen proper, might have proceeded in an action at law to recover the installments as they became due, but they could not have a foreclosure until the day of redemption was passed." See, also, *Allen v. Taylor*, 96 N. C. 37, 1 S. E. Rep. 462. The principle stated in *Harshaw v. McKesson*, 65 N. C. 688, that where a mortgage is executed to secure a note previously given, there is an implied promise to suspend the personal remedy, has no application to the facts of this case. Modified.

See *Harshaw v. McKesson*, 66 N. C. 266, inserted at ch. 3, sec. 18, ante. If the vendor in a contract to convey realty die, an action against the vendee for specific performance must be brought by both his real and personal representatives. [But an action in personam for the debt merely, may be brought by the personal representative alone.] *Grubb v. Lookabill*, 100 N. C. 267, 6 S. E. 390. If the vendee in such contract die, the vendor may proceed against the personal representative of the vendee, but he is not obliged to resort to that remedy, for he may proceed against both the real and personal representatives to have the land sold for the satisfaction of his claim. *Harper v. McCombs*, 109 N. C. 714, 14 S. E. 41.

In an action for specific performance of a contract, the plaintiff must allege and prove that he has performed his part of the contract, or his ability and readiness to do so. *Wilson v. Lineberger*, 92 N. C. at mid. p. 551, citing several authorities. See "Vendor and Purchaser," *Century Dig.* § 847; *Decennial and Am. Dig. Key No. Series* § 302.

SEC. 21. WRIT OF ASSISTANCE.

KNIGHT v. HOUGHTALLING, 94 N. C. 408. 1886.

Remedy of Purchaser at Judicial Sale to Obtain Possession.

[Petition in the cause by Winston and Hargrove, purchasers, for a writ of assistance. The petition was filed in the supreme court, the sale having been made by a commissioner appointed by that court. Writ of assistance ordered.]

The supreme court, by a judgment in this case, ordered certain lands to be sold by a commissioner appointed by the court. Winston and Hargrove bought the land, paid for it, and took a deed from the commissioner. The sale was duly reported and confirmed and the commissioner directed to make title to the land to the purchasers. William H. Wood was in possession of the land and positively and defiantly refused to surrender it to Winston and Hargrove after oral and written demand for such surrender. Wood was one of the defendants in the original action against whom a judgment for sale had been rendered.]

ASHE, J. We are of opinion, upon the facts of the case as stated in the petition and accompanying affidavits, that the petitioners are entitled to the writ.

The writ of assistance is a novel process in this state. We believe it is the first time an application has been made to any court of this state for such a writ. But it has been frequently used in several of the states. It may be termed an equitable habere facias possessionem, for it is only issued from courts of chancery, and only

in these cases when the courts have by their decree caused lands to be sold, in which case they will complete the sale by putting the purchaser in possession, when it is withheld by the defendant, or any one who has come into possession pendente lite. It is never issued except when the case is clear, and upon notice to the person in possession—and it is held to be the appropriate remedy to place the purchaser of mortgaged premises, under a decree of foreclosure, in possession, after he has obtained the sheriff's deed." *Herman on Executions*, § 353, and cases referred to on margin. It is said by the same authority in sec. 354, that "all that is requisite to obtain a writ of assistance, as against the parties, and those claiming under them after the commencement of the action, is to furnish to the court proper evidence of a presentation of the deed to them, and a demand of the possession, and their refusal to surrender it." A demand of possession, it would seem, is always necessary, but the presentation of the deed to the party in possession may be dispensed with, when it is waived by the conduct of the parties, as in this case, when the party in possession was informed of the sale, the purchase, and the deed as registered, and he makes no question as to these facts, but positively refuses to surrender possession, and sets at defiance the demand of the purchasers. We are of opinion the petitioners are entitled to the writ, and it is so ordered.

See Rule 19 of the Equity Rules of the United States Supreme Court; 4 Cyc. 290 et seq. For form, see *Shiras Equity Practice*, 215, and 1 *Loveland's Forms of Federal Practice*, p. 605. See "Assistance, Writ of," *Century Dig.* §§ 1-4; *Decennial and Am. Dig. Key No. Series* §§ 1-9. That the purchaser's remedy is not confined to the writ of assistance but he may also bring ejectment, see *Townshend v. Simon*, 38 N. J. L. 239, inserted at ch. 8, sec. 6, ante.

CHAPTER IV.

FORMS OF ACTION TO ASSERT RIGHTS OTHER THAN CONCERN-
ING REAL PROPERTY.

SEC. 1. ACTIONS EX CONTRACTU AND EX DELICTO DISTINGUISHED.

MOORE v. GREEN, 73 N. C. 394, 396, 397. 1875.

Imprisonment for Debt and for Tort Distinguished.

[Motion by defendant to vacate an order of arrest issued in the cause. Motion refused, and defendant appealed. Affirmed.]

Moore sued Green for damages for an alleged libel, and had Green arrested under ancillary proceedings of arrest and bail. Green, after being arrested, made this motion before the judge. Green contended that, as this was a civil action for damages, he could not be lawfully arrested and imprisoned, because the state constitution forbade imprisonment for debt except in cases of fraud.]

RODMAN, J. . . . It is contended that an arrest in an action for a libel is in violation of sec. 16 of the Bill of Rights of this state, which says: "There shall be no imprisonment for debt in this state, except in cases of fraud." The argument is this: The moment a judgment shall be obtained, the claim for damages is converted into a debt; the person of the defendant is thereupon liberated, and his bail discharged. For what purpose, then, require bail, who are to be discharged at the first moment when their liability can be of any value? It is an oppression to the defendant and of no possible benefit to the plaintiff. *Dellinger v. Tweed*, 66 N. C. 206, is cited as authority for the proposition that the claim for damages is converted into a debt, within the meaning of the constitution, by the recovery of judgment. Undoubtedly, for some purposes, it is. An action of debt may be maintained on it, and a *fi. fa.* may issue on it. But to construe the above-cited clause of the Bill of Rights as forbidding imprisonment for any cause of action which by judgment would become a debt, would make its prohibition extend to all cases, as every cause of action becomes a debt in one sense when a judgment is recovered on it. Chitty, in his standard book on Pleading, divides all actions into two great classes: Those which are *ex contractu* and those which arise *ex delicto*. No doubt, the framers of the constitution had this familiar classification in mind, and in forbidding imprisonment for debt they referred rather to the cause of action as being *ex contractu* than to the form it would assume upon a judgment. If they had meant to forbid imprisonment in every civil action, they would have said so. But by forbidding it for debt, they plainly imply that it may be

allowed in actions which are not for debt. In forbidding imprisonment for debt as popularly understood, viz., for a cause of action arising *ex contractu*, they responded to the general public sentiment; but I know of no writer on the reform of law who has recommended the abolition of punishment for trespassers and wrongdoers. Such a provision might be humane to the injuring, but it would not be so to the injured parties. It would withdraw from the state its power to impose a wholesome check on violence and wrong, and would tend to license disorders and law-breakings incompatible with the peace and welfare of society. . . . There is no error in the judgment below.

The principal case is fully approved in *Long v. McLean*, 88 N. C. 3, in which case it is said that similar provisions in the constitutions of other states have received a like construction, citing therefor *Harris v. Bidgers*, 57 Ga. 407; *McCook v. State*, 23 Ind. 127; *Lathrop v. Singer*, 39 Barb. (N. Y.) 396; *People v. Cotten*, 14 Ill. 414. That a judgment for damages consequent upon a tort, is not a debt *ex contractu*, and as such protected by art. 7, sec. 10, of the constitution of the United States, is ruled in *Louisiana v. Mayor of New Orleans*, 109 U. S. 285, 3 Sup. Ct. 211. See "Arrest," *Century Dig.* §§ 8-12; *Decennial and Am. Dig.* Key No. Series § 4.

RICH v. N. Y. C. & H. R. R. Co., 87 N. Y. 382. 1882.

Various Definitions of Tort. Tort Arising out of Contract.

[Action for damages. Judgment against plaintiff dismissing the action, from which he appealed. Reversed.]

Plaintiff alleged several contracts between himself and the defendant relative to the location of a passenger station in close proximity to plaintiff's business house; that defendant had on several occasions broken such contracts and then renewed them upon valuable concessions being made by plaintiff; that at length, with a view to coercing plaintiff to further and ruinous concessions, the defendant had, regardless of its contracts to the contrary, closed the passenger station, thereby causing great loss and damage to the plaintiff by reason of the deterioration in the value of his property as the direct consequence of such acts of the defendant; that "in all of which the defendant was actuated by malice and vindictiveness toward the plaintiff, and a design to crush, ruin and destroy him." The questions presented are: (1) Did defendant's malicious purpose in breaking its contract constitute a tort for which an action of tort would lie? (2) Was the cause of action set up in the complaint a contract or a tort? The plaintiff offered testimony to establish his cause of action, but it was ruled out by the judge, because he ruled that plaintiff's cause of action as set out in the complaint was in tort, while the proof offered tended to establish a breach of contract.]

FISCH, J. We have been unable to find any accurate and perfect definition of a tort. Between actions plainly *ex contractu* and those as clearly *ex delicto* there exists what has been termed a border land, where the lines of distinction are shadowy and obscure, and the tort and the contract so approach each other, and become so nearly coincident as to make their practical separation somewhat difficult. (Moak's *Underhill on Torts*, 23.) The text-writers either avoid a definition entirely (Addison on *Torts*), or frame one plainly imperfect (2 *Bouvier's Law Dict.* 600, or de-

pend upon one which they concede to be inaccurate, but hold sufficient for judicial purposes. (Cooley on Torts, 3, n. 1; Moak's Underhill, 4; 1 Hilliard on Torts, 1.) By these last authors a tort is described in general as "a wrong independent of contract." And yet, it is conceded that a tort may grow out of, or make part of, or be coincident with, a contract (2 Bouv. *supra*), and that precisely the same state of facts, between the same parties, may admit of an action either *ex contractu* or *ex delicto*. (Cooley on Torts, 90.) In such cases the tort is dependent upon, while at the same time independent of, the contract, for if the latter imposes a legal duty upon a person, the neglect of that duty may constitute a tort founded upon a contract. 1 Addison on Torts, 13.

Ordinarily, the essence of a tort consists in the violation of some duty due to an individual, which duty is a thing different from the mere contract obligation. When such duty grows out of relations of trust and confidence, as that of the agent to his principal or the lawyer to his client, the ground of the duty is apparent, and the tort is, in general, easily separable from the mere breach of contract. But where no such relation flows from the constituted contract, and still, a breach of its obligation is made the essential and principal means, in combination with other and perhaps innocent acts and conditions, of inflicting another and different injury, and accomplishing another and different purpose, the question whether such invasion of a right is actionable as a breach of contract only, or also as a tort, leads to somewhat difficult search for a distinguishing test.

In the present case, the learned counsel for the respondent seems to free himself from the difficulty by practically denying the existence of any relation between the parties, except that constituted by the contract itself, and then, insisting that such relation was not of a character to originate any separate and distinct legal duty, argues that, therefore, the bare violation of the contract obligation created merely a breach of contract, and not a tort. He says that the several instruments put in evidence showed that there never had been any relation between the plaintiff and the railroad company, except that of parties contracting in reference to certain specific subjects, by plain and distinct agreements, for any breach of which the parties respectively would have a remedy, but none of which created any such rights as to lay the foundation for a charge of wilful misconduct or any other tortious act. Upon this theory the case was tried. Every offer to prove the contracts, and especially their breach, was resisted upon the ground that the complaint, through all its long history of plaintiff's grievances, alleged but a single cause of action and that for a tort, and, therefore, something else, above and beyond and outside of a mere breach of contract, must be shown, and proof of such breach was immaterial. From every direction in which the plaintiff approached the allegations of his complaint, the same barrier obstructed his path and excluded his proof. Whatever may be true of the earlier agreements between the plaintiff and the railroad company, and conceding, what seems probable, that the evidence

relating to them was properly rejected, on the ground that they left the defendant entirely at liberty to change the site of its depot, so that such change was in no respect either unlawful or wrong. there was yet a later agreement by the terms of which the defendant was bound, as soon as practicable and within a reasonable time, to restore the depot to its old location. The complaint explains the importance of such restoration to the plaintiff. It alleges that valuable property of his, heavily mortgaged, had depreciated in value in consequence of the removal of the depot, and could only be restored to something like its old value, and saved from the sacrifice of a foreclosure in a time of depression, by the prompt return of the depot to its former site. The complaint further avers, that to secure this result, the plaintiff had surrendered valuable riparian rights to the defendant, but the latter, fully understanding the situation, maliciously and wilfully broke its agreement, and delayed a restoration of the depot for the express purpose of preventing plaintiff from being enabled to ward off a foreclosure of the mortgage, and itself instigated such foreclosure and caused the ultimate sacrifice. For the breach of this contract to restore the depot within a reasonable time, the plaintiff had a cause of action. But that was not the one with which he came into court. His complaint was for a single cause of action, and that for a tort; and what that alleged tort was, it is quite necessary to know, and in what respect, and how it differs from a mere breach of contract, in order to determine whether the rejected proofs were admissible or not.

There was here, on the theory of the complaint, something more than a mere breach of contract. That breach was not the tort; it was only one of the elements which constituted it. Beyond that, and outside of that, there was said to have existed a fraudulent scheme and device by means of that breach to procure the foreclosure of the mortgage at a particular time and under such circumstances as would make that foreclosure ruinous to the plaintiff's rights, and remove him as an obstacle by causing him to lose his property, and thereby his means of resistance to the purpose ultimately sought. In other words, the necessary theory of the complaint is that a breach of contract may be so intended and planned; so purposely fitted to time, and circumstances and conditions; so inwoven into a scheme of oppression and fraud; so made to set in motion innocent causes which otherwise would not operate, as to cease to be a mere breach of contract, and become, in its association with the attendant circumstances, a tortious and wrongful act or omission. . . . Assuming now that we correctly understand what the tort pleaded was, and which was conceded to constitute a cause of action, it seems to us quite clear that the plaintiff was improperly barred from proving it. . . . He is entitled to prove his cause of action if he can. The judgment should be reversed.

When a breach of contract involves a tort, the contract may be waived and redress be had in an action of tort. *Manning v. Fountain*, 147 N. C.

at p. 19, 60 S. E. 645. See next succeeding case and note. See also *Bowers v. R. R.*, 107 N. C. 721, inserted later in this section.

As to the difficulty experienced by the court in separating the shadowy and obscure lines of demarcation between actions *ex contractu* and actions *ex delicto*, it may not be inappropriate to quote the language of Judge Brown, in *State v. Dannenberg*, 150 N. C. 799: "Nor can we answer affirmatively the inquiry of the attorney-general, 'but is there not somewhere between the buttermilk of the pure in heart and the brandy of the morally stunted a twilight zone, and does not the drink sold by this defendant lie within this zone?'" While in the way of quoting from the attorney-general, it may not be amiss to add the following from the columns of the *Durham Herald*: "In rounding up his argument in support of the Charlotte ordinance and the right of North Carolina cities to control the near-beer problem with license taxes within their discretion Attorney-General T. W. Bickett said: 'What is near-beer? The testimony in this case shows that it is a beverage that finds ready sale as a substitute for real beer. Our bibulous constituents cry for it as children cry for castoria. It is made by the people who make beer, and drunk by the people who drink beer. It looks like beer, smells like beer and tastes like beer. It is served by the same white-aproned many-chinned friends who were wont to comfort us in other days. It is shoved across the old oaken counter and mirrored-back bar, with the picture of Aphrodite springing from the foam, making the illusion complete. And sometimes in the gloaming the alchemy of a shadow projecting from a policeman's expansive back and falling athwart the bar, works a transformation, and suddenly, even as the thirsty one lifts the cup to his lips, near-beer becomes the real thing. And yet this court is asked to relegate this lusty beverage, this scion of centuries of vats, to the insipid level of soda water. Perish the thought. It proclaims itself in North Carolina as the sole heir and successor to the gaudy fluid. It boasts of its bubble, and sparkle and snap. It says to the disconsolate legions in an arid land, 'I may not be entirely wicked, but try me.' It capitalizes its kinship with Budweizer and Schlitz. It scorns soda water as Roosevelt scorns a molly-coddle, and lords it over grape juice like a mint julip over a milkshake.'" See "Action," Century Dig. §§ 160-195; Decennial and Am. Dig. Key No. Series § 27.

BULLINGER v. MARSHALL, 70 N. C. 520, 525, 526. 1874.

Tort Arising out of Contract. Waiving the Tort and Suing in Contract.

[Action commenced in the superior court for the recovery of damages for deceit in the sale of a mule. Defendant moved to dismiss for want of jurisdiction. Motion overruled. Judgment against the defendant, and he appealed. Affirmed. The facts appear in that portion of the opinion which is here inserted.]

PEARSON, C. J. . . . The action demands damages for a deceit in the sale of a mule and the allegation made out a cause of action which, by the former mode of procedure, would have been classed under "actions *ex delicto*," as distinguished from "actions *ex contractu*." At the trial it was moved on the part of the defendant to nonsuit the plaintiff, on the ground that the action ought to have been commenced before a justice of the peace, as the damages demanded are only one hundred dollars.

The constitution ordains, art. IV, sec. 23: "The several justices of the peace shall have exclusive original jurisdiction of all civil actions founded on contract wherein the sum demanded shall not exceed two hundred dollars, and where the title to real estate shall

not be in controversy." According to our construction of this section a justice of the peace has not jurisdiction in "actions ex delicto," although the cause of action may grow out of a contract. It being in form, under the old mode of procedure, an action ex delicto, proves that it is not founded on the contract, but is collateral thereto. There are cases where a party is allowed to waive the tort and sue in contract, as if one takes my horse and sells it and receives the money, I may waive the tort and sue for "money had and received to my use," and if the sum does not exceed two hundred dollars the jurisdiction belongs to a justice of the peace; but if the money be not received, my remedy is for the tort, and a justice of the peace has not jurisdiction. So if there be a warranty of soundness in the sale of a horse, the vendee may sue upon the contract of warranty and a justice of the peace has jurisdiction, or he may declare in tort for a false warranty and add a count in deceit (see Williams' notes to Saunders' Reports), in which case a justice of the peace has not jurisdiction—the plaintiff being permitted to declare collaterally in tort for a false warranty, in order to enable him to give in a count for the deceit, which of course was in tort.

Our conclusion is, that the effect of this section of the constitution is to enlarge the jurisdiction of a justice of the peace by raising the amount to the sum of two hundred dollars, and by extending it to cases founded on contract for unliquidated damages—as in cases of a breach of warranty of soundness and other like instances; but that the jurisdiction does not extend to any matter collateral, although it grew out of the contract, for in such case the action is not founded on the contract. See *Froelich v. Express Co.*, 67 N. C. 1. . . . Affirmed.

In *Manning v. Fountain*, 147 N. C. mid. p. 19, 60 S. E. 645, it is said: "Even if a tort had been committed, growing out of a false and fraudulent representation, the plaintiff had a right to waive the tort and sue for money had and received. Such an action is ex contractu and not ex delicto. *Winslow v. White*, 66 N. C. 432; *Bullinger v. Marshall*, 70 N. C. 526. Upon this theory it has been held that, where defendant wrongfully took into his possession timber logs of the plaintiff and sold them and received the money, the plaintiff might waive the tort and sue for the money. *Land Co. v. Brooks*, 109 N. C. 700, 14 S. E. 315. E converso, it has been held that where the breach of contract involves a tort, the complaining party may waive the contract and recover damages for the tortious injury. *Bowers v. R. R.*, 107 N. C. 722, 12 S. E. 452." See "Justices of the Peace," Century Dig. §§ 116-134; Decennial and Am. Dig. Key No. Series § 38.

BRITTAİN v. PAYNE, 118 N. C. 989, 24 S. E. 711. 1896.

Waiving the Tort and Suing in Assumpsit.

[Civil action in justice's court for one hundred and sixty dollars received by defendant from the unauthorized sale of timber belonging to plaintiff. Defendant appealed to the superior court, and there moved to dismiss the action for want of jurisdiction in the justice's court. Motion allowed. Judgment against the plaintiff dismissing the action, and he appealed. Reversed.]

CLARK, J. Where property is tortiously taken and sold, the owner may waive the tort, and maintain an action to recover the money realized from the sale by the defendant. *Land Co. v. Brooks*, 109 N. C. 698, 14 S. E. 315; *Wall v. Williams*, 91 N. C. 477. And this is clearly what the plaintiff did by his complaint in this case. Every intendment being in favor of jurisdiction, if the complaint could have been construed as being either for the tort or to recover the money received by the defendant, this being an action before the justice, the court would construe it to be an action on the implied contract, in favor of the jurisdiction. *Lewis v. Railroad*, 95 N. C. 179; *Stokes v. Taylor*, 104 N. C. 394, 10 S. E. 566; *Fulps v. Mock*, 108 N. C. 601, 13 S. E. 92. Error.

Compare with the principal case and those preceding it, *Mann v. Kendall*, 47 N. C. 192, which holds that jurisdiction cannot be conferred by waiving the tort and suing in assumpsit. No court can take jurisdiction of the assumpsit that would not have had jurisdiction of the tort "for the reason that the same questions of law arise in each." In *Froelich v. Express Co.*, 67 N. C. 1, plaintiff sued an express company for \$164 for not delivering a barrel of wine shipped by express. After declaring the law as to waiving the tort and suing in assumpsit and giving several instances of it, attention is called to the fact that all the old forms of actions are abolished by the constitution, which provides that there shall be but one form of action in civil cases. It is then said that the plaintiff could have recovered the \$164 in an action founded on contract, and whether he declared in contract or tort his recovery would be the same, to wit, the agreed price of the wine. "As the distinction between declaring in tort or in contract is a refinement abolished by the constitution, taking it in any point of view, this is a civil action founded on contract." The action was commenced in the superior court. The complaint set up the failure to deliver a barrel of wine shipped c. o. d. by plaintiff to a person in Connecticut; *that the wine was valued at \$164*. The sum for which the plaintiff prayed judgment was \$250. In the supreme court there was a motion to dismiss for want of jurisdiction, which motion was sustained and the action dismissed—the real subject of the action being \$164 due by contract, notwithstanding the prayer for judgment for \$250.

See "Justices of the Peace," *Century Dig.* § 310; *Decennial and Am. Dig. Key No. Series* § 91; "Action," *Century Dig.* §§ 196-215; *Decennial and Am. Dig. Key No. Series* § 28.

BOWERS v. RAILROAD, 107 N. C. 721, 12 S. E. 452. 1890.

Waiving the Contract and Suing in Tort.

[Action in the superior court for damages for failure to deliver goods shipped to the plaintiff from Boston. Judgment against plaintiff dismissing the action for want of jurisdiction. Plaintiff appealed. Reversed.]

The complaint alleged the shipment and failure to deliver, and that defendant "so negligently and carelessly conducted itself in regard to the same" that part of the goods were "broken open and scattered to the great damage of the plaintiff of one hundred and forty dollars." Notwithstanding the statement as to the damage sustained, the plaintiff prayed for judgment for three hundred dollars. The questions presented are: (1) If a carrier fails to deliver goods shipped, does an action *ex contractu* or *ex delicto* lie against him? (2) May the plaintiff waive the contract and sue in tort?]

MERRIMON, C. J. It is settled that, under the present method of civil procedure, when the breach of a contract involves a tort, the complaining party may waive the contract, and sue for and recover damages for the tortious injury. In such case, if the damages alleged in good faith are \$50, or less, the court of a justice of the peace will have jurisdiction; if for that or a greater sum, the superior court will have jurisdiction. *Bullinger v. Marshall*, 70 N. C. 520; *Ashe v. Gray*, 88 N. C. 190; *Norville v. Dew*, 94 N. C. 43; *Harvey v. Hambricht*, 98 N. C. 446, 4 S. E. Rep. 187; *Edwards v. Cowper*, 99 N. C. 421, 6 S. E. Rep. 792; *Long v. Fields*, 104 N. C. 221, 10 S. E. Rep. 253. In this case the plaintiffs might have sued for a simple breach of the contract, and if they had done so the superior court would not have original jurisdiction, because the damage alleged was but \$140, a demand within the jurisdiction of the court of a justice of the peace. The mere demand for \$300 could not give the superior court jurisdiction, because, manifestly, such demand would not be made in good faith, but simply to apparently give the court jurisdiction, and the court ought to dismiss the action. We think, however, that it appears sufficiently from the face of the complaint that the plaintiffs allege, not simply a breach of contract, but a tort, a tortious injury, and damages occasioned thereby exceeding \$50, so that the court had jurisdiction. A breach of the contract is alleged in general terms, but it is further alleged, particularly and specifically, that the defendant "so negligently and carelessly conducted in regard to the same that the said mica was greatly damaged, three boxes being broken open and scattered, to the great damage of the plaintiffs of one hundred and forty dollars." Obviously, these words were intended to allege more than a simple breach of the contract,—a tort, tortious injury. Granting that more appropriate terms for such purpose might have been employed, still the court can see the purpose informally expressed, and as it can, the pleading should be upheld and the jurisdiction sustained. As we have seen, the plaintiff might sue for the tort, and it sufficiently appears that he intends to, and does so. In cases like that under consideration, when the plaintiff intends to sue in tort, the distinctive tortious cause of action should be alleged in terms that clearly show the purpose. This is necessary to the end the court may see that it, and not the court of a justice of the peace, has jurisdiction. There is error. The court should have denied the motion to dismiss the action. To the end that the judgment may be reversed and the action disposed of according to law, let this opinion be certified to the superior court. It is so ordered.

See *Balto etc. Ry. Co. v. Kemp*, 61 Md. 619, inserted in section 6 post of this chapter. See "Courts," *Century Dig.* § 549; *Decennial and Am. Dig. Rev. No. Series* § 183.

WHITE v. ELEY, 145 N. C. 36, 58 S. E. 437. 1907.

Tort or Contract, at Plaintiff's Election. Jurisdiction.

[Action for conversion of a sum of money less than \$200, commenced in the superior court. Demurrer to the jurisdiction. Demurrer sustained and action dismissed. Plaintiff appeals. Reversed. The facts appear in the opinion.]

CLARK, C. J. The complaint alleges that plaintiff placed with the defendant a horse to sell for him; that the defendant received for the horse the sum of \$149, which he has converted to his own use, and asks for the recovery of the sum so converted, and for arrest and bail of defendant. The defendant demurred ore tenus that the superior court had no original jurisdiction because this is an action on contract. The court sustained the demurrer and dismissed the action. There is error. "When the action can be fairly treated as based either on contract or in tort, the courts, in favor of jurisdiction, will sustain the election made by the plaintiff." *Brittain v. Payne*, 118 N. C. 989, 24 S. E. 711; *Schulhofer v. Railroad*, 118 N. C. 1096, 24 S. E. 709. The plaintiff could sue either for the tort, the unlawful conversion, or on the contract. Bringing the action in one court, when he might have brought it in the other, is *prima facie* an election. *Sams v. Price*, 119 N. C. 574, 26 S. E. 170; *Parker v. Express Co.*, 132 N. C. 130, 43 S. E. 603.

In such cases the plaintiff may waive the tort and sue in contract. *Bullinger v. Marshall*, 70 N. C. 520; *McDonald v. Cannon*, 82 N. C. 245; *Wall v. Williams*, 91 N. C. 477; *Edwards v. Cowper*, 99 N. C. 421, 6 S. E. 792; *Timber Co. v. Brooks*, 109 N. C. 698, 14 S. E. 315. Or he may elect to sue for the tort. *Bowers v. Railroad*, 107 N. C. 721, 12 S. E. 452; *Purcell v. Railroad*, 108 N. C. 424, 12 S. E. 954, 956; *Thompson v. Express Co.*, 144 N. C. 389, 57 S. E. 18. In *Froelich v. Express Co.*, 67 N. C. 1, it was held that the complaint showed that the plaintiff had elected to sue on the contract for a sum less than \$200, notwithstanding the action had been brought in the superior court. The judgment dismissing the action is reversed.

See "Action," *Century Dig.* §§ 196-215; *Decennial and Am. Dig. Key No. Series* § 28.

FISHER v. GREENSBORO WATER SUPPLY CO., 128 N. C. 375, 38 S. E. 912. 1901.

Action of Tort for Breach of Contract.

[Action for damages caused by inefficiency of the water supply furnished by the defendant. Verdict for the plaintiff. Plaintiff insisted upon a judgment as upon a recovery for a tort, because, under a statute, such a judgment had advantages over a judgment on a contract. The judge refused to grant such a judgment, and the plaintiff appealed. Reversed.

The defendant had contracted with the city of Greensboro to furnish a water supply up to a specified standard of efficiency. Plaintiff's house was injured by fire, and he alleges that his loss was attributable to de-

defendant's failure to perform its contract with the city and its inhabitants, and also the "wilful, tortious, culpable, reckless, and gross negligence" of the defendant to keep a sufficient storage of water for fire extinguishing purposes. The third and fourth issues and the responses thereto were: (3) Did the defendant fail in its contract? Ans. Yes. (4) Was the plaintiff injured by the negligence of the defendant? Ans. Yes.]

COOK, J. There is but one question presented: Was the plaintiff entitled to judgment *ex contractu* or *ex delicto*? which depends solely upon the nature of the action as brought,—whether for a breach of contract or for negligent injuries. The rule is that where the law, from a given statement of facts, raises an obligation to do a particular act, and there is a breach of that obligation, and a consequent damage, an action on the case, founded on the tort, is the proper action. *Bond v. Hilton*, 44 N. C. 310, 54 Am. Dec. 552; *Robinson v. Threadgill*, 35 N. C. 41; *Solomon v. Bates*, 118 N. C. 315, 24 S. E. 478. . . . Upon the verdict the plaintiff moved for a judgment "for the tortious injury and damage done him by the negligence of the defendant," which was refused by his honor, who entered judgment for damage as upon breach of contract, to which plaintiff excepted and appealed.

We think the plaintiff was entitled to judgment as prayed for. There was an express and legal obligation upon the part of the defendant to provide and furnish ample protection against fires, and a breach of that obligation, and a consequential damage to the plaintiff. Although action may have been maintained upon a promise implied by law, yet an action founded in tort was the more proper form of action, and the plaintiff so declared. He stated the facts out of which the legal obligation arose fully, and also the obligation itself, and the breach of it, and the damage resulting from that breach. *Chit. Pl.* 155; 5 *Thomp. Corp.* § 6340. The case of *Coy v. Gas Co.* (Ind. Sup.), 46 N. E. 17, 36 L. R. A. 535, is to the same effect, and very similar in facts. In that case the defendant had obligated to supply the town of Haughville and its inhabitants with natural gas. By reason of defendant's negligence and failure to supply the needed gas for fuel during severe winter weather, the plaintiff's child died, on account of which the action was brought. The court there held that the failure to perform such obligation was in itself a tort, and sustained the action. While common-law judgments do not contain any of the precedent facts or proceedings on which they are based, and are comprised of those words only which explain the idea with utmost accuracy and brevity, yet, under our system of pleading and practice, courts are required to frame their judgments so as to determine all the rights of the parties, as well equitable as legal. *Hutchinson v. Smith*, 68 N. C. 354; and, being a final determination, should contain every element of the action necessary to enable the successful party to obtain the fullness of his recovery. The defendant in this action is an incorporated company, and the plaintiff insists that, under section 1255 of the Code, an execution issued upon a judgment founded on an action for tort has superior advantages, in its enforcement, over executions issued upon judg-

ments founded upon contracts. As to this, however, we do not express an opinion, as that question is not before us. Let the judgment of the court below be entered according to this opinion. Error.

See *Nevin v. Pullman Palace Car Co.*, 106 Ill. 222, 46 Am. Rep. at p. 697, inserted at sec. 3 of this chapter. See *F. & W. Mfg. Co. v. Beckett*, 79 N. E. 503, 12 L. R. A. (N. S.) 924, and elaborate note. See "Action," Century Dig. §§ 160-195; Decennial and Am. Dig. Key No. Series § 27.

OATES v. KENDALL, 67 N. C. 241. 1872.

Forms of Action Ex Contractu and Ex Delicto under the Code Practice. Declaration in Tort, Recovery in Contract.

[Action to recover damages for alleged conversion of plaintiff's cotton by defendant. Verdict and judgment against defendant, and he appealed. Affirmed.]

Plaintiff bought some cotton from the defendant. The cotton was paid for and delivered; but placed in defendant's custody. The defendant sold the cotton to another person and collected the proceeds. Prior to such sale by defendant, the plaintiff had sold the cotton to another person, but, of course, had not delivered it. Defendant insisted that, as this action was for the wrongful conversion, the plaintiff could not sustain the action because he was not the owner of the cotton at the time of the defendant's conversion. The judge ruled otherwise.]

BOYDEN, J. In this case it is contended, that the plaintiff cannot recover, for the reason that although this is a civil action, it is in the nature of an action of trover, and that at the time of the alleged conversion the plaintiff was not the owner of the cotton alleged to have been converted. It is true, that to sustain an action of trover, according to the principles of the common law, the plaintiff must, as a general rule, be the owner of the property at the time of the alleged conversion, so that if this had been an action of trover, under our former system of pleading, the plaintiff could not recover. . . . In our case it is not even pretended that there is any substantial defense to this action; the main objection to the recovery being, that the plaintiff, in his complaint, has alleged and set out a case in trover, when the case, as proved on the trial, shows that it should have been in the nature of an assumpsit for money had and received. It would be a violation of one of the most important provisions of the new code, to permit a party to defeat a recovery, upon the sole ground that the form of the complaint is not just as it should have been, from the facts established by the proofs in the case. To allow such an objection now to avail a party would be to defeat that great and vital principle of the new code and constitution, which declares that there shall be but one form of action, and it would incorporate into our new system all the mischief and intricacies touching the form of action intended to be obviated by that provision. No such objection can be permitted to defeat a recovery. The 135th section of the C. C. P. enacts that "the court, and the judge thereof, shall in every stage of the action disregard any error or defect in the

pleadings or proceedings which shall not affect the *substantial* rights of the adverse party." . . . Judgment affirmed.

See "Trove and Conversion," Century Dig. § 214; Decennial and Am. Dig. Key No. Series § 34.

WILLIAMS v. RAILROAD, 144 N. C. 498, 504, 505, 57 S. E. 216. 1907.
Forms of Action Ex Contractu and Ex Delicto under the Code Practice.
Tort for Breach of Duty to the Public, Arising Ex Contractu.

[Action to recover damages because defendant failed to stop its train to take plaintiff on board as a passenger. Verdict and judgment against plaintiff, and he appealed. Reversed.]

The plaintiff alleged that the defendant *negligently* failed to stop the train where it should have stopped for passengers to get aboard, etc. He further charged that the defendant *wilfully disregarded* the plaintiff's rights in refusing to stop, etc.

The judge charged that if the failure to stop was *wilful and intentional* the plaintiff could recover, because he had sued in tort; but if the failure to stop was *merely negligent*, plaintiff could not recover, because he had sued in tort and not in contract; that plaintiff might have sued in contract, and if he had done so, he could have recovered for negligence, because such negligence would have constituted a breach of the contract which the railroad "had with the people generally;" that such breach would entitle the plaintiff to nominal damages at least; that if the defendant acted wilfully and intentionally, plaintiff could recover punitive damages in this action. The question presented is: Is there any distinction between tort and contract in actions for wrongfully failing to stop a train for passengers to get aboard?]

WALKER, J. [After discussing the liability of the defendant for punitive damages if it wilfully refused to stop, etc.] . . . We might well stop here and rest our decision upon the clear and explicit statement of the law as contained in the cases cited, but for the fact that, while the court charged correctly as to punitive damages, it withdrew from the consideration of the jury the question of actual or compensatory damages altogether, and restricted the recovery to nominal and punitive damages, and charged that they could be recovered only in case the jury found that the engineer wilfully refused to stop the train. This charge was given because, as his honor stated, the plaintiffs had sued in tort, and not in contract, and that mere inattention on the part of the engineer, or a negligent failure to stop the train, would not entitle the plaintiffs to recover as for a tort, and, further, that they could not recover actual damages, because none had been alleged or proven. We are not aware of any authority distinguishing between tort and contract in respect to the right to recover in actions of this kind. All forms of action are abolished, and we have now but one form for the enforcement of private rights and the redress of private wrongs, which is denominated a civil action (Revisal 1905, § 354), and the court gives relief according to the facts alleged and established. Clark's Code (3d ed.), § 133, and notes: *Sams v. Price*, 119 N. C. 572, 26 S. E. 170; *Bowers v. Railroad*, 107 N. C. 721, 12 S. E. 452; *Voorhees v. Porter*, 134 N. C. 591.

47 S. E. 31. The complaint in this case is the product of a careful and skillful pleader, knowing his client's cause of action and able to state it with accuracy and precision. Its allegations are abundantly sufficient to cover every phase of the evidence, and it is otherwise sufficient in substance and in form. The plaintiffs have alleged, not only a willful disregard of their rights, but negligent inattention on the part of the engineer; and whether it is in tort or contract can make no difference. The law does not deal with forms, but with facts. There was error in the charge, so far as it denied to the plaintiffs the right to recovery for mere negligence.

The error of the court in confining the plaintiffs' right of recovery to the narrow limits stated in the charge entitles them to another trial. New trial.

See "Carriers," Century Dig. § 1075; Decennial and Am. Dig. Key No. Series § 274.

N. C. LAND CO. v. BEATTY and BENNETT, 69 N. C. 329, 333-335. 1873.

Joinder of Tort and Contract in the Same Action. Multifariousness.

[Action to recover money alleged to be due for commissions. Judgment against defendants, and they appealed. Reversed.]

Plaintiff alleged a contract with the defendant Beatty, by which plaintiff was to be paid a commission for selling land which Beatty asserted to belong to him; that Bennett was present and knew of this contract and assertion of Beatty's; that plaintiff brought about the sale and thereby became entitled to the commissions under the contract with Beatty; that after the sale the land was found to belong to Bennett and not to Beatty; that both refused to pay the commissions due the plaintiff; that in making the representations to the plaintiff as to the ownership of the land, and in procuring plaintiff's services, etc., "the defendants were guilty of fraud upon the plaintiff, and plaintiff believes they are jointly and severally liable to the plaintiff to the amount of the commissions claimed by virtue of the contract, or as damages for the fraud." Demurrer by defendants for misjoinder of causes of actions—one a money demand claimed under a contract with Beatty, to which contract Bennett was not a party; the other, to recover damages for a fraud, tort, alleged to have been perpetrated by both defendants. Demurrer overruled.]

RODMAN, J. . . . The question before us is, can the plaintiff join in the same complaint a count (or cause of action) in contract against one of the defendants, with a count (or cause of action) on the fraud of both?

Prior to the C. C. P. it is clear that at law such a misjoinder was demurrable. 1 Chit. Pl. 331; *Chamberlain v. Robertson*, 52 N. C. 12. In equity multifariousness was not allowed in a bill. 1 Dan. Ch. Pr. 384; *Boyd v. Hoyt*, S. Paige, 65. Multifariousness is well defined in Story Eq. Pl. § 271, and in *Bedsole v. Monroe*, 40 N. C. 313. By either definition this action would be multifarious.

But it is contended that the joinder is allowed by sec. 126, C. C. P. This says: "The plaintiff may unite in the same complaint several causes of action whether they be such as have been hereto-

fore denominated legal or equitable, or both, where they all arise out of: (1) The same transaction, or transactions connected with the same subject of action; (2) Contracts express or implied; or (3) Injuries with or without force, etc. But the causes of action so united must all belong to one of these classes, and . . . must affect all the parties to the action, . . . and must be separately stated."

The argument of the plaintiff must be that under the first clause he could unite any number of causes of action belonging to all of the after enumerated classes, provided only they all arose out of the same transaction, or out of distinct transactions concerning the same subject of action. It is easy to see that this construction would produce all the inconvenience and confusion which it was the object of all the rules regulating the joinder in action to prevent. Take an example: A lends a horse to B who sells him to C. The sale is one transaction, but it may give rise to several causes of action of different kinds, and between different parties. A may have an action of trover against B or C. B may have an action for the price. C may have an action for deceit; and if the sale were to C in trust for D, he might have an action. If we suppose two transactions about the same horse, the number of possible actions about the same subject becomes much greater. It cannot be possible that all these numerous actions between different parties, and having no common bearing or connection, except that the subject of all is the same horse, can be united.

It is difficult to give any exact meaning to that clause. Perhaps it was not intended to make a distinct class; for it is not united as all the following clauses are, by the conjunction "or." Or, perhaps it is an imperfect attempt to condense the rule of equity by which all persons having rights or estates in the same subject matter (as for example devisees, heirs at law, creditors and a widow, in the estates of decedents) may by one proceeding obtain an adjustment of all their respective claims. However this may be, the clause has no bearing on the present question. These remain the classes of contract, injury, etc. Any number of causes of action belonging to any one of these may be united, provided they all affect the parties, but no two belonging to different classes. Judgment below reversed and demurrer sustained.

See "Action," Century Dig. §§ 378-547; Decennial and Am. Dig. Key No. Series §§ 43-51.

WILT v. WELSH, 6 Watts (Pa.), 9, Smith's Cases L. P. 329. 1837.

Tort Growing Out of Contract. Waiving Contract and Suing in Tort. Application to Infant's Contracts.

Welsh sued Wilt in trover. Wilt pleaded infancy. Judgment against Wilt, who carried the case to the supreme court by writ of error. Reversed.

The infant, Wilt, hired Welsh's horse to go to one place, but instead of abiding by the contract, he drove the horse to another place. The death of the horse was the result. Welsh claimed that the act of the infant in driving to a different place from that specified in the contract,

was a tort and that the infant was liable, since infancy is no defense to a tort. The infant contended that his liability, if any, could only arise out of the contract, between himself and Welsh, under which the horse was hired; that the driving to a different place from that contracted for, was a breach of the contract and not a tort; and as an infant is not liable for his contracts of this kind, if he chooses to avoid them, his plea of infancy is a good defense. The judge below held with Welsh and against Wilt, the infant. The supreme court held with Wilt, the infant, and against Welsh.]

GIBSON, C. J. It would have been sufficient to rest the decision of this cause on the precedent of *Penrose v. Curren*, 3 Rawle, 351, if the point had not since been ruled differently by the court of errors of New York; but a respect for the opinion of that court, renders it proper to re-examine the question on principle and authority. The ground of the New York case (*Campbell v. Stakes*, 2 Wend. 137) is that a positive breach of the contract is a disaffirmance which works a dissolution of it and reduces the infant to a level with an adult who is chargeable with a conversion, for any act which subverts the nature of the bailment. That would, indeed, bring the common-law principle of protection within a narrow compass; for there are few breaches of bailment that are not subversive of it. The supposed act of subversion, in cases like the present, is the overworking of a horse or the otherwise abusing of the thing bailed, which, by the way, is at the same time an indisputable breach of the contract, and ground sufficient for an action on it. This being so, it remains to be seen whether an infant is chargeable for it in the shape of a tort. There are two cases (*Powel v. Layton*, 2 N. R. 365, and *Weall v. King*, 12 East, 452) in which it is maintained that even an adult is not. . . .

But *Campbell v. Stakes*, though entitled to less authority merely as a decision, being the judgment of a popular court, yet distinctly enough discloses the foundation of the doctrine. The contract, it was justly said, comprises a promise to keep the thing from harm and return it at the stipulated time; for a negligent breach of which, it was admitted, the infant would not be liable as for a tort. But it was said that any positive act of injury inconsistent with the contract, would disaffirm it and leave him liable as if there had never been a contract. What is that but to make him a tortfeasor by construction? It is scarce maintainable, however, that a positive breach of the contract is an unqualified disaffirmance of it. Where the infant intended no disaffirmance, I am unable to see how the adult shall intend it for him, or insist that he rescinded the whole by perhaps an inconsiderable breach of a part. However convenient such a pretext might be to add a new responsibility to the predicament of the bailee or to extricate the bailor from an old one, it is to be remembered that the exercise of the privilege is not for the adult but for the infant. I know nothing, nor did I ever before hear, of a constructive election to disaffirm in order to strip an infant of his privilege, and, by turning him from a contractor into a trespasser, to put him in a worse condition than if the contract had been indefeasible. Such a construction is not in keeping with the benign principles of the common law, which, in other

cases, holds him only to such acts as are beneficial to him, and declares such as are positively detrimental to him to be positively void. Even were that otherwise, yet to give to an injury done to the thing bailed the character of an independent trespass, would require the bailment to have been first terminated; for the very foundation of the argument is, that the contract was out of the way at the time; but by the most attenuated construction, its cessation and the inception of the wrong, could be but simultaneous. On what principle, then, can it be a trespass? The distinction taken in the *Six Carpenters' Case*, 8 Coke, 146, betwixt an authority given by the law, whose abuse makes the offender a trespasser from the beginning, and a license by the party, whose abuse does not, has never been questioned. The killing of a beast distrained by the grantee of a rent charge makes not the distress a trespass, because it is given by the grant and not by the law. 1 Inst. 141. The reason is that a party is entitled to the best protection the law can give against an abuse of an authority delegated not by himself but by the law, which to that end, makes void everything improperly done under it; while a party who gives an authority to an unsafe person has only himself to blame for it. 6 Wils. Bac. 561. Now taking for granted that the act annihilated the contract: it cannot be denied that there was a precedent license, for an excessive use of which the infant is sought to be charged as for a trespass; with what pretense of reason, when an adult could not be so charged, it is unnecessary to say. The theory on which a breach of contract has been thus turned into a trespass, is as incomprehensible to me as the theory on which a common recovery bars an entail; and why we should employ any juggle whatever to tear from an infant the defenses with which the law has covered his weakness, is equally incomprehensible. In the American courts, the hardship of particular cases, as in the earlier decisions on the statute of limitations, seems to have run away with the law; but it is to be remembered that particular hardships are to be borne in giving effect to every general principle of policy. To fritter away the rule by exceptions such as these, would expose a child of the most tender years to an action for the destruction of a delicate or dangerous instrument thoughtlessly or wickedly put into his hands; for, in contemplation of law, an infant of three years is not inferior in discretion to one of twenty. The mischiefs to which minors are exposed from the cupidity of those whose trade it is to pamper their appetites, are sufficiently depicted in *Penrose v. Curren*; and we are not disposed to surrender the principle asserted in it. It is clear that the evidence of infancy ought to have been admitted; and that the court erred also in directing that if the infant hired the horse to go to a particular place and injured him by going beyond it, he was guilty of a conversion. Judgment reversed, and a venire facias de novo awarded.

FREEMAN v. BOLAND, 44 R. I. 39, Smith's Cases, L. P. 331, 51 Am. Rep. 349, 1882.

Same Points as in Wilt v. Welsh, Ante.

DURFEE, C. J. The question here is whether an infant or minor who hires a horse and buggy to drive to a particular place, and, who, having got them under the hiring, drives beyond the place or in another direction, is liable in trover for the conversion. We think he is. There are cases in which infancy has been held to be a good defense to an action *ex delicto* for tort committed under contract or in making it. But that is not this case. The act here complained of was committed, not under the contract, but by abandoning it; the bailment being thus determined.

The contract cannot avail if the infant goes beyond the scope of it. The distinction may be subtle, but it is well settled, and has been often applied in support of actions precisely like this. It is true the contract must be generally put in proof to support the action, but this is because the tort, inasmuch as it is committed by departing from the terms of the contract, cannot be shown without showing the contract, and not because the contract is otherwise involved. *Homer v. Thwing*, 3 Pick. 492; *Towne et al. v. Wiley*, 23 Vt. 355; *Fish v. Ferris*, 5 Duer, 49; *Vasse v. Smith*, 6 Cranch. 226; *Green v. Sperry*, 16 Vt. 390; *Campbell v. Stakes*, 2 Wend. 137; *Addison on Torts*, sec. 1314. . . . Exceptions overruled.

See "Infants," Century Dig. §§ 161-168; Decennial and Am. Dig. Key No. Series §§ 59-62.

BARNES v. HARRIS, 44 N. C. 15. 1852.

Same Points as in Wilt v. Welsh, Ante.

[Action of tort against a feme covert and her husband for injuries to a horse caused by the wife. Verdict and judgment against plaintiff, and he appealed. Affirmed.]

The feme defendant borrowed the plaintiff's horse to drive a distance of fourteen miles, and injured it by hard driving and overloading. She acted with negligence and with want of skill and judgment in her treatment of the horse, but *not wilfully or maliciously*. In borrowing the horse the wife acted as agent for her husband. The judge charged that the plaintiff's remedy was on the contract of the husband, and that he could not recover of the wife by electing to sue her in tort.]

NASH, C. J. The action was commenced against Jesse Harris and his wife, the present defendant, Matilda Harris, and against Henry Nance, the other defendant. Jesse Harris is dead, and the suit abated as to him; and the only question raised by the bill of exceptions is, can it be carried on, or survive against the wife? On the part of the plaintiff it is admitted that in the contract of bailment, Mrs. Harris was the agent of her husband, and on it she is not liable; but it was sought to subject her by deserting the con-

tract and suing in tort, upon the ground that a feme covert is answerable for her own personal trespasses, and may be sued with her husband, and that if he die pending the action, the suit will not abate as to her. The principle is correct in the abstract, and if the facts set forth in the case amount to such a trespass on her part, then the suit is properly prosecuted against her. All persons are liable for their own tortious acts, unconnected with, or in disaffirmance of, a contract. Thus, though an infant cannot be sued upon his contract, except for necessities, yet he is liable in damages for an assault and battery, and for his slander; but a person cannot, by changing his form of action, charge him for a breach of contract, as for negligence or immoderate use of a horse. *Jennings v. Rundall*, 8 Term R. 335. In that case, the immoderate use of the horse, which was the gravamen of the plaintiff's claim, and which had been hired to the defendant, who was an infant, was strongly urged as being a tortious act, which would sustain the action. It was decided that the plaintiff could not recover, because the cause of action grew out of a contract, for a breach of which no action could be sustained. If this were not the law, the protection thrown around infants would, in many cases, be fruitless. A married woman is not personally liable for her contracts of any kind; but if she commit an actual tort, she is liable, and may be sued jointly with her husband; but it must be an actual tort, as an assault and battery, and not a constructive one, arising from ignorance and negligence. *Coke Lit.* 180, B. n. 4. It is admitted in this case, that in borrowing the horse from the plaintiff, she was acting as the agent of her husband; and therefore the attempt is made to charge her in tort. Two tortious facts are alleged—the one overloading the vehicle, and the other immoderate driving. We understand from the case, that she both loaded and drove the vehicle. Do both or either of these acts amount to such an actual trespass, as to subject her to an action? We are very clearly of opinion they do not. Both the overloading and the immoderate driving were acts of negligence or want of skill. In the case of the infant, we have seen that the immoderate driving was not such a tortious act as subjected the defendant to an action of tort. Why should it in a feme covert? Neither was answerable upon the contract, and both are answerable for an actual tort. The case discloses no act of the defendant, Matilda, amounting to such a tort. It is not shown that she struck the horse a blow on the ride. If she had beaten him with a club, or cut him with a knife, whereby he was injured, or his owner deprived of his services, she would have been answerable—and for an actual tort. We see no error in the judgment. Affirmed.

See also *Schenck v. Strong*, 4 N. J. L. 99; *Lowery v. Cate*, 64 S. W. 1968, 37 L. R. A. 673, and note elaborately treating the subject of actions in tort brought against infants for acts growing out of, or intimately connected with, contracts. The excellent summary of the doctrine, at the end of the note, gives a clear and concise outline not only of the law, but of the conflicting views entertained on the subject. See "Husband and Wife," *Century Dig.* §§ 791-795; *Decennial and Am. Dig.* Key No. Series §§ 214, 223.

SEC. 2. ACTIONS EX CONTRACTU.

(a) *Covenant.*

JEROME v. ORTMAN, 66 Mich. 668, 33 N. W. 759. 1887.

In What Cases the Action of Covenant Lies.

[Action of covenant on an instrument not actually sealed. Objection by defendant to the form of the action. Objection overruled and verdict and judgment against the defendant, from which he appealed. Affirmed.]

A statute in Indiana enacts that "no bond shall be deemed invalid for want of a seal affixed." The instrument sued on possessed all the requisites of a bond or covenant except the seal.]

CAMPBELL, C. J. In this case the plaintiffs sued defendants in an action of covenant for the violation of the terms of an agreement which was executed without any actual seal or scroll, but which was declared to be the act of the parties, in witness whereof they thereunto set their hands and seals. The court below held that the action of covenant was properly brought, and judgment was rendered upon the verdict of the jury for damages shown. It is claimed now by defendants that, the agreement not being actually sealed, assumpsit was the only action permissible; and assumpsit being barred in six years, while covenant is not barred until ten years, the distinction is material and vital in the present case, where more than six years had expired. We have no statutory definition either of a covenant or of the action of covenant. We must therefore go back to the common law. It is claimed by defendants that a covenant is an instrument under seal, and that the action of covenant is confined to sealed instruments. This was generally so at common law, but the definition is not accurate in the order of statement. Covenant at common law is an action upon a deed. It is only because a deed at common law required a seal that covenant has been declared to lie upon a covenant or agreement under seal. It is the question whether the instrument was a deed or not that governs. All sealed instruments are deeds. But even at common law a party could be held sometimes where he had not affixed his own seal at all. Thus the lessee in a king's patent might be sued for a covenant broken, although he sealed no counterpart, because bound by his acceptance. Com. Dig. "Covenant." A 1. And in a lease to two persons, one only of whom sealed the counterpart, the same doctrine was laid down. Id.; Co. Litt. 231a. Several other cases are put in Comyn to the same effect. Implied covenants, before our statutes on the subject, came under this rule.

In Fitzherbert's *Natura Brevium*, 146A, where the writ of covenant is explained, it is said that by the custom of London covenant would lie without deed. And the same customary exceptions appears to have existed elsewhere. Com. Dig. Id.

It is declared by our statutes (How. St. § 7778) that no bond, deed of conveyance, or other contract in writing, signed by any party, his agent or attorney, shall be deemed invalid for want of

a seal or scroll affixed thereto by such party. At common law the seal alone was the test of the existence of a deed. Our statutes contemplate a signature as equally necessary. The statute just referred to indicates that some other thing than a seal may be considered, and this can only be the intention of the parties as found in the instrument itself, and the purpose it was intended to serve. There can be no doubt what the agreement before us means. It uses the word "covenant" throughout to indicate what agreements the parties were making, which involved the sale and conveyance of lands when paid for. It was provided that the covenants should bind the heirs of the respective parties as well as their representatives; and it recited that the parties thereunto set their hands and seals. This language, and the whole contract taken together, cannot be construed as intending anything else than what would have been an agreement under seal or deed at common law. It is apparent that the failure to seal was inadvertent. It is the precise case intended by the statute, where an instrument purporting to be a deed is not sealed. There is no ambiguity in the expressed intention. The statute is in harmony with the general policy of our law, which does not require any particular method of sealing, and permits anything to be called a seal which is adopted for that purpose. It does not put specialties and simple contracts on the same footing, but it allows parties who intend to make specialties to have their intent carried out. In a case so plain as the one before us, there is no occasion for prolonged discussion. The paper purports to be a deed, and is a deed. The judgment must be affirmed.

"Debt and covenant are concurrent remedies for the recovery of any money demand, when there is an express or implied contract in any instrument under seal to pay it: but, in general, debt is the preferable remedy—as in that form of action the judgment is final in the first instance if the defendant do not plead. See *Stephens N. P.* 1057." *Taylor v. Wilson*, 27 N. C. at p. 216. See "Covenant, Action of," *Century Dig.* § 6; *Decennial and Am. Dig. Key No. Series* § 1.

(b) *Debt.*

CASSADY v. LAUGHLIN, 3 Blackford, 134. 1832.

In What Cases the Action of Debt Lies.

[Laughlin sued, in debt, on an instrument for the payment of two hundred dollars—to be paid in lumber of such description as the payee might require, at the lowest cash price. The declaration set out the instrument; that demand had been made for the lumber; that delivery was refused. Demurrer: (1) That debt will not lie, but the proper action was covenant; (2) That the demand was insufficient. Demurrer overruled and judgment against the defendant. After the judgment was rendered, the defendant died and Cassady, his administrator, carried the case to the supreme court by writ of error. Reversed.]

STEVENS, J. . . . In the decision of this case, we do not think it necessary to examine both causes of demurrer, as the first

point made is a decisive objection. Debt is defined in Bac. Abr. to be an action founded on *an express or implied contract, in which the certainty of the sum or duty appears*, and "therefore the plaintiff is to recover the same in numero, and not to be repaired in damages by the jury." Com. Dig. says: "Debt lies upon every express contract to pay a *sum certain*." Blackstone in his commentaries, says: "The legal acceptance of debt is, a sum of money due by certain and express agreement, where the quantity is fixed and specific, and does not depend upon any subsequent valuation to settle it." Indeed, the definition given in all the books amounts to the same thing. The plaintiff must recover in numero and not in damages.

The three distinguishing points in the action of debt are that the contract must be—1st, for money; 2nd, for a sum certain; 3rd, specifically recoverable.

The contract in this case is not for money, but for lumber; and as that is not any certain and specific lumber, being designated only by its price or value, the contract cannot be specifically enforced by a judgment. It applies equally to all lumber of that value, and no specific judgment could be rendered for it. The sum to be recovered sounds in damages, and may be a greater or less sum. That the recovery should be the amount of the value for which it ought to have been delivered, is granted; but a greater or a less sum might be recovered, for the contract is not to pay the amount in money, but sounds solely in damages for the breach of the contract. If upon a failure to pay the lumber, the demand became, instanter, a liquidated demand for money then being due by specialty, the interest would immediately attach as a legal consequence. But that is not the case here; for interest may or may not be allowed in the discretion of the court or jury who try the issue.

Suppose the defendant below had offered a plea of tender of \$200 in money on the day of payment, would it have barred the action? It would not. The defendant had bound himself to deliver lumber, and the delivery of the specified sum of money named in the contract as the value of the lumber, is not a legal compliance with the contract. The payee might be much more or much less damaged, than the amount of the price or value set upon the lumber by the contract. *Wilson v. Hickson*, 1 Blackf. 230; *Hedges v. Gray*, 1 Blackf. 216; *Campbell v. Weister*, 1 Litt. 30; *Bruner v. Kelsoe*, 1 Bibb, 487; *Watson et al. v. M'Nairy*, 1 Bibb, 356; *Scott v. Conover*, 1 Hals. 222.

Per Curiam. The judgment reversed with costs.

See "Debt, Action of," Century Dig. §§ 5-10; Decennial and Am. Dig. Key No. Series § 1.

(c) Account.

SCOTT v. McINTOSH, 2 Campbell, 238. 1809.

When an Action of Account Lies.

Assumpsit for commission on the sale of goods, for money paid, for money had and received, and on account stated. Plea, the general issue.

This action was brought to recover the balance of an account which had been running between the parties for several years, and which consisted of several thousand items. The plaintiff's case being opened by the attorney-general.

Lord Ellenborough said, this being strictly a matter of account, if it was to be investigated in a court of law, the action of account was the proper remedy. I should be fully warranted in stopping the trial and requiring the plaintiff to institute a different mode of proceeding. Those who so wisely framed our jurisdictions did not contemplate a long account between merchants being referred to a jury. This tribunal is quite unfit for such an investigation; and we have not the necessary time to bestow upon it. Let the plaintiff bring his action of account, and auditors will be appointed, who will do justice between the parties, without producing any inconvenience to the public.

The attorney-general allowed that the action of account was the proper mode of proceeding; but said assumpsit had been brought, in the confidence that the matters in difference would have been referred to an arbitrator, who would have performed the office of the auditors. The defendant would not agree to a reference, and the plaintiff submitted to be nonsuited.

See "Account," Century Dig. §§ 26-35; Decennial and Am. Dig. Key No. Series § 11.

TOMKINS v. WILLSHEAR, 5 Taunton, 431. 1814.

When an Action of Account Lies.

This was an action for money had and received, and on an account stated; it was tried before Richards, B. at the Sussex spring assizes 1814, when the defendant objected that the action could not be maintained under the circumstances of the case. The learned Baron reserved the point, but wished the case to go to the jury, who accordingly found a verdict for the plaintiff. The action was brought to recover the balance of a banking account, which had run from 1800 to 1808. In 1808 a balance was struck: between 1808 and 1811 a great many sums had been paid, but no balance struck. The balance now due appeared to be 134 pounds. It was objected on the authority of *Scott v. McIntosh*, 2 Campb. 238, that assumpsit was not the proper form of action to try such a cause, but that it ought to be an action of account, and Campbell cited *Gilb. Exid.* 192, and 2 Keb. 781, *Lincoln v. Parr*.

Shepherd, solicitor general, now moved to set aside the verdict and enter a nonsuit, upon the ground that assumpsit could not be maintained.

GIBBS, C. J. A sad use is made of these nisi prius cases. I remember that case: it was a case which it was impossible to try; and there is usually a decency about counsel which prevents them from pressing that to a conclusion which can never be concluded. It is impossible it ever can have been decided, that if, upon dissecting an account, there appears money due upon certain items, an action for money had and received cannot be maintained. The use of the action of account is, where the plaintiff wants an account, and cannot give evidence of his right without it; but if, by subtracting the amount of the six articles on the one side, from the amount of the nine articles on the other, the plaintiff can make out that a balance is due to him, even of 50 pounds, it is impossible to say that the action of assumpsit will not lie for that balance. Here the plaintiff takes up the balance stated on the account, proceeds with his evidence through many other items, and establishes a balance due. Rule refused.

See "Account," Century Dig. §§ 26-35; Decennial and Am. Dig. Key No. Series § 11.

FIELD v. BROWN, 146 Ind. 293, 297-299, 45 N. E. 464. 1896.

"Bill for an Account," "Account Render," *Assumpsit at Law. Bill for an Account, in Equity.*

[Action (1) to set aside a settlement; (2) for an account; and (3) for money had and received. A jury trial was refused as to the first two (affirmed), and denied as to the last (reversed). Only so much of the opinion as discusses the jurisdiction at law and in equity in matters of account, is here inserted.]

HACKNEY, J. . . . Bisp. Eq. § 484, is cited by appellees. It is there said: "While the jurisdiction of courts of chancery in matters of account is limited by the considerations above stated, and perhaps by others, it is, nevertheless, difficult to draw the line with absolute precision. It may, however, be affirmed that, in all cases in which an action of account would be a proper remedy at law, the jurisdiction of a court of equity is undoubted; and that this jurisdiction will extend, moreover, to all cases of mutual accounts, and also to cases in which the accounts are all on one side, but are very complicated and intricate, although such accounts would not be cognizable in the common-law action, as not existing between those parties by and against whom account render will lie. In short, the jurisdiction of the chancellor covered all cases for which account render would lie, besides many to which that action did not extend." Some of the limitations referred to in the section quoted are stated in section 483 of that work: "It must not be supposed, however, that a court of chancery can draw to itself every transaction between individuals in which an account

between the parties is to be adjusted. Its jurisdiction is limited by certain restrictions. A court of equity cannot take cognizance of every action for goods, wares, or merchandise sold and delivered, or for money advanced, where partial payments have been made, or of every contract, express or implied, consisting of various items, in which different sums of money have become due, and different payments have been made. . . . Where the receipts or payments, or both, are all on one side, a bill for an account will not lie." To clearly comprehend the meaning of the author in these sections, we must look to the definitions of the phrases "bill for account" and "account render." They were formerly employed in the common-law practice to denote the procedure by which an accounting was secured, and, as indicated by Tiedeman, *supra*, the frequent inadequacy of the remedy at law or by jury trial gave rise to the equitable remedy. But this did not carry into equity every proceeding to enforce the collection of an unliquidated demand consisting of several items. "The difficulty of drawing the line with absolute precision" between those demands of an equitable and those of a legal nature has resulted in the more modern action of assumpsit, a legal remedy, and the suit for an accounting, an equitable remedy. Burrill Law Dict. "Account," p. 22; Bouv. Law Dict. "Account," p. 85; 2 Greenl. Ev. §§ 34, 35; Bisp. Eq. §§ 479, 480, 481, 482; Enc. Pl. & Prac. pp. 84, 85. In the latter it is said: "'Account,' sometimes called 'account render,' was a form of action at common law against a person who, by reason of some fiduciary relation, was bound to render an account to another, but refused to do so. In England the action early fell into disuse. And, as it is one of the most dilatory and expensive actions known to the law, and the parties are held to the ancient rules of pleading, and no discovery can be obtained, it never was adopted to any great extent in the United States. But the action of account was adopted in several states, principally because there were no courts of chancery in which a bill for an accounting lay." Pennsylvania, Connecticut, and Illinois are cited as some of the states adopting the old practice. It is by reason of these changes from the ancient to the modern rules of practice, as here illustrated, that the appellant's second and third paragraphs of complaint presented causes of equitable jurisdiction, and that his first paragraph presented a cause of legal jurisdiction. The former would, under the old practice, have been causes of common-law jurisdiction. The latter is now the action of assumpsit.

We do not think, however, that the dividing line between causes or defenses of equitable and those of legal cognizance is to be ascertained by counting the items of account subject to inquiry. If an accounting is necessary or desirable, by reason of the complicated condition of the transactions in dispute, an appeal may be made to the equitable jurisdiction of our courts, either by complaint or cross complaint, seeking such relief. But it has never, in this state, been deemed a cause for equitable relief that one may set forth an account of numerous items. As early as *Cummins v.*

White, 4 Blackf. 356, it was held that "equity has no jurisdiction over accounts, however numerous and important the charges, where there is no mutuality of dealing, and discovery is not required; but law has." That there should appear affirmatively some cause for equitable relief, independently of the presentation of numerous items of account, before the equity side of the court will be opened to entertain the question, is manifest. This proposition has been clearly held in *Grafton v. Reed*, 26 W. Va. 437; *Bowen v. Johnson*, 12 Ga. 9, and *Upton v. Paxton* (Iowa), 33 N. W. 773.

See ch. 8, § 3 (a); 23 L. R. A. (N. S.) 478, 787, 924, and notes. For a very full statement of the practice in the action of account at common law, see the brief at pp. 394-400 of 33 N. C. Reports. For the practice in North Carolina before the adoption of the Code of Civil Procedure, see Rev. Code, pp. 102, 179, §§ 94, 114. See Adams' Eq. *220 for further information on the subject of the action of account at law and the jurisdiction of equity in matters of account. See "Account," Century Dig. § 62-71; Decennial and Am. Dig. Key No. Series §§ 12-14.

(d) *Assumpsit*.

CARROL et al. v. GREEN et al., 92 U. S. 509, 512-514. 1875.

When Assumpsit Lies, and the Origin of the Action.

[Plaintiff filed a bill in equity in the United States Circuit Court seeking to enforce the personal liability of the defendants as stockholders in a bank chartered in South Carolina. Defendants set up the statute of limitations. The judge held that the cause was not barred and rendered a decree against the defendants, from which they appealed. Reversed.]

The statute of limitations applicable to this case required *actions on the case*, and *actions of debt* grounded upon any contract except a specialty, to be brought within four years. This bill was not filed within four years. Only that portion of the opinion which discusses the actions of debt and case or assumpsit, is here inserted.]

Mr. Justice SWAYNE. . . . The section of the Act of 1852, which is said to create the individual liability here in question, is silent as to who shall sue. The suit was, therefore, necessarily to be brought by and for the benefit of the parties injured. 2 Inst. 650; Com. Dig. Debt, A. 1.

Individual liability is repugnant to the law of corporations, and qualifies in this case an exemption which would otherwise exist. Stockholders in such cases are liable according to the plain meaning of the terms employed by the legislature, and not otherwise. The section is silent as to a preference to any class of creditors. All, therefore, in this case, stood upon a footing of equality, and were entitled to share alike in the proceeds of the litigation. The remedy against the stockholders was necessarily in equity. *Pollard v. Bailey*, 20 Wall. 521. They were severally compellable to contribute according to the amount of stock they respectively held, and the liabilities of the bank to be met, after exhausting its means, the maximum of the liability of each stockholder not to exceed in

any event twice the amount of his stock. *The Bank of Circleville v. Iglehart*, 6 McLean, 568, Fed. Cas. No. 860.

It is obvious from this statement, that, if there had been a suit at law against the stockholders, debt could not have been maintained. The action of debt lies on a statute where it is brought for a sum certain, or where the sum is capable of being readily reduced to a certainty. It is not sustainable for unliquidated damages. 1 Chit. Pl. 108, 113; *Stockwell v. United States*, 13 Wall. 542. "The action of debt is in legal contemplation for the recovery of a debt *eo nomine* and in *numero*." "Case, now usually called *assumpsit*," is founded on a contract express or implied. 1 Chit. 99; *Metcalf v. Robinson*, 2 McLean, 364, Fed. Cas. No. 9,497.

Let us apply these tests to the case in hand. Certainly the amount sought to be recovered was not certain, and could not readily be reduced to a certainty; and there was clearly an implied promise on the part of the stockholders. The legislature created the corporation, and prescribed certain terms to which the stockholders should be subjected. This was an offer on the part of the state. It could be accepted or declined. There was no constraint. By taking the stock the terms were acceded to, the contract became complete, and the stockholders were bound accordingly. The same result followed which would have ensued under the like circumstances between individuals. The assent thus given and the promise implied are of the essence of the liability sought to be enforced in this proceeding. If a remedy at law were necessary, clearly it must have been case.

Case is a generic term, which embraces many different species of actions. "There are two, however, of more frequent use than any other form of action whatever: these are *assumpsit* and *trover*." Steph. Pl. 18. "The more legal denomination of the action of *assumpsit* is trespass on the case upon promises." 3 Woodison's Lect. 168. This form of action originated, like many others, under the Stat. of Westm. 2, 13 Edw. I. ch. 24, s. 2. Its establishment was strenuously resisted through several reigns. 2 Reeves's Hist. 394, 507, 608. It was sustained, upon full consideration, in *Slade's Case*, 4 Coke, which was decided in 44 Elizabeth. When the statute of South Carolina of 1712, here in question, was enacted, the term case was as well understood to embrace *assumpsit* as any thing else in the law of procedure to which it is now held to apply. Blackstone thought that one of the most important amendments of the law during the century in which he lived was effected "by extending the equitable writ of trespass on the case, according to its primitive institution by King Edward the First, to almost every instance of injustice not remedied by any other process." 4 Com. 442.

But if debt were the proper form of action, if this were a suit at law, the result must be the same. The act bars "all actions of debt" grounded upon any lending or contract without specialty, "after the lapse of four years." The contract here was of the class last designated. The statute was only inducement. The im-

pled promise of the stockholders to fulfil its requirements was the agreement on their part, and it was without speciality. . . .

If a claim like that of the appellees [plaintiffs] sued at law would have been barred at law, their claim is barred in equity. This proposition is too clear to require argument or authorities to support it. Decree reversed.

See "Assumpsit, Action of," Century Dig. § 1; Decennial and Am. Dig. Key No. Series § 1.

WILSON v. MURPHEY, 14 N. C. 352. 1832.

When Assumpsit Does Not Lie.

[Assumpsit for money due upon a settlement, between plaintiff and defendant, of matters arising under a written and sealed lease. Defendant objected to the form of action and insisted that the plaintiff should have brought covenant. Objection overruled and judgment against the defendant, from which he appealed. Reversed.]

Plaintiff, by the terms of the lease, was to be paid for all necessary rails used in fencing the demised land. The parties came to an accounting, and a balance was found to be due to plaintiff for rails, which balance the defendant promised to pay. Hence plaintiff sued in assumpsit.]

RUFFIN, J. I should very gladly decide this small cause for the plaintiff (who is a pauper), if I could do so without removing the landmarks of the law. We must take it that the sum due him upon the settlement, was for work mentioned in the lease to be done on the plantation, namely, getting rails at a particular price. If so, he still had a remedy on the covenant in the lease, which was executed by both parties. Can he have the inferior one of assumpsit for the same thing? If one owe money on a bond and engage by parol to pay it on such a day, he cannot be sued in assumpsit. This is not a mere technical rule. All the securities which deeds are intended to create, as to the terms of the contract, in favor of the covenantor, depend on it. If indeed there be no remedy on the deed; if the contract has been rescinded, or abandoned before breach; if after breach it has been delivered up, or satisfaction entered upon a settlement, then it is different, because there is but one remedy and that on the promise. If one covenant to build a house for another by a particular day and fail, but builds it afterwards and it is accepted, the deed does not bar an action on the quantum meruit, though it may restrict the prices to those specified in it. So if any other executory agreement be rescinded before breach, and in consideration of that, the parties account, assumpsit lies for the balance struck. Why? Because there is no remedy on the deed. That was precisely the case of *Foster v. Allanson*, 2 T. R. 479, and is the footing on which Judge Buller rests his decision, and this was after the case of *Moravia v. Levy*, before him at Nisi Prius. A partnership was there formed by deed for seven years, and there was a covenant to account an-

nually, and to account and pay at the end of the term. Before the seven years were out they agreed to dissolve, and then to account and pay. They did account, and the action was brought for the sum acknowledged to be due. On the deed no action could by its terms be brought; and Buller said the question was, whether the dissolving a previous partnership and settling the account was or was not, in point of law, a sufficient consideration for an express assumpsit, which he clearly held in the affirmative. But no instance can be stated in which after the time limited in the deed for the performance of a duty thereby created, an action can be maintained on a promise to fulfil the covenant, the deed remaining all the while in existence and full force. The reason is, because precisely the same evidence, as to the extent of the demand, and indeed every other matter but the making of the agreements and the terms of them, will support both actions. And whether the law ought, for the certainty of the contract, to take the specialty or the verbal agreement, it is easy for any to judge. Here, for example, the lease fixes the price of the rails. It might be different if that were left uncertain; for fixing the price is in itself a new agreement, distinct from any provision in the deed; but in the present case, the only further requisite to a full recovery on the deed is, evidence of the quantity; and that is as susceptible of proof in an action on the covenant, by the acknowledgement of the defendant, as it is in assumpsit. There is, then, no new consideration for the promise, and the deed remained in force, for it was to be delivered to the plaintiff by the holder, not as far as appears, to be cancelled, but as properly belonging to the only person who then had an interest in it and could take advantage under it. In such a case, I think no action lies on the promise merged in the existing deed, more than on a promise merged in a deed or judgment subsequently taken for the same debt. The case of *Codman v. Jenkins*, 14 Mass. 93, is an authority in support of the general reasoning I have adopted, and also of the import of *Foster v. Allanson*, which is cited and commented on by the court. That was the case of a lease for life, and an assignment by the lessor of the reversion; the assignee and the lessee came to an account of the rent in arrear in his time, and the tenant made an express promise to pay it; held, that assumpsit would not lie, but that it ought to be debt or covenant. This seems to me to be in point; and I think there must be a new trial. Judgment reversed.

For further information regarding the technical law governing the action of assumpsit, see *Bouvier's Law Dict.* "Assumpsit." See "Assumpsit, Action of," *Century Dig.* §§ 27-36; *Decennial and Am. Dig.* Key No. Series § 6.

SEC. 3. ACTIONS EX DELICTO.

(a) *Trespass Vi et Armis.*

LOUBZ v. HAFNER, 12 N. C. 185. 1827.

When Trespass Vi et Armis Lies.

[Action of Trespass Vi et Armis for purposely frightening plaintiff's horses by beating a drum in the public highway. The judge held that the action would not lie, but that trespass on the case should have been brought. Judgment against the plaintiff and he appealed. Reversed.]

Plaintiff was driving his horses along the public road. Defendant came into the road and beat a drum wilfully and for the purpose of frightening the horses. The horses ran away because of the beating of the drum, and injured plaintiff's wagon.]

TAYLOR, C. J. All the authorities concur in the position, that whenever the injury is committed by the immediate act complained of, the action must be trespass; in other words, "if the injurious act be the immediate result of the force originally applied by the defendant, it is the subject of an action of trespass vi et armis, by all the cases ancient and modern, and that it is immaterial whether the injury be wilful or not." Several cases are put to illustrate this rule, as when one shooting at a mark with a bow and arrow, and having no unlawful purpose in view, wounded a man, it was held that trespass was the proper action. So where a person is lawfully exercising himself in arms, and happens to wound another, the same action must be brought. Hob. 134. *In actions of trespass, the distinction has not turned either on the lawfulness of the act from whence the injury happened, or the design of the party in doing it, to commit the injury; but on the difference between immediate injuries or consequential ones.* For if the injury be done by the act of the party himself at the time, or he be the immediate cause of it, though it happen accidentally or by misfortune, yet he is answerable in trespass. 3 East, 600.

It is impossible to doubt from the statement in this case, that the action is properly brought according to all the decisions. For if the wilfulness were a necessary ingredient in the case, it exists here, since the defendant beat the drum for the purpose of frightening the plaintiff's horses. It is much stronger than the case of *Scott v. Shepherd*, for here the act was immediately injurious, without any intermediate agency. If in the case of *Scott v. Shepherd*, the injury had been done to the person upon whom the squib first alighted, it would have resembled the case before us, and then there would have been no grounds for the dissenting opinion of Mr. Justice Blackstone, who thought that the first act was complete when the squib lay on the stall where it first fell, and that the injury done to the plaintiff after the squib had received two new directions, was the consequence of, and not done immediately by, the first act of the defendant.

The nature of the act done in this case, the time and place where it was done, a wagon and team passing the public road, rendered it probable that injury would be the immediate result, and would

render the defendant liable in the action, though he had no views as to the consequences. For though the bad intention must be alleged and proved in a charge of felony, it is not necessary to be considered in this action. "Where a man shoots with a bow at a mark and kills a man [by misadventure, 4 Blk. *192] it is not felony, and it should be construed that he had no intent to kill him, but when he wounds a man, although that be against his will, he shall be said to be a trespasser." 3 Wils. 408. If the injury done be not inevitable, the person who doth it, or is the immediate cause thereof, even by accident, misfortune, and against his will, is answerable in this action of trespass vi et armis. 1 Strange. 596; Sir T. Jones. 305; Sir T. Raym. 422. For these reasons I am of opinion that upon every ground of law and convenience, as well as the most manifest justice in the particular case, the action was well brought, and the plaintiff, on the proof offered, should have had a verdict. Reversed.

See "Action," Century Dig §§ 236-255; Decennial and Am. Dig. Key No. Series § 30; "Trespass," Century Dig. § 16; Decennial and Am. Dig. Key No. Series, § 17.

MCCLEES v. SIKES, 46 N. C. 310. 1854.

When Trespass Vi et Armis Lies.

[Trespass with two counts—(1) Trespass q. c. f.; (2) Trespass vi et armis. Plaintiff abandoned the first count. Verdict and judgment against the defendant on the second count, and he appealed. Affirmed.

Defendant entered upon land which belonged to neither plaintiff nor defendant, and drove off plaintiff's slaves who were at work there by plaintiff's orders. The defendant did not touch the slaves. The judge instructed the jury that upon these facts plaintiff could recover in trespass vi et armis. Defendant excepted. Defendant also objected to the joinder of the two counts; but that point was also ruled against him by the judge.]

BATTLE, J. The objection to the joinder of the count for trespass vi et armis to slaves, with that for trespass quare clausum fregit to land, is clearly untenable. The form of the action is the same, requiring the same plea and judgment. This question is too plain to require any reference to authority.

We think there is very little more force in the other objection. The defendant's conduct was certainly an unlawful interference with the plaintiff's slaves. He did not touch them, it is true, but his driving them off was a direct injury with force, similar to that of an assault, for which trespass vi et armis is the proper remedy. In the case of Sample v. Bell, 44 N. C. 338, where the action was trespass on the case, there was no force, either actual or implied. The present is a much stronger case than that of Loubz v. Hafner, 12 N. C. 185, in which it was held that, where the defendant beat a drum near the highway, which caused a team of horses to run away with and damage a wagon, trespass vi et armis was the proper action. The judgment must be affirmed.

See "Action," Century Dig. §§ 236-255; Decennial and Am. Dig. Key No. Series § 30.

(b) Trespass on the Case.

"The action of trespass on the case lies where a party sues for damages for any wrong or cause of complaint for which covenant or trespass will not lie. This action originated in the power given by the statute of Westminster 2, 13 Edw. 1, ch. 24, to the clerks in chancery to frame new writs in consimili casu with writs already known. Under this power they constructed many writs for different injuries which were considered as in consimili casu with, that is, to bear a certain analogy to, trespass. The new writs invented . . . received the appellation of writs of Trespass on the Case—*brevia de transgressione super easum* . . . to distinguish them from the old writ of Trespass; and the injuries which are the subject of such writs were not called trespasses, but had the general names of Torts, Wrongs, or Grievances." These writs of Trespass on the Case though issued in various forms, to fit the special circumstances of each case, by degrees formed a new genus which took the name of Trespass on the Case. This genus comprises many species, the most prominent of which are Assumpsit and Trover, which are more used than any other form of action whatever." Stephen on Pleading, *17, 18.

In 1762 it was said by Lord Mansfield: "An action on the case is founded upon the mere justice and conscience of the plaintiff's case, and is in the nature of a bill in equity, and, in effect, is so. . . . Whatever will, in equity and conscience, . . . bar the plaintiff's recovery, may, in this action, be given in evidence by the defendant [without being specially pleaded.] because the plaintiff must recover upon the justice and conscience of his case and upon that only." *Bird v. Randall*, 3 Burrows, at p. 1355.

See "Action on the Case," Century Dig. §§ 1-14; Decennial and Am. Dig. Key No. Series § 1.

VAN PELT v. MCGRAW, 4 N. Y. 110. 1850.

Trespass on the Case. Broad Scope of the Action.

[Case for wrongfully and fraudulently removing rails, timber, etc., from land on which plaintiff held a mortgage. Judgment against the defendant, and he appealed. Affirmed. Only so much of the opinion as discusses the form of action, is here inserted.]

PRATT, J. There is no doubt but that an action on the case will lie for an injury of the character complained of in this case. It forms no objection to this action that the circumstances of the case are novel, and that no case precisely similar in all respects has previously arisen. The action is based upon very general principles, and is designed to afford relief in all cases where one man is injured by the wrongful act of another, where no other remedy is provided. This injury may result from some breach of positive law, or some violation of a right or duty growing out of the relations existing between the parties. 1 Cow. Treat. 3.

The defendant McGraw, in this case, came into the possession of the land subject to the mortgage. The rights of the holder of the mortgage were therefore paramount to his rights, and any attempt on his part to impair the mortgage as a security, was a violation of the plaintiff's rights. But the case is not new in its circumstances. The case of *Gates v. Joice*, 11 John. 136, was precisely like the case at bar in principle. That action was brought by the assignee of a judgment against a person for taking down and removing a building from the land upon which the judgment was a lien. The plaintiff's security was thereby impaired. The court in that case sustained the action. The decision in that case was referred to and approved in *Lane v. Hitchcock*, 14 John. 213; and in *Gardner v. Heartt*, 3 Denio, 234. Nor is there anything in the case of *Peterson v. Clark*, 15 John. 205, which conflicts with the principle of these cases. That was an action by a mortgagee in the usual form of action for waste. The declaration alleged seizure in the plaintiff, upon which the defendant took issue. There was no allegation that the mortgagor was insolvent, or the judgment as a security impaired. The only issue to be passed upon was that in relation to the seizure. It is quite clear that upon such an issue the mortgagee must fail. Now this action is not based upon the assumption that the plaintiff's land has been injured, but that his mortgage as a security has been impaired. His damages, therefore, would be limited to the amount of the injury to the mortgage, however great the injury to the land might be. It could, therefore, be of no consequence whether the injury occurred before or after forfeiture of the mortgage. The action is clearly maintainable.

See ch. 3, § 8, and ch. 7, § 1. See "Mortgages," Century Dig. §§ 544, 555; Decennial and Am. Dig. Key No. Series §§ 205, 216.

KELLY v. LETT, 35 N. C. 50. 1851.

Trespass on the Case and Trespass Vi et Armis Distinguished. Waiving the Trespass and Bringing Case.

[Action on the case for breaking plaintiff's milldam. Defendant insisted that trespass and not case was the proper remedy, and that, hence, this action would not lie. The judge ruled that this action would lie. Judgment against defendant, and he appealed. Reversed. The facts appear in the opening of the opinion.]

PEARSON, J. The declaration alleges that the plaintiff was the owner of a mill about one half of a mile below a mill, on the same stream, owned by the defendant; that the defendant repeatedly shut down his gates, so as to accumulate as large a head of water as possible, and then raised them, so as thereby to discharge an immense volume of water, which ran with great force against the dam of the plaintiff and swept it away; and that this was done by the defendant, wilfully and with intent to do the injury. The only question is, can an action on the case be sustained.

When the *act itself* is complained of, trespass *vi et armis* is the proper action. When the *consequences only* are complained of, then case is the proper action; or, as the rule is expressed in the books, trespass lies where the injury is immediate—case when it is consequential. There is no difficulty as to the rule. The difficulty is as to its application, and it sometimes requires an exceedingly nice perception to be able to trace the dividing line. But this case is settled by authority, and there is no occasion to resort to reasoning or to a discussion of principles. In *Scott v. Shepherd*, 2 Blk. Rep. 892, Grey, C. J., cites a suit from the register, 95a of trespass *vi et armis*, for cutting down a head of water maliciously, which thereupon flowed down to and overwhelmed another pond, which is our case.

It is true that in *some cases, although the injury be immediate, the party has his election, and may waive the trespass and bring case for the consequential damage*. As if one take another's horse, he may elect to bring trover (which is an action on the case), or if one in driving his carriage run on that of another, although the damage is immediate, case may be sustained, alleging that the defendant so *negligently* drove his carriage that it ran against that of the plaintiff and did great damage; and the defendant is not allowed to defeat the action by averring that the injury was more aggravated, for that in fact he drove against the carriage of the plaintiff on purpose and with intent to do the injury. *Williams v. Holland*, 10 Bing. 116. But if the declaration alleges that the defendant *took the horse from the possession of the plaintiff*, instead of supposing that he *found it*; or that the defendant *wilfully* drove against the carriage instead of ascribing it to *negligence*, case cannot be sustained because these allegations are inconsistent with the nature of that action, and it is simply an attempt to recover in case for a direct, wilful trespass, which is the peculiar subject of another form of action. To maintain case, you must waive your ground of complaint on account of the trespass. *Day v. Edwards*, 5 T. R. 648. It is apparent, then, that this right of election cannot exist except in cases where there is a separate and distinct cause of action besides the trespass. Admitting, for the sake of argument, this to be one of those cases, the plaintiff has no ground to stand on. He has not waived the trespass—that is, the burden of his complaint. But it seems to us this is not one of those cases, and we are inclined to think that case could not be maintained, if the declaration has been ever so carefully or skillfully drawn. Suppose the defendant had planted a cannon on his dam and wilfully fired at the plaintiff's dam until it was demolished, it could not be distinguished from the present case—the only difference being in the kind of force. In the one, the dam is destroyed by metal, propelled by the force of gunpowder; in the other, it is destroyed by water, propelled by the force of gravitation—the water being kept back on purpose to increase the head and thereby add to the power of the propelling force. Both are neither more nor less than wilful trespass. *And although the in-*

tent is not the test of liability, yet, when the damage is immediate, it is the test of the proper form of action. If the damage be immediate and the act is wilful, trespass is the only form of action.

There is no question that the doctrine by which plaintiffs in certain cases are allowed to waive trespass and bring case, which is finally settled by authority, is an indulgence granted on account of the difficulty of tracing the dividing line: and the principle is, that the plaintiff may, without injustice to the defendant, take the most charitable view of the case. But this doctrine only applies when two causes of action are involved: then one may be waived and still leave ground to stand on; but if the case involved merely a cause of action for trespass, to allow an election to bring case would be an absurdity—as if one wilfully shoots down another's horse or commits a battery on the person. Judgment reversed, and venire de novo.

See "Action," Century Dig. §§ 236-255; Decennial and Am. Dig. Key No. Series § 30.

NEVIN v. PULLMAN PALACE CAR CO., 106 Ill. 222, 46 Am. Rep. 689, 1883.

Trespass on the Case for Breach of Duty; for Breach of Contract. Case and Assumpsit when Concurrent Remedies.

[Action on the case for excluding plaintiff from a sleeping car after engaging a berth and tendering the price. Judgment against plaintiff, and he carried the case to the supreme court by writ of error. Reversed.

The error assigned is, that the lower court erred in holding that case would not lie.

After deciding that the defendant owes a duty to all unobjectionable persons to furnish them berths when it has berths unoccupied and the price is tendered, and that the facts of the case show a breach of such duty; and holding further that, under the facts of this case, the defendant was bound by contract to furnish plaintiff a berth, the opinion proceeds to discuss the question presented, to wit: Will an *Action on the Case* lie for excluding one from a sleeping car after he has engaged his berth and tendered the fare?]

MULKEY, J. . . . It is clear, in the present case the defendant utterly disregarded its duty in not making up the berth of the plaintiff, and in not permitting him and his wife to occupy it through the night, and in expelling them from the car, and for this it must be held liable.

The view here expressed is believed to be in consonance with the general principles of the law, and is clearly sustained by some of the best considered cases, both English and American. *Burnett v. Lynch*, 5 Barn. & Cress. 589; 11 Eng. Com. Law, 597; *Hancock v. Coffin*, 21 Eng. Com. Law, 318; *Dickson v. Clifton*, 2 Wils. 319; *Boorman v. Brown*, 3 Ad. & El. (N. S.) 525. In this last case, Chief Justice Tindal, in delivering the judgment in the Exchequer Chamber, entered into an extended review of the authorities, and in summing up used this language: "The principle in all these

cases would seem to be, that the contract creates a duty, and the neglect to perform that duty, or the nonfeasance, is a ground of action upon a tort," and this case was affirmed on appeal to the House or Lords, 11 Cl. & Fin. 44. In this case Lord Campbell, in delivering the judgment in the House of Lords, says: "I think the judgment of the Court of Exchequer Chamber is right, for you cannot confine the right of recovery merely to those cases where there is an employment without any special contract. But wherever there is a contract, and something to be done in the course of the employment which is the subject of that contract, if there is a breach of the duty in the course of that employment the plaintiff may recover either in tort or in contract." This, subject to the limitation hereafter to be stated, we regard as the true rule on the subject.

It is often and indeed generally stated that the action lies only for the breach of a common-law duty and this we believe to be strictly true; yet there is some confusion in the cases as to what is meant by a *common law duty*, growing out of the fact that it sometimes arises without the intervention of a contract and sometimes with it, and in the latter case it is often said, as in the case last cited, "the contract creates the duty," and while this is true and accurate enough in a certain sense, yet, when we attempt to define with precision just when the action will lie and when it will not, the statement is not sufficiently definite; for it must be conceded the law makes it the duty of every one to perform his contract, and it is clear that case will not lie for the breach of every duty created by contract. If one contracts to deliver to another a load of wood, or pay a specific sum of money on a given day, and fails to do so, an action on the contract alone will lie, and yet it is manifest, in the case supposed, there has been a breach of duty created by the contract. We think it more accurate, therefore to say that case lies only for the breach of such duties as the law implies from the existing relations of the parties whether such relations have been established with or without the aid of a contract; but if created by contract it is no objection to the action that the performance of the duty in question has been expressly stipulated for, if it would have existed by reason of such relations without such stipulation. This is well illustrated by the case put in the early part of this opinion where B let his horse to A to be kept at a stipulated price per day and returned on demand. Now in that case by the mere delivery of the horse to be kept at the price agreed upon, the law implied or imposed the duty of returning him upon demand without any agreement to that effect, and the duty being thus implied by law, independently of the express stipulation for its performance, case clearly would lie for its breach.

The general principle seems to be: Where the duty for whose breach the action is brought would not be implied by law by reason of the relations of the parties, whether such relations arose out of contract or not, and its existence depends solely upon the fact that it has been expressly stipulated for, the remedy is in contract,

and not in tort; when otherwise, case is an appropriate remedy. Of course assumpsit is a concurrent remedy with case, in all cases where there is an express or implied contract. . . . Judgment reversed.

See *Fisher v. Greensboro Water Supply Co.*, 128 N. C. 375, 38 S. E. 912; *Bowers v. R. R.*, 107 N. C. 721, 12 S. E. 452, and *Williams v. R. R.*, 144 N. C. 498, 57 S. E. 216, all inserted at ch. 4, § 1. See also *Solomon v. Bates*, 118 N. C. at p. 315, 24 S. E. 478, and *Robinson v. Threadgill*, 35 N. C. 39, inserted at ch. 8, § 3, d. See "Action," Century Dig. §§ 177-195; Decennial and Am. Dig. Key No. Series § 27.

(c) *Trover*.

Trover is one of the forms of trespass on the case and is "usually adopted by preference to that of detinue to try disputed questions of property in goods and chattels. In form, it claims damages; and is found on a suggestion in the writ—which suggestion is in general a mere fiction—that the defendant found the goods in question, being the property of the plaintiff; and proceeds to allege that he converted them to his own use." Stephen on Pleading, *18, 19.

The action of *trover* is, in form, a fiction; in substance, a remedy to recover the value of personal chattels wrongfully converted by another to his own use. The form supposes the defendant may have come lawfully by the possession of the goods, though the action lies where the defendant did *in truth*, get possession of the goods *lawfully*. Where the taking by the defendant is wrongful and by trespass, if the plaintiff brings *trover*, he thereby waives the trespass and admits the possession to have been lawfully gotten; and hence no damages can be recovered in such action for the *trespass* in taking the goods. *Trover* is an action of tort; and the whole tort consists in the *wrongful conversion*. Two things are necessary to be proved in *trover*: (1) Property in the plaintiff; (2) A *wrongful conversion* by the defendant. *Cooper v. Chitty* and *Blackiston*, 1 Burr. 20, 31.

See "Trover and Conversion," Century Dig. §§ 103-116; Decennial and Am. Dig. Key No. Series § 13.

(d) *Replevin*.

DAGGETT v. ROBINS, 2 Blackford, 415. 1831.

The History and Nature of Replevin.

[Action of replevin. Defendant pleaded former judgment. Plaintiff demurred to the plea. Demurrer overruled, judgment against plaintiff, and he appealed. Reversed. The facts appear in the opening of the opinion.]

STEVENS, J. This was an action of replevin, commenced by the appellant against the defendant for certain goods and chattels, which he alleged the defendant unjustly and unlawfully took and detained from him. The defendant pleaded in bar that the plaintiff in the year 1829, in the Vigo circuit court, by an action of replevin against the defendant, replevied the same goods and chattels out of the defendant's possession; and that at the May term, 1830, of said circuit court, the said plaintiff was nonsuit, and the defendant had judgment for a return of the goods and chattels; and that they were returned by the sheriff of the county. To this plea the plaintiff demurred, and the demurrer was overruled by the court and judgment rendered for the defendant.

The principal question is, whether a nonsuit in replevin is a bar to a second replevin. By the common law it would be no bar, but the statute of Westminster 2 (13 Edw. I. st. 1), ch. 2, restrains the plaintiff in replevin from a second replevin after nonsuit, but permits him to proceed with his first action by a writ of second delivery, and if he become nonsuit after the writ of second delivery, no further proceedings can be had. The counsel for the appellant insists that the record in this case shows it to be an action founded on a statute of the state authorizing the action of replevin in all cases where goods and chattels are unlawfully taken and detained, and not governed by the statute of Westminster which relates only to replevins founded on a distress for rent. The record does not show whether the action is founded on a distress for rent or not, nor is it material that it should; the action in either case, when once in court, is governed by the same principles and rules of practice. The record in an action of replevin never shows whether it is bottomed on a distress for rent or not, unless the defendant in replevin spreads that fact upon the record by his avowry, cognizance, or other defense which he may make to the action. It is true, that at the time those proceedings were had in Vigo circuit court, there were two statutes authorizing the action of replevin, the one founded on a distress for rent, and the other regulating the proceedings when the action is founded on any other unlawful and unjust taking or detaining of goods and chattels. But these acts only provide for the issue and service of the writ, the disposition to be made of the goods and chattels replevied, and the condition and effect of the replevin bond, etc. The pleadings, prosecution and proceedings in each action, and the judgment rendered, and the execution awarded, are the same, except as to costs.

The only action now in use is the detinuit and is an action that lies not only in the case of a wrongful distress for rent, but in all cases where goods and chattels are tortiously and unjustly taken and detained; *and our statutes above noticed do not materially change the general doctrine on the subject.* The passage in Blackstone's Commentaries, which says that replevin only lies in case of an unlawful distress, is unwarranted, and is contradicted by the best authorities in England and America. Vide 2 Saund.

Plead. and Evid. 760; 1 Chit. Pl. 119; Bishop v. Montague, Cro. Eliz. 824; Pangburn v. Partridge, 7 Johns. 140; Shannon v. Shannon, 1 Schoales & Lef. 327; Ilsley et al. v. Stubbs, 5 Mass. 283. The action of replevin is founded on a tortious taking and detaining, and is analogous to an action of trespass, but is in part a proceeding in rem, to regain possession of the goods and chattels, and in part a proceeding in personam, to recover damages for the caption and detention, but not for the value thereof. Vide Hopkins v. Hopkins, 10 Johns. 373; 1 Chit. Pl. 119; 1 Saund. Rep. 347, b, note 2; Fletcher v. Wilkins et al., 6 East, 283.

In England there are two kinds of replevin; first, by common law, when the writ issues out of the court of chancery; second, by the statute of Marlbridge, 52 Hen. 3, which enables the sheriff to make replevins without any writ and then having taken security, proceed on the complaint of the plaintiff, either by parol or precept to his bailiff, and if a claim of property is put in, the writ of *de proprietate probanda* at once issues, and is tried by an inquest, and if found for the plaintiff, the sheriff goes on to make the replevin; but if for the defendant, he forbears. If the writ issues out of chancery at common law, it is only directory to the sheriff to make replevin and proceed in the county court, and is not a returnable process. In that case, the writ *de proprietate probanda* cannot issue until a pluries is issued and returned into the King's Bench or Common Pleas, where a judicial writ may issue. Any of these suits are removable, by either party, into the King's Bench or Common Pleas, to be there determined. If the replevin be by writ in the county court, it must be removed by a *pone*; if by plaint, it must be removed by a *recordari facias loquelam*; if in a court of record that may hold pleas of replevin, it must be removed by a writ of *certiorari*; and if in a court of another lord, it may be removed by *recordari* to the sheriff.

This much of the law of England is stated to show that there can be no replevin under either the common law, or the statute of Marlbridge, without the aid of our statutes. The English law is founded on the usages and customs of that kingdom, growing out of the relation of landlord and tenant under the feudal system and the aristocratical doctrines of primogeniture, and is local to that kingdom and cannot be in force here. There are no two kinds of replevin in this state as in England, one by plaint and another by writ; nor is the writ in replevin liable to be defeated by a claim of property as it is in England, where such claim, as before observed, puts an end to the suit, unless it is revived by the writ *de proprietate probanda*. Our writs of replevin are returnable writs and the party is required to appear on the return day. They issue out of the circuit courts as other writs do, and are there returnable; and the suit is docketed, proceeded in, set down for trial and tried, agreeably to the laws and practice of the court as other actions are. The statute of Westminster 2 (13 Edw. 1, st. 1), ch. 2, is applicable only to actions of replevin founded on a distress for rent, and is not of a general nature, but is local to that kingdom

and inconsistent with the laws, practice and policy of this state, and therefore not in force. The court, therefore, considers the plea of the defendant in this behalf insufficient in law to bar the plaintiff's action, and that the circuit court erred in overruling the demurrer thereto. Judgment reversed.

See "Replevin," Century Dig. §§ 69-82; Decennial and Am. Dig. Key No. Series § 9.

DUFFY v. MURRILL, 31 N. C. 46. 1848.

Common-Law Action of Replevin. Essentials. Distinguished from Trover and Detinue.

[Action of replevin for a slave. No affidavit was filed as was required by a statute. Action dismissed on motion of defendant, and plaintiff appealed. Reversed. No further statement of facts is necessary.]

NASH, J. The error, into which his Honor was betrayed, consisted in considering the proceedings as instituted under the act of 1836, when, in truth, it is a proceeding at common law, in which no affidavit is required. The act does not repeal the common-law action, nor supersede it, but simply applies the remedy by replevin to cases, to which it did not extend before. By the common law, a taking by the defendant was necessary to authorize this remedy, and such is the language of the writ; it is: "We command you, that justly and without delay, you cause to be replevied the cattle of B which D took and unjustly detains," etc. 1 Fitzh. N. B. 68. *Without a trespass by the defendant, the writ could not be used.* If the defendant came into possession by bailment, the plaintiff was driven either to his action of trover or detinue. By the latter alone, the possession of the property detained could be regained, and, even then, after much delay, and subjecting the plaintiff often to inconvenience and loss which the tardy recovery would not compensate. Much the most valuable portion of the personal property, owned by the individuals of this state, consists of slaves, who, by artful and designing men having or pretending a claim of right, can be induced to leave the possession of the proprietor and go into that of his opponent. To such a case the common-law remedy of replevin could not apply, because the defendant had not taken the slave; he did but detain him. It was the intention of the legislature to remedy this evil by giving this writ, whereby the plaintiff might more speedily and surely regain possession of his property. The words of the act are very broad, "replevin for slaves shall be held and deemed sustainable in all cases, etc., where actions of detinue and trover are now proper." It is unnecessary to inquire here, whether these words, broad as they are, can embrace every case, in which actions of detinue or trover for a slave may be sustained. It is sufficient for our present purpose, to show that the act of 1836 was intended, not to repeal the common law remedy of replevin in such cases, but to apply it, when by the com-

mon law it could not be used. The writ, in this case, is not issued under the act; if it had been, the affidavit required in the proviso to the first section would have been necessary, and his Honor would have been right in holding that the plaintiff's proceedings could not be sustained; but it is at common law. The writ is "then and there to answer the said Charles Duffy, of the taking and detaining," etc. This is the language of the writ, as set forth in the *natura brevium*. A taking is charged, and without proving it on trial, the plaintiff cannot entitle himself to a verdict, if the defendant pleads *no cepit*. *Cummins v. McGill*, 6 N. C. 357. Judgment reversed.

See "Replevin," Century Dig. §§ 1-3; Decennial and Am. Dig. Key No. Series §§ 1, 2.

(c) *Detinue*.

JOHNSTON v. PASTEUR, 1 N. C. 520, 526. 1800.

Nature of Detinue. Ancient and Modern Practice.

[Action of detinue for a slave. Judgment in the court of conference against the defendant. The opinion is that of the court of conference, which then constituted the highest court in this state. The point presented was, whether or not a husband could sue jointly with his wife, in detinue, for the goods of the wife which the defendant had detained before her marriage. The decision holds that he can. Only that part of the opinion which discusses the action of detinue, is here inserted.]

By the Court. (Macay, Taylor, Hall, and Locke.) . . . Some dicta have been shown from the books which seem to countenance the idea that the action of detinue for the wife's goods must be brought by the husband alone. But it is probable that if the original cases could be examined, it would appear that such actions by the husband alone were sustained only where the goods had been in his possession during the coverture, either actual or constructive. In that case the property is completely his own, and the right would devolve to his representatives upon his death, and would not survive to his wife. This is rendered likely by what is said in *Viner*, Title, *Beson & Ferne*, 30, that the husband and wife may join in detinue for the wife's goods, bailed by the wife before coverture. And so it is said with respect to replevin for her goods taken when she was sole.

In addition to this, it is to be remarked, that the action of detinue hath, at least in this state, taken a range very wide of its original design, and been applied to transactions which were not formerly conceived to fall within its reach. It is defined in the old books as a remedy founded upon the delivery of goods by the owner to another to keep, who will not afterwards deliver them back again. In *Fitzh.* N. B. 323, and 2 Blk. 152, it is said that, *to ground an action of detinue, which is only for detaining, it is a necessary point among others, that the defendant came lawfully*

into the possession of the goods, as either by delivery to him, or by finding them. Hence it was that the wager of law was permitted in this action, which grew out of the confidence reposed in the bailee by the bailor. At present, however, the action is applied to every case where the owner prefers recovering the specific property to damages for its conversion, and no regard is had to the manner in which the defendant acquired the possession. . . . Judgment for the plaintiff.

See "Detinue," Century Dig. §§ 4-11; Decennial and Am. Dig. Key No. Series §§ 3-6.

PETERS v. HEYWARD, Cro. Jac. 682. 1626.

Form of Judgment and Execution in Detinue.

[This was an action of detinue. Judgment against defendant, and he insists that there was error in the *form of the judgment*. Judgment reversed.]

The action was to recover a bond. Verdict against the defendant assessing seven pounds damages if the bond could be found; but if the bond could not be found, the damages were assessed at twenty pounds additional. The judgment rendered was: That the plaintiff recover the seven pounds, and the bond or twenty pounds, and that a distringas [execution] issue to the sheriff for the bond or twenty pounds. Defendant contended that the judgment should be conditional and not alternative—that is, the judgment should have been that the plaintiff recover the bond and the seven pounds damages, but if possession of the bond could not be obtained, then that plaintiff—in that event and only in that event—recover the additional twenty pounds as damages. Some point was also made on the form of the distringas ordered.]

The court held—That although Waller, the prothonotary of the common pleas, certified that there were divers precedents there in this manner; and it was said, that in the Book of Entries judgment is entered in this manner, and alleged that the judgment being that he shall recover the bond or twenty pounds tantamount, and is to be intended conditional that he shall have the bond, and if he cannot have it, then the twenty pounds; yet upon consideration of many other precedents, and the books which mention that the judgment is and ought to be conditional in itself, and not by intendment, the judgment was erroneous; for by that judgment and awarding of a distringas the sheriff might distrain for the one or the other at his choice, which ought not to be; but he ought to distrain for the thing itself, and if he cannot have it, then for the twenty pounds; and although the writ of distringas was well made, and in that manner as it was shown to the court; yet forasmuch as the judgment is otherwise, the awarding upon the roll, which is the warrant of the writ, was not good; wherefore rule was given that the judgment should be reversed.

See "Detinue," Century Dig. § 47; Decennial and Am. Dig. Key No. Series § 25.

BADGER v. PHINNEY, 15 Mass. 359, 362, 363. 1819.

Detinue and Replevin Distinguished. Judgment and Execution in Detinue.

[Action of replevin in which the plaintiff declares on a taking by the defendant on the day the writ issued, and a detention on that day. The defendant showed that no demand had been made upon him prior to the commencement of the action, and insisted that therefore replevin would not lie, but that plaintiff's remedy was detinue. The facts were agreed on and the case submitted to the court for such judgment as was proper. Judgment was rendered against the defendant for reasons set out in the opinion; but only that part of the opinion is inserted, which treats of the common law actions of replevin and detinue.]

PUTNAM, J. Several objections have been made to the plaintiff's recovery. It is said that there has not been any tortious taking by the defendant, and that replevin lies only where there has been such a taking. And it is a general remark in the books that, where there has been a tortious taking, replevin will lie, as well as detinue and trespass.

Where the taking was originally without wrong, but the party detains the goods wrongfully, the owner should have some remedy for them specifically, if to be found. The defendant contends that detinue, in such case, is the only remedy. This is certainly not so effectual a remedy, if indeed it be not entirely obsolete. The judgment in detinue is, to recover the thing, or the value of it if it cannot be found, with damages for the taking. In replevin, the thing is immediately seized; but in detinue, the possession is not changed until after judgment; and this being conditional, the value, as estimated by the jury, may be but a poor compensation for the thing detained. After a judgment in detinue, a distringas goes to the defendant, *ad deliberanda bona*; and if he will not deliver them, the plaintiff shall have the value, as ascertained by the jury. So that it is at the defendant's election to deliver the goods or the value.

Replevin is, then, the only certain remedy to recover the specific goods; and it may be maintained where the taking was lawful, but the detention unlawful. Thus, where one takes cattle damage feasant, if the owner will tender amends before the cattle are impounded, he may, at common law, maintain replevin for the unlawful detention although the taking was lawful. And in such case, the plaintiff shall recover damages for the detention, and there shall be no return. It was truly said by Lord Redesdale that this action, being founded on any unlawful taking, is "calculated to supply the place of detinue and trover." And the remark seems to apply as well to an unlawful detention, as to an unlawful taking. . . . Judgment for the plaintiff.

As to the ruling that replevin will lie where the taking is lawful, but the detention, and that only, is unlawful, the principal case is doubted in a note to the case in the edition published in 1864. But whether that ruling be correct or not, the statement of the distinction between detinue and replevin is valuable. See "Replevin," Century Dig. §§ 71-73; Decennial and Am. Dig. Key No. Series § 9.

SEC. 4. FORMS OF ACTION UNDER THE CODE PRACTICE.

On the subject of forms of action, it is said by Clark, C. J., in *Hargrove v. Harris*, 116 N. C. 418, 419, 420, 21 S. E. 916 (1895): "Under our constitution art. IV, § 1, there is but one form of action in civil cases. In that, many ancillary remedies may be asked, i. e., Arrest and Bail, Claim and Delivery, Injunction, Attachment, and Appointment of Receivers. These need not be asked even if the party is entitled to them (*Wilson v. Hughes*, 94 N. C. 182), and if they are improperly asked, they are simply denied or dismissed, but that does not affect the action itself, which goes on if the plaintiff is entitled to any other remedy. *Deloatch v. Coman*, 90 N. C. 186; *Morris v. O'Briant*, 94 N. C. 72. This is the broad distinction between the present system of procedure and that formerly in force. Under the old system, all these were distinct forms of action, and so much regard was paid to the mode in which relief was asked that however meritorious the cause of action, a mistake in the exact manner of seeking the remedy sent the plaintiff out of court. The common sense of mankind and the intelligence of the age have caused the old system to be abrogated in the large majority of states and countries of the English speaking race—indeed it was never in force in any other. It was abolished in this state over a quarter of a century since."

In *Bitting v. Thaxton*, 72 N. C. 541, 548, 549 (1875, READE, J.), says: "The distinction between actions at law and suits in equity, and the forms of all such actions, heretofore existing, are abolished, and there shall be in this state hereafter but one form of action," etc. C. C. P. § 12. 'All the forms of pleading heretofore existing are abolished,' etc. C. C. P. § 91. A counterclaim must be 'a cause of action arising out of the contract, or transaction set forth in the complaint, as the foundation of the plaintiff's claim, or connected with the subject of the action.' C. C. P. § 101 (1). If there is anything settled in our new system it is that there is but one form of action. There are torts and contracts just as there used to be; but there are not several forms of action as there used to be, and pleadings are not suited for different forms of action, as they used to be; but all are suited to one form, whether the subject of the action be a tort or a contract. And when the plaintiff files his complaint, setting forth the 'transaction,' whether it be a tort or a contract, the defendant may set up any claim which he has against the plaintiff, connected with the transaction set up in the complaint; and this is called a 'counterclaim.' And when the plaintiff states the 'transaction' in his complaint, he cannot by calling it by one name or another—as tort or contract—cut off the defendant's counterclaim growing out of the same transaction. It is the transaction that is to be investigated, without regard to its form or name."

In *Lumber Co. v. Wallace*, 93 N. C. 22, 25-28 (1885), MERRIMON, J., says: "Under the code system of procedure as it prevails

in this state, equitable relief may be granted in every civil action wherein it appears by proper averments and proofs that the parties, or any of them, are entitled to it. The constitution (art. IV, § 1) provides that, 'the distinction between actions at law and suits in equity and the forms of all such actions and suits, shall be abolished; and there shall be in this state but one form of action, for the enforcement or protection of private rights or the redress of private wrongs, which shall be denominated a civil action,' etc. This provision does not imply that the distinctions between law and equity are abolished, or that the principles and doctrines of law and equity are so blended as to constitute one embodiment of legal science, without the differences that have heretofore existed between them and been recognized by courts of judicature in their application. Principles of law, principles and doctrines of equity, remain the same they have ever been—the change wrought is in the method of administering them, and in some degree, the extent of the application of them.

Under the common law method of procedure, the principles of law were applied and enforced in courts of law according to methods and forms of action peculiar to them—the principles of equity were applied and administered in courts of equity according to forms and methods of procedure peculiar to them. Such differences were distinctive, well understood and treated as essential. The constitutional provision cited abolishes such distinctions as to actions and their forms, and to a very large extent—not wholly—the method of procedure in directly applying principles both of law and equity. Causes of action distinctively legal in their nature, and like causes purely equitable in their nature, although in respect to the same matter in different aspects of it, need not necessarily be united in the same action, though they may be, if they come within any of the classifications prescribed in the code, § 267. *Gregory v. Hobbs*, 93 N. C. 1. But, when a single cause of action has both legal and equitable elements, and also, when the equitable relief sought is merely incidental or ancillary in the action—in such cases, the principles both of law and equity must be applied in the same action—as in case of application for relief by injunction, or the appointment of a receiver in the course of the action. And this is so as well, when two or more causes of action are united in the same action.

The purpose and effect of the constitutional provision is to abolish the distinctions between actions of law and suits in equity, and the forms of such actions—not the difference in respect to principles—and to establish a single form of action applicable in all cases, whether the cause of action be legal, or equitable, or both. The end sought to be attained is to obviate circuitry and multiplicity of actions, variety of forms of action and complication incident thereto, and to facilitate the application of the principles of law and equity where they apply to a greater or less extent to the same causes of action. The code of civil procedure prescribes the method of applying both law and equity in one form of action. By it is established a system of pleading, the purpose of

which is to effectuate the intention of the constitutional provision under consideration. This method of procedure is, in some respects, imperfect, particularly in respect to the trial of issues of fact arising in cases purely equitable, and that sometimes arise in cases involving both legal and equitable elements. Because of this imperfection, the courts oftentimes find it difficult to grant the full measure of equitable relief as contemplated by the doctrines of equity. The trial of issues of fact by a jury is generally ill-suited to the settlement of the facts in equity cases. But in some other respects, it facilitates and enlarges the scope of equitable relief that may be granted. This is so especially as to relief by injunction and the appointment of receivers. The provisions of the code, §§ 338, 379, in express terms invest the court with very large and comprehensive powers to protect the rights and prevent the perpetration, or the continuance, of wrong in respect to the subject matter of the action, and to take charge of and protect the property in controversy both before and after judgment, by injunctions and through receivers, pending the litigation; they facilitate and enlarge the authority of the courts in the exercise of these remedial agencies, and do not in any degree abridge the exercise of like general powers that appertain to courts of equity to grant the relief specified, or to grant perpetual injunctions in proper cases, and the like relief.

"It is not, however, to be understood, that the court will administer both law and equity in the same action upon the mere suggestion of the parties, or some of them. Of course, the cause of action, or the defense thereto, whatever may be its nature—whether legal or equitable or both—must be set forth in the action as required by the method of pleading established by the code, and in such intelligent way as to enable the court to see what principles apply and how they must be administered. *The pleadings should develop the nature of the relief sought.* Such relief may be granted in the same action in respect to the same cause of action, not only to the plaintiff, but as well to the defendant, either temporarily in the course of the action, or by the final judgment, accordingly as it may appear that he is entitled; and this is especially so, when the defendant pleads a counterclaim that he may be entitled to plead. Indeed, a counterclaim is generally, practically and in effect, a counter-action brought by the defendant against the plaintiff. Such being the scope and purpose of the method of civil procedure in this state, we think there can be no doubt that the defendants are entitled to equitable relief."

In *Staton v. Webb*, 137 N. C. 35, 39, 40, 49 S. E. 55, 57, DOUGLAS, J., says: "It is evident . . . that the code of civil procedure was neither a modification nor a simplification of any of the common-law modes of procedure. It practically abolished all the common-law forms of action, and adopted the old equity practice, with some slight modifications, the principal one being that in the code practice the summons precedes the complaint; while in equity the subpoena follows the bill. *Wilson v. Moore*, 72 N. C. 558. A brief glance at the methods of procedure in actions at law

before the adoption of the code of civil procedure will show how complete is the change. In this state the courts followed the practice of the court of King's Bench in England. Much space and learning were expended upon the nature and requisites of the different pleadings, but in actual practice the method was of the simplest kind. The action was begun by an "original writ" commanding the sheriff to "take the body of C. D. (if he be found in your county) and him safely keep so that you have him before the justices of our Court of Pleas and Quarter Sessions to be held . . . then and there to answer A. B. of a plea of trespass on the case to his damage . . . dollars." If the action lay in debt or covenant or any other form of action, the only change made was to insert in lieu of the words 'trespass on the case' the words 'that he render unto him the sum of . . . dollars, which he owes to and unjustly detains from him;' or a 'breach of covenant,' as the case might be. Eaton's Forms, 44. Under this writ the sheriff took the defendant into custody unless belonging to some exempted class, such as a woman or an administrator, and held him to bail, or himself became special bail. The plaintiff was supposed to file a declaration which in fact was rarely if ever done, the mere indorsement of the nature of the action on the back of the writ being deemed a sufficient compliance with the rule in the absence of a specific demand. The defendant was also expected to plead, which was usually done by his counsel merely marking upon the docket the nature of his pleas in contracted form. Whatever it may have been in theory, the usual entry was about as follows: 'Genl. Issue, Payt., & set-off, Stat. Lim. with leave.' The last two words mean leave to plead any other defense that may chance to occur to the pleader, such as *nil debit*, accord and satisfaction, *non est factum*, or the like. In ejectment, a form of trespass wherein the general issue was 'not guilty,' the procedure was more complicated, but even in that action Mr. Eaton feels called on to say: 'The practice which prevails in North Carolina of trying actions of ejectment with no declaration on file but that against the casual ejector is very irregular.' The force of this remark is apparent when we recall that the casual ejector had no actual existence, being purely a fictitious personage, the airy phantom of judicial imagination. In the old system the principal difficulties lay in deciding upon the proper form of action and the danger of encountering, during the trial, some equitable right that could not be adjusted in that court. The fact that the courts of law and equity were held by the same judge at the same place and during the same week, did not prevent them from being separate and distinct courts, with subjects of jurisdiction and methods of procedure entirely different. It was to remedy these evils that the new system was adopted. Whether it comes up to the full measure of simplicity claimed for it by its most enthusiastic advocates, we are not entirely prepared to say."

CHAPTER V.

INJURIES TO PERSONAL SECURITY, TO PERSONAL LIBERTY,
AND TO PRIVILEGES.SEC. 1. REMEDIES FOR THE DEATH OF A PERSON. APPEALS OF
DEATH. LORD CAMPBELL'S ACT.LOUISVILLE & ST. L. R. R. v. CLARKE, 152 U. S. 230, 14 Sup. Ct. 579.
1894.*Appeals of Death. Weregild.*

[Clarke, as executor of a person alleged to have been killed by the negligence of the Louisville, etc., R. R. Co., sued the railroad company for damages. The railroad company demurred. Demurrer overruled, and answer filed. Verdict and judgment against the railroad company, and the company carried the case to the supreme court by writ of error. Affirmed.]

The action was brought in the United States circuit court for the district of Indiana to recover damages under the statute of Indiana. It appeared from the complaint that the injury to the deceased occurred on November 25, 1886, but the death was not until February 23, 1888. The ground of demurrer was, that no cause of action was alleged, because the death of the injured person did not occur within a year and a day after the injury.

The Indiana statute provided for the recovery of damages for the death of a person, if such action were commenced *within two years from the death of such person*. In this case the action was commenced within two years from the death; but the railroad company contended that no cause of action existed at all because of the common-law rule that where the death of a person occurs more than a year and a day after an injury to such person, the injury shall not be considered the cause of the death.

Only that portion of the opinion which discusses the common law governing the remedy for wrongful acts causing death, appeals of death, etc., is here inserted.]

“At common law there were three occasions upon which the courts inquired in respect of the killing of a human being: First. Indictments which were public prosecutions—prosecutions brought in the name and behalf of the king. Second. Appeals of death, which were proceedings brought not by the king nor in his name, but in the name and for the benefit of private individuals. Third. Inquisitions against deodands.” (From brief of counsel, p. 231.)

MR. JUSTICE HARLAN. . . . In cases of murder the rule at common law undoubtedly was that no person should be adjudged, “by any act whatever, to kill another, who does not die by it within

a year and a day thereafter, in computation whereof the whole day on which the hurt was done shall be reckoned first." 1 Hawk. P. C. c. 13; 2 Hawk. P. C. c. 23 § 88; 4 Bl. Comm. 197, 306. The reason assigned for that rule was that, if the person alleged to have been murdered "die after that time, it cannot be discerned, as the law presumes, whether he died of the stroke or poison, etc., or a natural death; and, in case of life, a rule of law ought to be certain." 3 Inst. 53. And such is the rule in this country in prosecutions for murder, except in jurisdictions where it may be otherwise prescribed by statute. Whart. Am. Cr. Law, § 1073; *State v. Orrell*, 1 Dev. 139.

An appeal, when spoken of as a criminal prosecution, denoted, according to Blackstone, an accusation by a private subject against another for some heinous crime,—a "private process for the punishment of public crimes," having its origin in a custom, derived from the ancient Germans, of allowing a pecuniary satisfaction, called a "weregild," to the party injured or his relations, "to expiate enormous offenses." 4 Bl. Comm. 312, 313. Bacon defines it to be a "vindictive" action,—*"the party's private action, seeking revenge for the injury done him, and at the same time prosecuting for the crown in respect of the offense against the public."* Bac. Abr. tit. "Appeal." These appeals could be brought "previous to an indictment, and, if the appellee be acquitted thereon, he could not be afterwards indicted for the same offense." 4 Bl. Comm. 315; Com. Dig. tit. "Appeal," G, 11, 16. While, during the continuance of the custom referred to, a process was given for recovering the weregild by the party to whom it was due, "it seems that when these offenses, by degrees, grew no longer redeemable, the private process was still continued, in order to insure the infliction of punishment on the offender, though the party was allowed no pecuniary compensation for the offense." Book 4, p. 314. By statute of 59 Geo. III, c. 46, appeals of murder, treason, felony, and other offenses were abolished.

During the time when appeals of death were allowed, at common law, the rule established by the statute of Gloucester (6 Edw. I. c. 9) was that "the appeal must be sued out within a year and a day after the completion of the felony by the death of the party." 4 Bl. Comm. 315. This, the author said, seemed to be only declaratory of the common law. And Hawkins says: "It seems clear that the appeal of death must set forth the day when the hurt was given, but also the day when the party died of it, as it appears from all precedents of this kind, both in Coke and Baslat, and also from the manifest reason of the thing, that it may appear that the party died within a year and a day after the stroke, in which case, only, the law intends the death was occasioned by it." 2 Hawk. P. C. c. 23, § 88. Bacon, referring to the statute of Gloucester, says that, by that statute, "an appeal shall not be abated for default of fresh suit if the party sue within the year and day after the deed done, the computation whereof, as the law is now settled, shall be made, not from the day when the

wound is given, but from the day when the party died; also, the year and the day shall be computed from the beginning of the day, and not from the precise time when the death happened, because regularly no fraction shall be made of a day." Bac. Abr. tit. "Appeals," D. And Comyn: "By the statute of Gloucester, 6 Edw. I. c. 9, an appeal shall not abate by want of fresh suit, if brought in a year and a day after the fact done; which statute is, by construction, restrained to an appeal for the death of a man. And, therefore, an appeal upon the death of a man may be within the year and day, though there be not any fresh suit; within a year and a day after the death, though the blow was given before." 2 Inst. 320, tit. "Appeals," D.

The rule of a year and a day was also applied at common law to inquisitions of deodands, brought to forfeit to the king, "to be applied to pious uses and distributed in alms by his high almoner,"—personal chattels that were the immediate occasion of the death of any reasonable creature. 1 Bl. Comm. 300. The rule in those cases was that the law does not look upon such a wound as the cause of a man's death, "after which he lives so long." 1 Hawk. P. C. c. 8, § 7.

We have made this full reference to prosecutions for murder, appeals of death, and inquisitions against deodands because of the earnest contention of counsel that the rule applied at common law in such cases should control the construction of the Indiana statute. In our judgment, the rule of a year and a day is inapplicable to the case before us. In prosecutions for murder the rule was one simply of criminal evidence. Appeals of death and inquisitions against deodands, although having some of the features of civil proceedings, were, in material respects, criminal in their nature. Besides, as we have seen, the statute of 6 Edw. I. c. 9, was construed as giving a year and a day from the death of the party killed, not from the time the wound was inflicted; and we do not understand that any different construction was placed upon the statute of 3 Hen. VII. c. 1, to which counsel referred.

But, be that as it may, in prosecutions for murder and appeals of death, the principal object was the punishment of public offenses. In cases of murder and appeals of death, human life was involved, while in inquisitions against deodands it was sought to forfeit property that had caused the death of some one. In such cases the rule of a year and a day might well have been applied.

[The court holds that the rule of a year and a day has no application to actions under statutes like that of Indiana, "which are purely civil proceedings that involve no element of punishment, but only provide compensation to certain relatives of the decedent who have been deprived of his assistance and aid."]

Appeals of murder were never regarded as contrary to Magna Charta: but were considered "a noble remedy and a badge of the rights and liberties of Englishmen." Persons acquitted of murder on indictment were often tried again on appeals of murder, and convicted and executed. The right of appeal existed in Pennsylvania and Maryland. No appeal

was ever brought in Pennsylvania, but in 1765 a negro was hung under such proceedings in Maryland. An appeal of murder was brought in England in 1817, but was defeated because the prosecutor—called the appellant—declined to accept “the wager of battel.” *Hurtado v. The People of Cal.*, 110 U. S. 516, 526. See 9 L. R. A. (N. S.) 1193, 19 Ib. 633, and notes, for doctrine of principal case. See also 4 Blk. *312–317; 1 Bac. Abr. 291–299. See “Death,” *Century Dig.* § 21; *Decennial and Am. Dig. Key No. Series* § 17.

GROSSE v. DEL., & W. R. R. CO., 50 N. J. L. 317, 13 Atl. 233. 1888.

Actio Personalis Moritur cum Persona. Lord Campbell's Act of 1846.

[Action by plaintiff for damages caused by the death of his wife as the consequence of defendant's alleged negligence. Demurrer by defendant. Demurrer sustained. Judgment against the plaintiff, and he appealed. Affirmed. The facts appear in the opening of the opinion.]

MAGIE, J. The declaration demurred to charged the defendant company with the immediate killing of plaintiff's wife by the negligence of its employees. It sought to recover damages for the loss of her society and assistance in plaintiff's domestic affairs, and for money laid out by him in burying her. The case thus presented does not come within the provisions of the statute of March 3, 1848 (Revision, 294), or any other statute. It is of novel impression in this state, and the demurrer raises the question whether, apart from the authority conferred by statute, an action will lie to recover damages for the killing of a human being. In the very ingenious argument submitted in behalf of the plaintiff in error, it seems to be admitted that the current of English authority indicates that such an action could not be brought at common law. In 1607 it was held that a husband could not recover for the injury he sustained by the death of his wife occasioned by the battery of defendant. *Higgins v. Butcher*, Yel. 89. In deciding the case, TANFIELD, J., expressed this opinion: “If a man beat the servant of S. so that he dies of that battery, the master shall not have an action for the battery and loss of service, because, the servant dying of the extremity of the battery, it is now become an offense to the crown, being converted into a felony, and that drowns the particular offense and private wrong offered to the master before and his action is thereby lost.” No trace of a case involving the right to recover for the loss of services occasioned by the killing of a wife or servant can be found thereafter until 1808. Then, in an action tried before Lord ELLENBOROUGH, a husband sought to recover damages for injuries inflicted on his wife by the negligent overturning of a stage-coach, and which eventually produced her death. That eminent judge directed the jury to limit the damages to those the husband had suffered during the life of the wife, giving as the reason, that “in a civil court the death of a human being cannot be complained of as an injury.” *Baker v. Bolton*, 1 Camp. 493. No further opportunity to adjudicate upon the

question seems to have been afforded until 1872, when an action by a father, for loss of the services of a daughter and servant, occasioned by her death caused by the negligence of a servant of the defendant, came before the court of exchequer on demurrer to pleas, one of which set up that the death of the daughter was the immediate and instantaneous result of the negligence. The validity of that plea was sustained as affording a complete answer to the father's claim. *Osborn v. Gillett*, L. R. 8 Exch. 88. This course of decision cannot, perhaps, be said to have been promulgated without some protest. Thus the learned reporter of *Baker v. Bolton* appends to the report this query: "If the wife be killed on the spot, is this to be considered *damnum absque injuria*?" In *Osborn v. Lillitt*, the result was reached by the concurrence of Kelly, C. B., and Pigott, B., against the vigorous dissent of the then Baron Bramwell. Notwithstanding such evidences of some doubt, the fact that the common law has been construed in England from the earliest times to reject an action for loss of services occasioned by the death of the servant appears, not only from these adjudged cases, but also from the absence of precedents for such actions (the opportunity for which must have frequently occurred), and of any doctrine of text-writers or commentators to the contrary. There also appears a parliamentary declaration of what was the common-law rule, which seems to me must be decisive. It occurs in a recital of the preamble of Lord Campbell's act of 9 & 10 Viet. c. 93 (1846), which declares that "no action is now maintainable against a person who by his wrongful acts may have caused the death of another person." There is nothing to justify any restriction of this general expression of what the common law was, because the act then proceeds to give an action in favor, among others, of a husband for the death of his wife, and of a parent for the death of his child, although such death had been caused under circumstances which would amount in law to felony.

Counsel, therefore, properly admitting this rule to have existed at common law, strenuously contend that it has never been and ought not to be adopted here. His argument is that this doctrine depended upon the notion that every homicide was felony, and occasioned the forfeiture of the felon's goods; and since his property was to go to the crown, and his body to the gallows, an action for a private injury was useless and absurd; but that in this country, where the law of forfeiture has never been adopted, the rule is inapplicable under the maxim, *cessante ratione, cessat ipsa lex*. But it is obvious that the reason counsel assigns for the rule is not that afforded by the cases. In *Higgins v. Butcher* it is said, not that the private action is useless, but that the private wrong is merged or drowned in the public wrong. In *Baker v. Bolton* the case was not necessarily one of felony, and Lord Ellenborough's ruling opposed a barrier to any civil action for a death, however caused. In *Osborn v. Gillett* there was nothing to show the killing to have been felonious, and all the judges treat the case as not

involving a felony. So the recital of Lord Campbell's act declared that no action lay against any person who by his wrongful (not necessarily felonious) acts had caused the death of another. The rule having been applied to cases not felonious, we cannot accept the reason attributed by counsel as the ground of the rule. Many reasons have been suggested for the rule. It has been said that it is inconsistent with the policy of the law to permit the value of human life to become the subject of judicial computation (*Worley v. Railroad Co.*, 1 Handy, 481); that upon the principle which would allow an action to those who have been deprived of the services of deceased, an action would lie in favor of those entitled to the protection or interested in the life of deceased, as dependents or even creditors (*Insurance Co. v. Railroad Co.*, 25 Conn. 265); that there is a national and universal repugnance among enlightened nations to setting a price on human life (*Hyatt v. Adams*, 16 Mich. 180); and, which is perhaps as satisfactory as any, that the right to such services as are under discussion ceases at the instant of death, so that the husband or master is deprived of no service to which he can be said to have a right. *Wood, Mast. & Serv.* § 233; *Shear. & R. Neg.* § 290. What may have been the real reason for the establishment of this rule of the common law we may not be able to discover; but, if so, I do not apprehend we can apply the maxim, *cessante ratione*. In that case the rule must be held to be one (to use the apt illustration of Mr. Bishop) originally created for some legal reason which in the mutation of things has crumbled away, leaving the rule so crystalized as to be immovable except by legislative power. 1 Bish. Crim. Law, § 337. It is in this sense I think that the rule has been accepted as law in this country. While several of our text-books criticise it, all seem to admit it to have been a rule of the common law generally adopted here. *Reeve, Dom. Rel.* 377; *Schouler, Dom. Rel.* 110; *Shear. & R. Neg.* § 290; *Wood, Mast. & Serv.* § 223; 1 *Thomp. Neg.* note, 1272; *Hil. Torts*, 87. There are two early cases in this country in which the common-law rule was not applied. The first was *Smith v. Weaver*, *Tayl. (N. C.)* 42, in which an action for damages for the killing of a slave was allowed. The report is obscure, and it is obvious that some considerations growing out of the peculiar relations of master and slave may have afforded ground for the decision. The other case is that of *Ford v. Monroe*, 20 *Wend.* 210, where a father was permitted to recover for the loss of the services of his son killed by the defendant. But the point was evidently not raised by counsel, and passed sub silentio. The case, moreover, as well as the later case of *Lynch v. Davis*, 12 *How. Pr.* 323, was clearly overruled by the court of appeals in the case below cited. I have not found any other cases giving the least countenance to the contention of plaintiff in error until one of recent date hereafter referred to. On the contrary, we have the common-law rule forbidding an action for damages occasioned by the death of a human being, except in cases where a statute gives a remedy by action, acknowledged in *Massachusetts (Skinner v.*

Railroad Corp., 1 Cush. 475); in Kentucky (Eden v. Railroad Co., 14 B. Mon. 165); in New York (Green v. Railroad Co., 28 Barb. 9, 41* N. Y. 294); in Michigan (Hyatt v. Adams, 16 Mich. 180); in Indiana (Long v. Morrison, 14 Ind. 595; Railroad Co. v. Keeley, 23 Ind. 133); in Connecticut (Insurance Co. v. Railroad Co., 25 Conn. 272); in the supreme court of the United States (Insurance Co. v. Brame, 95 U. S. 754); in California (Kramer v. Railroad Co., 25 Cal. 434); in Maine (Nickerson v. Harriman, 38 Me. 277); in Pennsylvania (Railroad Co. v. Adams, 55 Pa. St. 499); and in Georgia (Railroad Co. v. Lacey, 49 Ga. 106). The case of recent date above referred to is *Sullivan v. Railroad Co.*, 3 Dill. 334, Fed. Cas. No. 13,599. The action was by a parent for the loss of the services of his son, claimed to have been killed by the negligence of the defendant. It was admitted that there was no existing statute upon which the action could rest. After a review of the English cases, Dillon, J., reached the conclusion that the plaintiff might recover. The decision indicates the opinion of that able judge to be that the common law, as administered here, does not prohibit such actions. But I have found no other federal court following the case, and the supreme court of the United States in *Insurance Co. v. Brame*, *supra*, declares the proposition that by the common law no civil action lay for an injury which results in death to be one not open to question.

Lord Campbell's Act, as we have seen, gave an action in favor of a husband and parent, as well as of a wife and child, for an injury occasioned by death. In the earliest period the common law had given to the widow and to the heir an action against the slayer of the husband and ancestor. Such actions, known as appeals of death, had fallen into disuse, and after the celebrated case of *Ashford v. Thornton*, 1 Barn. & Ald. 405, which exhibited to comparatively modern times two relics of ancient law, viz., pleadings *ore tenus* and wager of battel, were abolished by statute. As I have interpreted the common law, thenceforth an injury occasioned by death was absolutely without redress. Parliament thereupon, by Lord Campbell's Act, provided for redress for such injuries, etc. It gave an action in favor of the widow and of the children of the deceased. It also gave an action in favor of the husband and the parent. When the legislature of New Jersey passed the "Act to provide for the recovery of damages in cases where the death of a person is caused by wrongful act, neglect, or default," approved March 3, 1848, the lines of Lord Campbell's Act were not followed. An action was thereby given in favor of the widow, but not in favor of the husband; and the action was not limited to the children, but extended for the benefit of the next of kin. The omission of the husband does not, however, in my judgment, indicate a legislative declaration that he already had a right of action. As we have seen, no recognition of any such right has been discovered. The omission may rather be assumed to indicate a legislative intent to provide redress for those who, in general, had been dependent upon the deceased, and who for that rea-

son might be presumed to be peculiarly injured by his death. The conclusion I have reached is that the rule of the common law was that no action would lie to recover damages for the killing of a human being; that the rule has become so solidified that whatever its original reason was, and however such reason may have ceased to exist, it cannot be judicially disregarded or annulled, but, if injurious, its further modification must be sought from legislative action. This result excludes the whole action disclosed in the declaration. The demurrer was therefore properly sustained, and the judgment below should be affirmed.

If the killing be justifiable—in self-defense—no recovery can be had. *Suell v. Derricott* (Ala.), 49 So. 895, 23 L. R. A. (N. S.) 996, and note.

That the law of the principal case is contained in the maxim "*actio personalis moritur cum persona*," see *Broom's Legal Maxims*, 681–691. For a very elaborate note on the subject discussed in the principal case, see 41 L. R. A. 807–817; see also 11 L. R. A. (N. S.) 1157; 8 *Ibid.* 384. That a father cannot recover for the negligent, etc., killing of his minor child, see *Killian v. R. R.*, 128 N. C. 261, 38 S. E. 873, where it is said: "Lord Ellenborough tersely stated the doctrine of the *common law* to be: 'In a civil suit, the death of a human being cannot be complained of as an injury.' Where the injury subsequently resulted in death, the action abated—*actio personalis moritur cum persona*;" but under the *statute* of North Carolina, Rev. §§ 59, 60, the *administrator* of a person whose death resulted from the wrongful act of another, may recover damages even though the person killed was only five months old. *Russell v. R. R.*, 126 N. C. 961, 36 S. E. 191. The North Carolina statute corresponding with Lord Campbell's Act, though differing therefrom in several material particulars, is the act of 1868–69, now Rev. §§ 59, 60. The most excellent notes to these sections in Pell's *Revisal* enable the student to find every important point decided in North Carolina upon the subject embraced in the principal case, or arising under these sections—and thus can be accomplished within a few minutes as much as would consume many hours of diligent search, but for the pains-taking labor of that author in analyzing, condensing, and conveniently arranging, the decisions.

Statutes of like character with Lord Campbell's Act exist, perhaps, in all the states, though the provisions of such statutes differ in important particulars. For rulings upon such statutes, see 2 L. R. A. (N. S.) 640, and note (action for the death of, or for the benefit of, illegitimates); 11 *Ib.* 623, and note (what damages recoverable by collateral kin); 1 *Ib.* 1161, and note (what damages recoverable by parents); 3 *Ib.* 473, and note (for death of an alien); 4 *Ib.* 814, and note (what law governs distribution of recovery—that of the domicile of the decedent or that of the state in which the cause of action arose?); 9 *Ib.* 1078, and note (when injury suffered in one state but death occurs in another); 11 *Ib.* 1157, and note (does the action abate upon the death of the wrong-doer?); 2 *Ib.* 995, and note (rules as to recovery upon circumstantial evidence); 8 *Ib.* 384, and note (several distinct actions for the same wrongful act resulting in death). See "Death," *Century Dig.* §§ 35–46; *Decennial and Am. Key No. Series* § 31.

SEC. 2. PREVENTIVE REMEDIES.

STATE v. LYON, 93 N. C. 575. 1885.

Peace Warrant.

[Proceedings on a Peace Warrant by which Lyon was required to give sureties to keep the peace, etc. The proceedings were in the court of a justice of the peace, from whose judgment, requiring him to give bond, etc., Lyon appealed to the superior court. In the superior court the matter was heard de novo, and the decision was in favor of Lyon. Judgment for costs was rendered against those who instituted the proceedings—their names do not appear anywhere in the case as reported—and they appealed to the supreme court. Reversed. The opinion explains the nature of a Peace Warrant as a remedy.]

MERRIMON, J. The counsel for the present defendant insisted, on the argument before us, that no appeal lay in favor of the defendant in the peace warrant, from the order of the justice of the peace requiring him to enter into a recognizance to the state, conditioned that he would keep the peace and be of good behavior, etc. We are of that opinion, and think that the superior court should have dismissed the supposed appeal.

A "peace warrant" is denominated, in the code, a criminal action, but it is no part of its purpose to charge a party with a criminal offense, try him for the same, and, if found guilty, impose a punishment upon him. It is a proceeding in the administration of preventive justice, the purpose of which is to oblige a person, who, there is probable ground to believe, will commit some criminal offense, or do some unlawful act, to stipulate with and give satisfactory assurance to the public, that such apprehended offense will not happen; that he will keep the peace and be of good behavior generally, and in such cases, specially toward a person, or persons named. The party recognized is only required to do what a good citizen ought to do without compulsion. Sir William Blackstone says: "This preventive justice consists in obliging a person whom there is probable ground to suspect of future misbehavior, to stipulate with, and give full assurance to the public, that such offense as is apprehended shall not happen; by finding pledges or securities for keeping the peace, or for their good behavior. This requisition of securities has been several times mentioned before, as part of the penalty inflicted upon such as have been guilty of certain gross misdemeanors; but these must also be understood rather as a caution against the repetition of the offense than any immediate pain or punishment." 4 Blk. 252.

The nature of the purpose to be so subserved, suggests and requires that the action of the officer requiring such security of a party must be conclusive, and not subject to the right of appeal, ordinarily. An appeal, in the absence of any statutory regulation to the contrary, would vacate the order requiring security to keep the peace, and the persons, from whom danger is apprehended, might, without such restraint, commit the offense pending the ap-

peal. Hence, Justice Dick said in *State v. Locust*, 63 N. C. 574, that such proceedings must be summary and conclusive to render them effectual for the protection of the complainant, and to secure the public peace, and generally there is no appeal from the action of the justice of the peace in the matter. This view is not in conflict with the provision of the constitution (Art. 18, sec. 27), and the statute, the Code, sec. 900, allowing appeals from justices of the peace in criminal cases. These provisions have reference to criminal cases wherein the magistrate gives judgment against a party charged with a criminal offense, and imposes on him a punishment by fine or imprisonment. This is apparent from the nature of the matter, and as well from the language employed in the Code, secs. 900, 901, 903. They refer to the conviction and sentence of the defendant.

It is asked: "Is there no remedy, if the action of the justice of the peace is manifestly erroneous, or if he shall prostitute his powers?" It is not to be presumed that he will be in error, or prostitute his powers; but if he should, the law does not provide that such wrong shall be corrected by *appeal*, and for the reasons already stated. It may be that the action of the justice of the peace in such a case as that suggested, might be taken to the superior court by *certiorari*; or if the party complaining should be in close custody, he might obtain relief by *habeas corpus*, but we are not called upon to decide any question in this respect.

There is error. The judgment of the superior court reversing the order of the justice of the peace, must be reversed, and the appeal to that court dismissed.

See Rev. § 3173, which now provides for an appeal. This section was adopted in 1901. The principal case was approved in *State v. Walker*, 94 N. C. 857, and *State v. Gregory*, 118 N. C. 1199, 24 S. E. 712. See "Breach of the Peace," Century Dig. §§ 7, 12, 15; Decennial and Am. Dig. Key No. Series §§ 16, 21; "Criminal Law," Century Dig. § 567; Decennial and Am. Dig. Key No. Series § 260.

EX PARTE WARFIELD, 40 Texas Cr. 413, 50 S. W. 933, 76 Am. St. R. 724. 1899.

Injunction.

[Original application for writ of *habeas corpus*. Applicant remanded to prison.

W. R. Morris sued Warfield for damages for alleged alienation of the affections of Morris' wife. In the action he also prayed for an injunction against Warfield's visiting or associating with Mrs. Morris, and that he be restrained from writing or speaking to her. A writ of injunction was issued as prayed for. Warfield violated this order and was, in consequence, fined and imprisoned for contempt. Thereupon he sued out this writ of *habeas corpus* and, among other things, contended that the writ of injunction was void because the court had no power or authority to enjoin him from speaking to, or talking with, Mrs. Morris; "that the exercise of said power was beyond the jurisdiction of a court of equity and was not merely irregular, but void, and imposed upon him no duty to obey the same."

After passing on the questions of jurisdiction of the supreme court in the matter of habeas corpus, and the power of the lower court to enforce obedience to its orders, the opinion proceeds:]

HENDERSON, J. . . . The power of courts of equity to grant writs of injunction has a wide range of subjects. Courts and text writers have sometimes attempted to enumerate them, but we believe that the matter is of such a character as to escape designation; and, where the attempt has been made, the text-books say that it would indeed be difficult to enumerate all, for, in the endless variety of cases in which a plaintiff is entitled to equitable relief, if that relief consists in restraining the commission or continuance of some act of the defendant, a court administers it by means of the writ of injunction. See 1 Spell. Extr. Relief, § 5. Indeed, the interposition of courts of equity by restraining orders is a matter of growth, and keeps pace with advancing civilization, and courts are continually finding new subjects for the interposition of equitable relief by writs of injunction. Formerly, it seemed to be the rule that courts would only interfere where some property right or interest was involved; but now it seems the writ will be applied to an innumerable variety of cases, in which really no property right is involved. While in some of the cases the courts appear to adhere to the old rule, yet when we look at the case it is difficult to see any question of property right, but a vain endeavor on the part of the court to adhere to the old doctrine, while it reaches out for the protection of some personal right. In the note to *Chappell v. Stewart*, reported in 37 Lawy. Rep. Ann. 783 (S. C. 82 Md. 323, 33 Atl. 542), the learned annotator attempts to classify the cases, where courts have interfered for the protection of merely personal rights, as rights relating to physical life, and rights relating to the intellectual, moral and emotional life, and we refer to the cases embraced in the note to said case. We quote from the conclusion of the annotator, as follows: "The variety of cases above referred to, in which personal rights are really protected by courts of equity, shows that, while it is a commonly accepted theory that their jurisdiction must rest upon rights of property, there are, at least, many exceptions to the rule, among them, cases of contract, trust, or breach of confidence, relating to personal rights, cases respecting the education and custody of children, and cases relating to privacy and reputation, such as those restraining the publication or exhibition of photographs or other representations of persons, and the publication of private letters. In addition to this are the cases relating to the security of the person and the protection of health and physical comfort. While, in many of these cases, the jurisdiction is nominally based on an alleged property right, it is plain that the observance of the rule that equity will be limited to rights of property is little more than nominal. In all this class of cases equity does concern itself about personal rights as the real subject of consideration. England relieved its courts of equity from any necessity for searching for rights of property on which to base its jurisdiction by Act

1873. § 25, subd. 8, which gave power to grant an injunction in all cases in which it shall appear to the court to be just that such order should be made. Under such a statute, the English courts are entirely free to grant injunctions to protect personal rights, including the right of reputation, and injunctions against libels are in fact granted." Under this increased exercise of power, courts of equity grant injunctions to restrain one set of employees or servants of a railroad company from interfering with or molesting another set of employees, especially where the road is in the hands of a receiver. See *In re Wabash R. Co.* (C. C.), 24 Fed. 217; *U. S. v. Debs* (C. C.), 64 Fed. 724. And so one who has learned the business secrets of another by virtue of his employment will be restrained from interfering with the business of such former employer by writing letters, soliciting trade, etc. See *Loven v. People* (Ill. Sup.), 42 N. E. 82. And equity will interfere to restrain a husband from interfering with a wife or children after an agreed separation. *Sanders v. Rodway*, 16 Beav. 207; *Swift v. Swift*, 34 Beav. 266; *Hamilton v. Hector*, L. R. 6 Ch. App. 701; *Aymar v. Roff*, 3 Johns. Ch. 48, 49.

While equity will interfere in matters of contract involving personal services, a distinction is taken between affirmative and negative stipulations. Equity will not compel a servant to perform an act, but will restrain that servant from performing a negative stipulation, or some act negative in its character, involved or implied in the affirmative stipulation. See 1 *Spell, Extr. Relief*, § 11; 2 *High, Inj.* §§ 1164, 1165. Under this authority, it has been held that where an opera singer or actor has contracted to sing or play for plaintiff at his theater, and nowhere else, without his permission, an injunction will be granted to restrain the party from singing elsewhere; the court thus preventing a breach of the negative covenant, although it cannot specifically enforce the affirmative agreement by compelling defendant to sing or act for plaintiff. See *Lumley v. Wagner*, 1 *De Gex, M. & G.* 604; *Daly v. Smith*, 38 N. Y. Super. Ct. 158. And see other authorities cited in 2 *High, Inj.* p. 902, note 2. From these cases will be seen somewhat of the growth and application of the modern doctrine of equity in granting writs of injunction. We might cite a number of other cases illustrative of this view, but do not deem it necessary. If we refer to the modern cases (especially under liberal statutes on the subject of granting writs of injunction), the old doctrine of the freedom of speech and of the press, and that courts will only punish after an act which is violative of one or the other, appears to be overthrown in England, as we have seen, by statute. And see *Kitent v. Sharp*, 52 *Law J. Ch.* 134. Our statute, as we shall hereafter see, is as liberal as the English statute on the same subject. So, the cases of *People v. Durrant*, 116 *Cal.* 179, 48 *Pac.* 75, and *Association v. Boogher* (Mo.), 4 *Cent. Law J.* 40, would seem to have no application.

[The opinion then discusses "the question as to whether or not . . . the action of the court here complained of was absolutely

void:" and, after reviewing a number of authorities, proceeds:| We deduce from the foregoing authorities and others that might be cited, these propositions: First. That courts of equity can authorize the issuance of writs of injunction in all cases of equitable cognizance, where the party shows himself entitled to the issuance of the writ under the well-known rules of equity. As ancillary to this, that the growth of the principles of equity in this regard have been greatly enlarged, so that it may be said that where a court of equity has jurisdiction of the case, and a party shows that he is liable to suffer injury by some act threatened or that may be done pending the litigation, whether this has regard to property in issue or to some personal right dependent upon some personal act or conduct, the court will grant the writ. In such case, it cannot be said that the court lacks the power, although, in doubtful cases, it may refrain from the exercise of such power. Second. That in actions purely legal, of which the law courts have exclusive cognizance, there is no authority to issue a writ of injunction. Third. In a case (and there have been many such) where it is doubtful whether the action is one at law or of equitable cognizance, as a general rule, where the case is brought in an equity court, the chancellor has the same power to issue the writ as if there was no question of the jurisdiction, and as long as the writ continues it must be obeyed.

So far we have spoken of the matter as if the jurisdictions were entirely separate, as is the case in England and in most of our states. But in Texas we have a blended system of law and equity, there being but one jurisdiction for both, and, by a stronger reason, the writ of injunction will be authorized in a doubtful case.

Now, recurring to the subject-matter of this litigation, as set forth in plaintiff's petition, we think there can be no question that applicant sets forth a cause of action for the partial alienation of his wife's affections. The marital relation existing between these parties was a civil contract, binding, until it should be abrogated, upon both of the spouses. "He is entitled to the society of his wife, and may sue for damages any person enticing her away from him; and, whenever a wife is not justified in abandoning her husband, he who knowingly and intentionally assists her in thus violating her duty is guilty of a wrong for which an action will lie." See 2 Lawson, Rights, Rem. & Prac. § 714. "It is a legal presumption that a wife's services and the comfort of her society are fully equivalent to any obligations which the law imposes upon her husband because of the marital relation, and her obligation to render family service is coextensive with that of her husband to support her in the family. Id. § 715; Schouler, Dom. Rel. § 41; Bennett v. Smith, 21 Barb. 439; Barnes v. Allen, 30 Barb. 663. A husband, from time immemorial, has an interest in the services of his wife, springing from the marital relation. In this state, suits for personal injuries to her must be maintained by the husband predicated upon this idea. The suit here was brought for damages on an alleged partial alienation of the affections of his wife.

and it was averred that, on account of the past conduct of the defendant in that suit, plaintiff was apprehensive, and had just grounds to fear, that, by a continuance thereof, the wife's affections would be entirely alienated. There would consequently be a breach and destruction of the matrimonial contract existing between the parties, by which plaintiff would entirely lose the affections and services of his said wife. These, it must be conceded, were of a peculiar value to plaintiff; and it would seem that, if the court had the power to maintain this suit for damages on account of a partial alienation of the affections of his said wife, he would have a right to invoke the restraining power of a court of equity to prevent the utter alienation of his wife's affection and the utter destruction of the marital agreement. We believe this would be so under the liberal rules of equity, as now practiced in the courts, but much more so under the provisions of our statute on the subject of injunctions. Article 2989, Rev. St., provides that the judges of the district courts may grant writs of injunctions in the following cases: "(1) Where it shall appear that the party applying for said writ is entitled to the relief demanded, and such relief or any part thereof requires the restraining of some act prejudicial to the applicant." This provision shows that it was intended to be broader than the ordinary authority, because, in the third subdivision of the act, the court is authorized to grant the writ in all other cases where the applicant for said writ may show himself entitled thereto under the principles of equity. For a construction of these provisions, see the able opinion of Judge Denman of the supreme court in *Summer v. Crawford*, 91 Tex. 129, 41 S. W. 994. After reciting the provisions of the statute, the learned judge uses this language: "It will be observed that the latter portion of the article requires the case to be brought within the rules of equity, and does not undertake to state the circumstances entitling the applicant to the writ, and therefore, under it, it must appear that there is no 'adequate remedy at law,' as that term has always been understood. But the first portion of the article does state what facts will justify the issuance of the writ thereunder, and does not require that there shall be no adequate remedy at law." And we would further suggest that the question decided in said case is very much in point in this case, as showing the liberality of our courts in granting writs of injunction. The court below, it will be conceded, had jurisdiction and authority to maintain the suit, and it cannot be seriously questioned that the principal object of the suit was to preserve the marital relations existing between plaintiff and his spouse, and to conserve, as far as may be, and rehabilitate, her affections for the plaintiff. It was claimed, by the continued conduct and interferences of the defendant in that suit, that the integrity of the marital relation was threatened, and, if his course of conduct was suffered to continue, that the marital relation would be destroyed. Among other things, it was alleged that said defendant exercised an undue influence over the wife of the plaintiff, and, if suffered to as-

sociate with her and visit her, it was very likely he would entirely corrupt and lead her astray, and therefore the power of the court was invoked to arrest these interferences, and defendant was enjoined from speaking to or talking with her, or visiting the house where she was staying. It occurs to us, if the suit was maintainable, that the acts complained of were prejudicial to the plaintiff; indeed, that, by their continuation, the real object of the suit would be entirely frustrated; and that the court consequently had the power and authority to inhibit said defendant from interfering with plaintiff's wife, and that this was no interference with the inalienable rights of the citizen to go where he pleased, and to associate with whom he pleased, and to pursue his own happiness in his appointed way, provided such course of conduct did not interfere with another's right. "He had a perfect right to so use his own as not to abuse another's." Nor is there any inconsistency, when thus construed, between the freedom of speech and of the press and the integrity of the marital relation. The law is as much bound to protect the one as the other, and when both can be construed in harmony, it is the duty of the courts to protect both.

It has been said that the applicant was not shown to have violated the spirit of the injunction, inasmuch as no conversation was shown of a character calculated to persuade or lead away the wife of plaintiff; but his conduct was certainly in violation of the letter of said injunction, and we cannot say that the court did not have the right and authority to make the injunction as broad as it did, as, under the allegations of the petition, it is shown that the defendant was not to be trusted in the society of Mrs. Morris, or to speak with her.

But, even if it be conceded that the act of the court in this regard is of doubtful validity,—that is, that it may or may not be void,—still we do not feel inclined to interfere. The defendant in that suit had his right to invoke the action of that court to dissolve that injunction. He did not do so, but he saw fit to wilfully disregard it, and he now claims before this court that the same was absolutely void, and that he had the right to defy it and set it at naught. It occurs to us that the injunction could have been obeyed easily, without infringing upon any of the fundamental rights of the applicant. We accordingly hold that the applicant does not show himself entitled to be relieved. It is therefore ordered that he be remanded to the custody of the sheriff of Dallas county, and undergo the sentence imposed upon him by the judge of the Forty-fourth judicial district court. It is further ordered that the costs incurred in this court be taxed against the applicant.

That there is no equitable jurisdiction to enjoin the commission of a crime, see *Hargett v. Bell*, 134 N. C. 395, 46 S. E. 749, inserted at ch. 10, § 5, post. See "Injunction," Century Dig. §§ 165-175; Decennial and Am. Dig. Key No. Series §§ 94-101.

SEC. 3. THREATS.

GRIMES v. GATES, 47 Vt., 594, 19 Am. Rep. 129. 1874.

What Threats are Actionable.

[Action on the case for writing a scandalous or threatening letter to plaintiff. Demurrer by defendant. Demurrer sustained, and judgment against the plaintiff, from which she appealed. Reversed.]

The first count in the declaration alleged a threat to injure plaintiff, but did not state the character of the injury threatened. The other counts alleged threats of arrest and imprisonment and to accuse plaintiff of crimes punishable by imprisonment, and to take measures to have her arrested and imprisoned in the penitentiary. The supreme court holds that the demurrer should have been overruled as to all counts except the first—that is, that all the counts set up a cause of action except the first.]

WHEELER, J. Threats of bodily hurt which occasion such interruption or inconvenience as is a pecuniary damage, are actionable. Not the threats alone, but the threats and consequent damage together. 3 Blk. Com. 120; 2 Com. Dig. Battery, D; Jacob's Law Diet. tit. Threats; Bouv. Law Diet. tit. Menace; 1 Swift's Dig. 477. The extortion of money or property by means of such threats is, at common law, indictable. *The Queen v. Woodward*, 11 Mod. 137, 6 East, 133; 3 Chit. Crim. Law, 607. The threats make the cause of action, by producing fear which causes damage; and the crime, by producing fear which compels the giving over of money or property. A mere vain fear is not sufficient. It must be founded upon an adequate threat. Co. Lit. 253b; *The King v. Southerton*, 6 East, 126; *Taft v. Taft et ux.*, 40 Vt. 229. A threat of imprisonment is a threat of bodily hurt, and would seem to be sufficient. Co. Lit. 253b; *The King v. Southerton*, supra. In declaring for such an injury, the pleader must "show some just cause of feare, for feare of itself is internal and secret." Co. Lit. 253b. In indictments for such threats, it is not necessary to set forth the words in which the threats were made, but only the substance of the threat. 3 Chit. Crim. Law, 607. No reason for any greater particularity in civil cases is apparent. In actions for slander, the injury is occasioned wholly by the words, and the words must be set forth, so as to show that they were such as would occasion an actionable injury, or no cause of action would be set forth. So in indictments on statutes for sending threatening letters of certain kinds, the letters must be set out, so that they may appear to be such as the statutes were directed against. 2 East, P. C. 1122. The gist of this action is not the use of words to the injury of reputation, nor the writing of anything prohibited by a particular statute, but is the threatening so as to cause pecuniary damage. It would seem to be sufficient, as to this, to set forth in substance the making of such a threat as would be adequate to the result. The only threat alleged in the first count is, that the defendants did threaten the plaintiff with great injury. This may have meant an injury to property, and not to person,

and something remote and fanciful, and not any thing direct and tangible. Such allegations are to be taken most strongly against the pleader. Such threats would not be sufficient to awe persons of ordinary firmness. And the count does not set forth that the defendants knew of any reason why the plaintiff could not withstand as much and as severe threatening as ordinary persons. If there was such a reason that the defendants knew of, and took advantage of, and thereby, and by making the threat alleged, they injured the plaintiff, and all these facts were alleged, the count would, probably, be sufficient. But such facts not being alleged, cannot be presumed to exist. There seems to be a lack of **any** threat sufficient of itself, and of any threat made sufficient by accompanying circumstances, alleged in this count, to make it sufficient. *Taft v. Taft et ux.*, *supra*. In each of the other counts, a threat to imprison the plaintiff, or to cause her to be imprisoned, is distinctly alleged. In each one of all the counts it is alleged that the defendants made the threats intending to frighten, terrify, and injure the plaintiff, and that by means of the threats she was terrified, frightened, and made sick, and rendered unable to attend to her usual business and perform her usual work, and was thereby put to expense and made to suffer loss. These are sufficient allegations of pecuniary damage. *Underhill v. Welton*, 32 *Vt.* 40. All the counts, except the first, seem to set forth sufficient facts when admitted by demurrer or found by a jury, to constitute good ground of recovery.

The pro forma judgment that the declaration was insufficient is reversed as to all the counts but the first, and the cause is remanded, with leave to the parties to move for amendment or repleader, in the county court.

See 28 *Am. & Eng. Enc. Law*, 140 et seq.; *Revisal*, § 3428. See "Threats," *Century Dig.* § 14; *Decennial and Am. Dig. Key No. Series* § 10.

SEC. 4. ASSAULT AND BATTERY.

SCOTT v. SHEPHERD, 2 *Wm. Blackstone*, 892, 898. 1773.

What Acts Amount to a Direct Assault or Trespass.

[Scott, an infant by his next friend, brought an action of trespass *vi et armis* against Shepherd, an infant who defends by his guardian *ad litem*. Verdict against defendant subject to the opinion of the court as to whether this action would lie. The decision was that the action did lie, and judgment was entered against the defendant.

The defendant threw a lighted squib into a market house wherein a large concourse of people were assembled. The squib fell upon the stand of Yates, a seller of gingerbread. Willis, to save himself and Yates' gingerbread, threw the squib across the market house. It fell on the gingerbread stand of Ryall who threw it to another part of the building. The squib when thrown by Ryall fell in the face of the plaintiff and put out one of his eyes. The question presented is: Under the circumstances stated, did Shepherd's act of throwing the squib into the crowded market house, constitute a direct assault or trespass upon Scott?]

DE GRAY, C. J. . . . The real question certainly does not turn upon the lawfulness or unlawfulness of the original act. For actions of trespass will lie for legal acts when they become trespasses by accident. As in the cases cited of cutting thorns, lopping of a tree, shooting at a mark, defending oneself by a stick which strikes another behind, etc. They may also not lie for the consequences even of illegal acts, as that of casting a log in the highway, etc. But the true question is, whether the injury is the direct and immediate act of the defendant, and I am of opinion that in this case it is. The throwing of the squib was an act unlawful and tending to affright the bystanders. So far, mischief was originally intended; and not any particular mischief, but mischief indiscriminate and wanton. Whatever mischief therefore follows, he is the author of it; *egreditur personam*, as the phrase is in criminal cases. And though criminal cases are no rule for civil ones, yet in trespass I think there is an analogy. Every one who does an unlawful act is considered as the doer of all that follows; if done with a deliberate intent, the consequences may amount to murder; if incautiously, to manslaughter. *Fost.* 261. So too in *Ventr.* 295. A person breaking a horse in Lincoln's Inn Fields hurt a man, held that trespass lay; and 2 *Lev.* 172, that it need not be laid *scienter*. I look upon all that was done subsequent to the original throwing as a continuation of the first force and first act, which will continue till the squib was spent by bursting. And I think that any innocent person removing the danger from himself to another is justifiable; the blame lights upon the first thrower. The new direction and new force flow out of the first force, and are not a new trespass.

The writ in the Register, 95b, for trespass in maliciously cutting down a head of water, which thereupon flowed down to and overwhelmed another's pond, shows that the immediate act need not be instantaneous, but that a chain of effects connected together will be sufficient.

It has been urged that the intervention of a free agent will make a difference; but I do not consider Willis and Ryall as free agents in the present case, but acting under a compulsive necessity for their own safety and self-preservation. On these reasons I concur with brothers Gould and Nares that the present action is maintainable.

See "Negligence," *Century Dig.* §§ 74-79; *Decennial and Am. Dig.* Key No. Series §§ 61, 62.

CLARK v. DOWNING, 55 Vt., 259, 45 Am. Rep. 612. 1882.

What Constitutes an Assault.

[Plaintiff sues for an assault and battery. The proof was that defendant struck the horse that plaintiff was driving. Judgment against the plaintiff, and he appealed. Reversed.]

ROYCE, C. J. . . . Did the striking of the plaintiff's horse constitute an assault upon the plaintiff? It is not necessary to constitute an assault that any actual violence be done to the person. If the party threatening the assault have the ability, means, and apparent intention to carry his threat into execution, it may in law constitute an assault. The disposition, accompanied with a present ability to use violence, has been held to amount to an assault. Where violence is used it is not indispensably necessary that it should be to the person. It was decided in *Hopper v. Reeve*, 7 Taunt. 698, that the upsetting of a chair or carriage in which a person was sitting was an assault; in *Martin v. Shopp*, 3 C. & P. 373, that riding after a person at a quick pace and compelling him to run into his garden to avoid being beaten was an assault; that the striking of the horse upon which the wife of the plaintiff was riding was an assault upon the wife. 1 Stephen, N. P. 210.

An assault is defined in *Hays v. People*, 1 Hill, 351, to be an attempt with force or violence to do a corporal injury to another. The striking of the plaintiff's horse in the manner that his evidence tended to show, would probably result in a corporal injury to him; hence the requests should have been complied with. . . . Judgment reversed.

For what acts constitute an assault as distinguished from a battery, see *State v. Martin*, 39 Am. Rep. 711, and note. See "Assault and Battery," Century Dig. §§ 1-4; Decennial and Am. Dig. Key No. Series §§ 1-7.

TUBERVILLE v. SAVAGE, 1 Modern, 3. 1670.

What Does Not Constitute an Assault.

Action of assault, battery, and wounding. The evidence to prove a provocation was, that the plaintiff put his hand upon his sword and said: "If it were not assize-time, I would not take such language from you." The question was, if that were an assault? The court agreed that it was not: for the declaration of the plaintiff was, that he would not assault him, the judges being in town; and the intention as well as the act makes an assault. Therefore if one strike another upon the hand, or arm, or breast in discourse, it is no assault, there being no intention to assault; but if one, intending to assault, strike at another and miss him, this is an assault: so if he hold up his hand against another in a threatening manner and say nothing, it is an assault. In the principal case the plaintiff had judgment.

See *State v. Myerfield*, 61 N. C. 108. See "Assault and Battery," Century Dig. §§ 1-4; Decennial and Am. Dig. Key No. Series §§ 1-7.

LEWIS v. HOOVER, 3 Blackford, 407. 1834.

Assault Without Battery or Special Damage.

[Action of trespass. Verdict and judgment against plaintiff, and he carried the case to the supreme court by writ of error. Reversed. The error assigned was this: The judge charged that if defendant struck at the plaintiff in an angry and violent manner, but no damage resulted therefrom, they ought to find for the defendant.]

STEVENS, J. . . . The only question to be determined is, whether that latter and additional charge of the court was correct? An assault is an attempt or offer with violence to do a corporal hurt to another, as if one lift up his cane or fist at another in a threatening manner, or strike at him with a stick, his fist, or any weapon, within striking distance, but miss him. This is called an unlawful setting upon one's person, and is an inchoate violence for which the party assaulted may have redress by an action of trespass *vi et armis*, and shall recover damages as compensation, although no actual injury or suffering is proved. The damages are not assessed for the mere corporal injury or pecuniary loss, but for the malicious and insulting conduct of the defendant. 2 Blk. Com. 120; 1 Bac. Abr. 242; 1 Saund. on Pl. & Ev. 103, 104. From this it appears that the above additional and latter charge of the circuit court to the jury is incorrect, and should not have been given. Judgment reversed.

See "Assault and Battery," Century Dig. §§ 1-4; Decennial and Am. Dig. Key No. Series §§ 1-7.

NEWELL v. WHITCHER, 53 Vt., 589, 38 Am. Rep. 703. 1880.

Assault. What Amounts to. Assault Without Physical Injury. Fright.

[Plaintiff, who was a blind girl and a guest at defendant's house, sued the defendant in trespass with three counts—Trespass *vi et armis*, Trespass *q. c. l.*, and Trespass on the Case—for entering her room, sitting on her bed, and soliciting her to sexual intercourse. Judgment against the defendant, and he appealed. Affirmed. The plaintiff suffered no direct physical injury; but was so excited, alarmed, frightened, and outraged in her feelings, that she was made sick. The judge instructed the jury that they might give punitive damages.]

REDFIELD, J. . . . 1. It is claimed that the entry into the plaintiff's private apartments did not support the action of trespass *quare clausum*; but we think that her right to her private sleeping room during the night under the circumstances of this case, was as ample and exclusive against the inmates of the house as if the entry had been made into her private dwelling house through the outer door. Her right of quiet occupancy and privacy was absolute and exclusive; and the entry by stealth in the night into such apartments, without license or justifiable cause, was a trespass; and if with felonious intent, was a crime. *State v. Clark*, 42 Vt. 630.

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2. The approach to her person in the manner her testimony tends to prove—sitting on the bed and bedclothes that covered her person, and leaning over her with the proffer of criminal sexual intercourse, so near as to excite the fear and apprehension of force in the execution of his felonious purpose, was an assault. The whole act and motive was unlawful, sinister and wicked. The act of stealing stealthily into the bedroom of a virtuous woman at midnight to seek gratification of criminal lust, is sufficiently dishonorable and base in purpose and in act; but especially so, when the intended victim is a poor, blind girl under the protecting care of the very man who would violate every injunction of hospitality, that he might dishonor and ruin at his own hearthstone this unfortunate child, who had the right to appeal to him to defend her from such outrage. *Alexander v. Blodgett*, 44 Vt. 476.

3. The court charged the jury that if the plaintiff was so frightened and shocked in her feelings as to injure her health by defendant's conduct as described in her testimony, she could recover damages for such injury. The defendant's counsel asked the court to charge, in substance, that if defendant's acts and conduct would not have injured a person of ordinary nerve and courage, then there could be no recovery. When the acts of the party complained of are of themselves innocent and harmless, and may become wrongful by the manner in which they are done, then a man is to be judged by the common and ordinary effect of such acts. But when a married man breaks into the bedroom of a chaste and honest woman at midnight, and proposes to her sexual and criminal commerce with her, the act is wholly wrongful; the aim and purpose is wrongful and the act if perpetrated is criminal; and the party offending must answer in damages for all actual injuries. And we think in this case, if all the facts claimed by the plaintiff in her testimony were found to be true, the plaintiff had a right to recover. And the charge of the court as to exemplary damages was sound. Judgment affirmed.

See *Mitchell v. Rochester R. Co.*, 151 N. Y. 107, § 5, post. A railroad company is liable in damages to a female passenger for improper proposals made to her by its conductor. *Strother v. R. R.*, 123 N. C. 197, 31 S. E. 386. For when an action will and will not lie for pain and injury resulting from fright caused by the unlawful act or negligence of another, see *Ewing v. R. R.*, 23 Atl. 340, 14 L. R. A. 666; *Hill v. Kimbell*, 13 S. W. 59, 7 L. R. A. 618; *Huston v. Freemansburg*, 61 Atl. 1022, 3 L. R. A. (N. S.) 49, and elaborate note. See also sec. 5, post; *Razor v. Qualls*, 4 Blackf. 286, and *Brame v. Clark*, 148 N. C. 364, 62 S. E. 418, both inserted at ch. 3, § 12, ante; and *Craker v. R. R.*, 36 Wis. 675, inserted post in this section. See "Assault and Battery," *Century Dig.* §§ 1-4; *Decennial and Am. Dig.* Key No. Series §§ 1-7.

FULLERTON v. WARRICK, 3 Blackford, 219. 1833.

Provocation as a Defense to an Action for Assault, etc.

[Action for damages for an alleged assault and battery. In mitigation of damages the defendant proved frequent slanders of himself by the plaintiff; but there was no proof that such slanders were uttered on the

occasion of the assault and battery. Verdict and judgment against defendant, and he appealed. Reversed.]

STEVENS, J. . . . The only question before the court is, whether the evidence set out in the record was correctly permitted to go to the jury, in mitigation of damages.

The law, in tenderness to human frailties, distinguishes between an act done deliberately and an act proceeding from a sudden heat. As, if upon a sudden quarrel two persons fight and the one kills the other, this has been adjudged only manslaughter. So, if a man be greatly provoked, as by pulling his nose, or other great indignity, and immediately kills his aggressor, though this is not excusable, the offense is mitigated homicide. But in every case of homicide upon provocation, if there be any time intervening between the insult and the killing, sufficient for passion to subside and reason to interpose, the offense becomes murder. In analogy to this principle, evidence in civil actions for assault and battery is admitted, in mitigation of damages, to show a provocation on the part of the person complaining of the injury. But the provocation must be so recent as to induce a fair presumption that the violence done, was committed during the continuance of the feelings and passions excited by it, before the blood has had time to cool; a different rule would greatly encourage breaches of the peace, rencounters, and brutal force. For the purpose of illustration, we will notice two or three leading cases.

First, the case of *Avery v. Ray et al.*, 1 Mass. 12. This was an action of trespass, assault and battery, tried on the plea of not guilty. The defendants offered to prove, in mitigation of damages, that the plaintiff reported that the sister of Ray, one of the defendants, had openly solicited the plaintiff to have carnal connection with her; that Ray, having heard that, called on him to know whether he had or had not said so, and that he refused to confess or deny it; that the defendant then told him that he would chastise him for it, and did so; and for that chastisement the action was brought. The court said that the admission of such evidence is contrary to all rule; that immediate provocations are admitted in mitigation of damages, but when time for reflection has intervened, so as to give the blood time to cool, they are not admitted.

Secondly, the Case of *Lee v. Woolsey*, 19 Johns. 319. This was an action of trespass, assault and battery, also, tried on the plea of not guilty, in the month of July, 1820. The defendant was a post-captain in the navy, and the plaintiff was an attorney at law. On the trial the defendant offered to prove, in mitigation of damages, that in the month of February preceeding, the plaintiff had addressed to the secretary of the navy a scandalous and defamatory letter respecting the defendant, charging him with having embezzled the public property under his care as a post-captain, and that that letter had been circulated among the citizens of the place where the parties resided, and had been known to the defendant only a few hours before the time of committing the violence complained of, and that at the time of committing the violence, and

before the commencement of the attack, the defendant asked the plaintiff whether he was the author of that scandalous and defamatory communication or not, and he admitted that he was, but stated that he wrote it as an attorney, and was paid for it. The defendant also offered to prove that on the day before the attack was made by him on the plaintiff, the plaintiff had made scandalous insinuations against him respecting his having embezzled the public property. The court said that the evidence was not admissible in mitigation of damages, there having been time between the provocations and the assault for deliberate reflection.

We will notice one other case only, and that is the case of *Rochester v. Anderson*, 1 Bibb, 428. In that case the defendant offered to prove, in mitigation of damages, that the plaintiff had circulated slanderous reports about him, and for that he had assaulted him. The court refused the evidence on account of the time which intervened between the time of giving the insult and the time of making the assault. The court in that case says that such opprobrious language, if used at the time of the battery, and especially if used with an intent of provoking a quarrel, would be legal evidence in mitigation of damages; but if there have been time for deliberation, the peace of society requires that men should suppress their passions.

There is nothing upon the record before us which authorizes us to presume that the evidence in question was correctly permitted to go to the jury. The judgment is reversed.

For the general subject of provocation as a defense or mitigation, see 1 L. R. A. (N. S.) 137; 11 Ibid. 670. See "Assault and Battery," Century Dig. §§ 10, 48; Decennial and Am. Dig. No. Series §§ 12, 34.

PALMER v. R. R. and ELECTRIC CO., 131 N. C. 250, 42 S. E. 604. 1902.

Provocation as a Defense to an Action for Assault, etc.

[Action for damages caused by an assault and battery upon the plaintiff by an alleged employee of the defendant. Only so much of the opinion as discusses provocation as a defense, is here inserted.]

CLARK, J. The plaintiff, while a passenger on the street car of the defendant, and somewhat intoxicated, used grossly insulting words to the motorman. Arrived at his destination, the plaintiff got out, deposited his bundles on the sidewalk, returned to the car, again got into an altercation with the motorman, turned, and left the car, whereupon the motorman followed him up, and, two or three steps from the car, struck the plaintiff on the back of the head with the lever which controlled the car, knocking him down.

The fact that the plaintiff invited the assault by insulting language or provoking conduct would not bar recovery in a civil action, not even when the parties fight by consent. *Bell v. Hansley*, 48 N. C. 131; *Williams v. Gill*, 122 N. C. 967, 29 S. E. 879; *Cooley*,

Torts (2d ed.), pp. 183, 187, 190. The rule in criminal actions is that no words, however violent and insulting, justify a blow, but, if a blow follows, both are guilty, though the party giving the insult strikes no blow. The insult is not a defense, but matter in mitigation of punishment. In a civil action, if the provocation is great, the jury will usually see fit to return nominal or small damages; and, if the amount is less than \$50, the plaintiff recovers no more costs than damages. Code, § 525 (4). In the civil as in the criminal action, the provocation is a mitigation, not a defense.

See "Carriers," Century Dig. § 1121; Decennial and Am. Dig. Key No. Series §§ 283, 341.

STOUT v. WREN, 8 N. C. 420. 1821.

Mutual Assaults. Volenti non fit Injuria, as a Defense.

[Action for damages resulting from assault and battery. Plaintiff and defendant fought by agreement. The court charged that if plaintiff agreed to fight he could not recover, unless he was too drunk to know what he was doing. Verdict and judgment against plaintiff, and he appealed. Reversed.]

TAYLOR, C. J. It is equally reasonable and correct, that a man shall not recover a recompense for an injury received by his own consent; but the rule must necessarily be received with this qualification: that the act from whence the injury proceeded be lawful. Hence, in those manly sports and exercises which are thought to qualify men for the use of arms, and to give them strength and activity, if two played by consent at cudgels, and one hurt the other, no action would lie. But where in an action for assault and battery, the defendant offered to give in evidence that the plaintiff and he boxed by consent, from whence the injury proceeded, it was held to be no bar to the action; for, as the act of boxing is unlawful, the consent of the parties to fight could not excuse the injury. *Boulter v. Clark*, Buller N. P. 16. The consequence of this distinction is apparent also in the law of homicide; for if death ensue from innocent and allowable recreations, the case will fall within the rule of excusable homicide; but if the sport be unlawful, and endanger the peace, and death ensue, the party killing is guilty of manslaughter. *Fost.* 259. It is laid down in *Mather v. Ollerton*, Comberd. 218, that if one license another to beat him, such license is void, because it is against the peace; and the plaintiff recovered a verdict and judgment. The case was very fairly put to the jury, as to the evidence of the plaintiff's intoxication, but I think the law was misconceived in stating to them, that if the plaintiff was sober and assented, he was not entitled to recover. There must be a new trial.

HALL, J. Upon principle unconnected with municipal law, or policy, I doubt how far a person is entitled to recover damages, after having agreed to take his chance in a combat, and after the

event had proved the miscalculation he had made upon his own strength: considering it merely as a violation of a private right, I should say, *volenti non fit injuria*. Where the state is a party by way of indictment, the consent of the party does not stand in the way of conviction, because the fine goes to the state for the injury done her, by a breach of the peace. However, the authority in Buller's N. P. 16, is the other way, and I am inclined to believe has policy for its support; for these reasons, I acquiesce and agree that the rule for a new trial shall be made absolute.

See Bishop, Non Cont. Law, § 196; 20 L. R. A. (N. S.) 907, and note. See "Assault and Battery," Century Dig. § 9; Decennial and Am. Dig. Key No. Series § 11.

STATE v. WILLIAMS, 75 N. C. 134. 1876.

Volenti non fit Injuria, as a Defense. Ceremonies in Secret Society.

[Indictment for assault and battery. Defendant was convicted, and appealed. Affirmed. Defendant aided in suspending a woman from the wall by means of a cord fastened around her waist. The woman resisted to the extent of her ability. The actings of the defendant were in accordance with the rules of the "Good Samaritans," a benevolent society of which both the woman and the defendant were members. Defendant insisted that if he only intended to perform the usual ceremony of expulsion and was actuated by that motive alone—with no intention to hurt the woman—he was not guilty. The judge charged that such was not the law, but that defendant was guilty if he tied the cord around the woman against her consent.]

BYNUM, J. When the prosecutrix refused to submit to the ceremony of expulsion established by this benevolent society, it could not be lawfully inflicted. Rules of discipline for this and all voluntary associations must conform to the laws. If the act of tying the woman would have been a battery had the parties concerned not been members of the society of "Good Samaritans," it is not the less a battery because they were all members of that humane institution. The punishment inflicted upon the person of the prosecutrix was wilful, violent and against her consent, and thus contained all the elements of a wanton breach of the peace. *Bell v. Hansly*, 48 N. C. 131. Judgment affirmed.

For a discussion of the civil liability of fraternal societies for injuries, etc., inflicted upon members during initiation or expulsion ceremonies, see 13 L. R. A. (N. S.) 314, and note. See "Assault and Battery," Century Dig. §§ 68-74; Decennial and Am. Dig. Key No. Series §§ 47-53.

PAUL v. FRAZIER, 3 Mass. 71. 1807.

Volenti non fit injuria, as a Defense to Seduction.

[Action of trespass on the case wherein a woman seeks to recover damages for her own seduction. Verdict for plaintiff; defendant moved in arrest of judgment; and judgment was arrested. Plaintiff appealed. Affirmed. The facts appear in the opinion.]

PARSONS, C. J. This is an action on the case to recover damages against the defendant for seducing the plaintiff under a false pretense of courtship and intention of marriage, and for getting her with child, whereby her reputation has suffered, and her peace of mind been injured. After a verdict for the plaintiff on the issue of not guilty, the defendant moves to arrest the judgment. And we are of opinion that the judgment must be arrested. An action of this nature is not given by statute; and there is no principle of the common law on which it can be sustained. Fornication and adultery are offenses in this commonwealth created by statute. And the declaration amounts to a charge against the defendant for deceiving the plaintiff, and persuading her to commit a crime, in consequence of which she has suffered damage. She is a partaker of the crime, and cannot come into court to obtain satisfaction for a supposed injury to which she was consenting. It has been regretted at the bar that the law has not provided a remedy for an unfortunate female against her seducer. Those who are competent to legislate on this subject will consider, before they provide this remedy, whether seductions will afterwards be less frequent, or whether artful women may not pretend to be seduced, in order to obtain a pecuniary compensation. As the law now stands, damages are recoverable for a breach of promise of marriage; and if seduction has been practiced under color of that promise, the jury will undoubtedly consider it as an aggravation of the damages. So far the law has provided; and we do not profess to be wiser than the law.

Action for seduction brought by divorced woman or widow, see 21 L. R. A. (N. S.) 265.

In *Hood v. Sudderth*, 111 N. C. 215, 16 S. E. 397, the rule of *volenti non fit injuria* was set aside in cases of seduction—"a ruling since followed in Missouri, Arkansas and other states." *Willeford v. Bailey*, 132 N. C. at p. 404, 43 S. E. 928. In the opinion and the dissenting opinion in *Hood v. Sudderth*, *supra*, will be found a thorough discussion of both sides of the question. See also *Scarlett v. Norwood*, 115 N. C. 284, 20 S. E. 459; *Mordecai's Law Lect.* 388. See ch. 6, § 2 (C), *post*. See 123 N. C. mid. p. 199. See "Seduction," *Century Dig.* § 17; *Decennial and Am. Dig. Key No. Series* § 9.

COLE v. TURNER, 6 Modern, 149. 1705.

What Constitutes a Battery.

HOLT, Chief Justice, upon evidence in trespass for assault and battery, declared: First, That the least touching of another in anger is a battery. Secondly, If two or more meet in a narrow passage, and without any violence or design of harm, the one touches the other gently, it will be no battery. Thirdly, If any of them use violence against the other, to force his way in a rude inordinate manner, it will be a battery; or any struggle about the passage to that degree as may do hurt, will be a battery.

It was an action of battery by husband and wife, for a battery upon the husband and wife, *ad damnum ipsorum*; and though the plaintiff had a verdict, yet the chief justice said, he should never have judgment. And the judgment was after arrested above upon that exception.

Administering croton oil, in jest, is a battery. *State v. Monroe*, 121 N. C. 677, 28 N. C. 547, inserted at ch. 5, § 6, post. That laws excluding unvaccinated children from the public schools are valid, and that a refusal to be vaccinated may be made criminal, see *Jacobson v. Mass.*, 197 U. S. 11, 25 Sup. Ct. 358, 183 Mass. 242; *Hutchins v. Durham*, 137 N. C. 68, 49 S. E. 46; *State v. Hay*, 126 N. C. 999, 35 S. E. 459, 49 L. R. A. 588; *Morris v. Columbus*, 30 S. E. 850, 42 L. R. A. 175; *People ex rel. Jenkins v. Bd. of Ed.*, 84 N. E. 1046, 17 L. R. A. (N. S.) 709, and note. For whether or not it can be made lawful to vaccinate one forcibly against his will, see *Levin v. Burlington*, 129 N. C. 184; *People v. Bd. of Ed. supra*—in the note to which case it is said that no American case can be found which holds the affirmative, though it is practiced in England. See "Assault and Battery," *Century Dig.* §§ 1-4; *Decennial and Am. Dig. Key No. Series* §§ 1-7.

CRAKER v. C. & N. W. R. R. Co., 36 Wis. 657, 677. 1875.

Measure of Damages in Actions for Personal Insult, Injury, and Fright.

[Action for insulting, violent, and abusive acts alleged to have been done to the plaintiff by the conductor of defendant's train while plaintiff was a passenger thereon. Verdict and judgment against defendant for \$1,000, and defendant appealed. Affirmed.]

The proof was that the conductor put his arms around the plaintiff and kissed her five or six times. The judge charged that the measure of plaintiff's damages would be such compensation as the jury might see fit to award for the injury sustained, including injury to the feelings, "the elements of which are, such insult, indignity, contumely and the like, as she may have suffered;" that they could not give vindictive damages. This charge is approved by the supreme court which classes mental suffering as an element of compensatory, as distinguished from punitive, damages. Only that part of the opinion which bears directly and authoritatively on the question of damages, is here inserted.]

RYAN, C. J. . . . In giving the elements of damages, Mr. Sedgwick distinguishes between "the mental suffering produced by the act or omission in question: vexation: anxiety;" which he holds to be grounds for compensatory damages; and the "sense of wrong or insult, in the sufferer's breast, from an act dictated by a spirit of wilful injustice, or by a deliberate intention to vex, degrade or insult," which he holds to be ground for exemplary damages only. *Sedgwick's Meas. Dam.* 35. Mr. Sedgwick himself says that the rule in favor of exemplary damages "blends together the interests of society and the aggrieved individual, and gives damages not only to recompense the sufferer, but to punish the offender" (*Ib.* 38); and following him, this court held in the leading case of *McWilliams v. Bragg*, 3 Wis. 424, and has often since reaffirmed, that exemplary damages are "in addition to actual damages."

In actions of tort, as a rule, when the plaintiff's right to re-

cover is established, he is entitled to full compensatory damages. When proper ground is established for it, he is also entitled to exemplary damages, in addition. The former are the compensation of the plaintiff; the latter, for the punishment of the defendant and for example to others. This is Sedgwick's blending together of the interest of society and the interest of plaintiff. And it is plain that there cannot well be common ground for the two. The injury to the plaintiff is the same, and for that he is entitled to full compensation, malice or no malice. If malice be established, then the interest of society comes in, to punish the defendant and deter others in like cases, by adding exemplary to compensatory damages.

We need add no authority to Mr. Sedgwick's that, in actions for personal tort, mental suffering, vexation and anxiety are subjects of compensation in damages. And it is difficult to see how these are to be distinguished from the sense of wrong and insult arising from injustice and intention to vex and degrade. The appearance of malicious intent may indeed add to the sense of wrong; and equally, whether such intent be really there or not. But that goes to mental suffering, and mental suffering to compensation. So it seems to us. But if there be a subtle, metaphysical distinction which we cannot see, what human creature can penetrate the mysteries of his own sensations, and parcel out separately his mental suffering and his sense of wrong—so much for compensatory, and so much for vindictive damages? And if one cannot scrutinize the anatomy of his own, how impossible to dissect the mental agonies of another, as a surgeon does corporal muscles. If possible, juries are surely not metaphysicians to do it. And we must hold that all mental suffering directly consequent upon tort, irrespectively of all such inscrutable distinctions, is ground for compensatory damages in an action for the tort. With these views, we can see no error in the charge of the court below on the subject of damages.

The respondent appears to be of respectable rank in life, and of sufficient culture to qualify her for teaching in public schools. In the painful trial of character and temper of the scene which culminated in the assault, in her action and demeanor following upon it, in the interview intruded upon her by the appellant, and in the embarrassment of her examination on the trial, she appears to have acted with great propriety, free from all exaggeration and affectation. She appears in the record to be a person who would feel such wrong keenly. She was entitled to liberal damages for her terror and anxiety, her outraged feelings and insulted virtue, for all her mental humiliation and suffering. We cannot say that the damages are excessive. We might have been better satisfied with a verdict for less. But it is not for us, it was for the jury, to fix the amount. And they are not so large that we can say that they are unreasonable. Who can be found to say that such an amount would be in excess of compensation to his own or his neighbor's wife or sister or daughter? *Hewlett v. Cruchley*, 5 Taunt. 277. We cannot say that it is to the respondent. Judgment affirmed.

See note to *Scott v. Shepherd*, 2 Wm. Blk. 822, and *Newell v. Whitteher*,

22 Vt. 367, each inserted ante in this section. See "Carriers," Century Dig. § 1344; Decennial and Am. Dig. Key No. Series § 319, "Damages," Century Dig. § 253; Decennial and Am. Dig. Key No. Series § 102.

SEC. 5. INJURIES TO THE PERSON RESULTING FROM NEGLIGENCE.

LEAME v. BRAY, 3 East, 593. 1803.

When Trespass vi et armis, and when Trespass on the Case Lies.

[Trespass vi et armis for defendant's colliding with plaintiff's curriole, causing plaintiff's horses to run away, whereby plaintiff had to leap from the curriole in self-preservation, fracturing his collar bone in consequence. The evidence showed negligence on the defendant's part rather than wilful misconduct; for the only blame imputed to him was driving on the wrong side of the road on a dark night when his carriage could not be seen. The defendant insisted, therefore, that if plaintiff's injury resulted from the negligence of the defendant, this action would not lie, but trespass on the case was the proper remedy. Judgment of nonsuit was entered against the plaintiff, who moved to set aside the nonsuit. The nonsuit was set aside in this court upon the ground that *trespass vi et armis was the proper remedy.*]

LORD ELLENBOROUGH, C. J. The true criterion seems to be according to what Lord C. J. De Grey says in *Scott v. Shepherd*, whether the plaintiff received an injury by force from the defendant. If the injurious act be the immediate result of the force originally applied by the defendant, and the plaintiff be injured by it, it is the subject of an action of trespass vi et armis by all the cases both ancient and modern. It is immaterial whether the injury be wilful or not. As in the case alluded to by my Brother Grose, where one shooting at butts for a trial of skill with the bow and arrow, the weapon then in use, in itself a lawful act, and no unlawful purpose in view; yet having accidentally wounded a man, it was holden to be a trespass, being an immediate injury from an act of force by another. So also was the case of *Weaver v. Wood*, in *Hob.* 134, where a like unfortunate accident happened whilst persons were lawfully exercising themselves in arms. So in none of the cases mentioned in *Scott v. Shepherd* did wilfulness make any difference. If the injury were received from the personal act of another, it was deemed sufficient to make it a trespass. In the case of *Day v. Edwards*, the allegation of the act having been done furiously was understood to imply an act of force immediately proceeding from the defendant. As to the case of *Ogle v. Barnes*, I incline to think it was rightly decided; and yet there are words there which imply force by the act of another; but, as was observed, it does not appear that it must have been the personal act of the defendants; it is not even alleged that they were on board the ship at the time: it is said indeed that they had the care, direction, and management of it; but that might be through the medium of other persons in their employ on board. That therefore might be sustained as an action on the case, because there

were no words in the declaration which necessarily implied that the damage happened from an act of force done by the defendants themselves. I am not aware of any case of that sort, where the party himself sued having been on board, this question has been raised. But here the defendant himself was present, and used the ordinary means of impelling the horse forward, and from that the injury happened. And therefore there being an immediate injury from an immediate act of force by the defendant, the proper remedy is trespass: the wilfulness is not necessary to constitute the trespass.

GROSE, J. I am of the same opinion. Looking into all the cases from the year book in the 21 Hen. 7, down to the latest decision on the subject, I find the principle to be, that if the injury be done by the act of the party himself at the time, or he be the immediate cause of it, though it happen accidentally or by misfortune, yet he is answerable in trespass. The case mentioned from Strange, that in Hobart, and those in the Term Reports, all agree in the principle.

See "Action," Century Dig. §§ 236-255; Decennial and Am. Dig. Key No. Series § 30.

BALT. CITY PASS. RY. CO. v. KEMP, 61 Md. 619, 48 Am. Rep. 134. 1883.

Remedy of a Passenger Injured by Negligence of Carrier.

[Kemp and his wife sued for damages resulting to the wife from the negligence of the railway company. The case went to the supreme court and was decided for Kemp and his wife, and this is a motion for re-argument. The court overruled the motion.

The wife was a passenger at the time of the injury. This action is one in tort. The railway company insisted that, while the form of the action is tort, the real ground of the right to recover is the breach of the contract to carry the passenger safely; and, that being so, no recovery can be had except for such injury as may fairly be taken to have been contemplated as the possible result of the breach of the contract. The court, after announcing that it cannot approve of that proposition, proceeds:]

ALVEY, C. J. . . . A common carrier of passengers, who accepts a party to be carried, owes to that party a duty to be careful, irrespective of contract; and the gravamen of an action like the present is the negligence of the defendant. The right to maintain the action does not depend upon contract, but the action is founded upon the common-law duty to carry safely; and the negligent violation of that duty to the damage of the plaintiff is a tort or wrong which gives rise to the right of action. *Bretherton v. Wood*, 3 B. & Bing. 54. If this were not so, the passenger would occupy a more unfavorable position in reference to the extent of his right to recover for injuries than a stranger; for the latter, for any negligent injury or wrong committed, can only sue as for a tort, and the measure of the recovery is not only for the actual suffering endured, but for all aggravation that may attend the commission of the wrong; whereas in the case of a passenger, if

the contention of the defendant be supported, for the same character of injury, the right of recovery would be more restricted. The principle of these actions against common carriers of passengers is well illustrated by the case of a servant whose fare has been paid by the master; or the case of a child for whom no fare is charged. In both of the cases mentioned, though there is no contract as between the carrier and the servant, or as between the carrier and the child, yet both the servant and the child are passengers, and for any personal injuries suffered by them, through the negligence of the carrier, it is clear they could sue and recover; but they could only sue as for a tort. The authorities would seem to be clear upon the subject, and leave no room for doubt or question.

In the case of *Marshall v. York, Newcastle & Berwick R. Co.*, 11 C. B. 655, in discussing the ground of action against a common carrier, Jervis, C. J., said: "But upon what principle does the action lie at the suit of the servant for his personal suffering? Not by reason of any contract between him and the company, but by reason of a duty implied by law to carry him safely." And in the same case Mr. Justice Williams said: "The case was, I think, put upon the right footing by Mr. Hill, when he said that the question turned upon the inquiry whether it was necessary to show a contract between the plaintiff and the railroad company. His proposition was, that this declaration could only be sustained by proof of a contract to carry the plaintiff and his luggage for hire and reward to be paid by the plaintiff and that the traverse of that part of the declaration involves a traverse of the payment by the plaintiff. I am of opinion that there is no foundation for that proposition. It seems to me that the whole current of authorities, beginning with *Govett v. Radnidge*, 3 East, 62, and ending with *Pozzi v. Shipton*, 8 Ad. & El. 963, establishes that an action of this sort is, in substance, not an action of contract, but an action of tort against the company as carrier." And in the subsequent case of *Austin v. Great Western R. Co.*, L. R. 2 Q. B. 442, Mr. Justice Blackburn, now Lord Blackburn, in delivering his judgment in that case said: "I think that what was said in the case of *Marshall v. York, Newcastle & Berwick R. Co.*, 11 C. B. 655, was quite correct. It was there laid down that the right which a passenger by railway has to be carried safely does not depend on his having made a contract, but that the fact of his being a passenger casts a duty on the company to carry him safely." And to the same effect and with full approval of the authorities just cited, are the cases of *Foulkes v. Met. Dis. R. Co.*, 4 C. P. Div. 267; 30 Eng. Rep. 536, and the same case on appeal, 5 C. P. Div. 157; 30 Eng. Rep. 740; and *Fleming v. Manchester, etc., R. Co.*, 4 Q. B. Div. 81. The case of *Bretherton v. Wood*, 3 Bro. & Bing. 54, is a direct authority upon the question.

A passenger may, without doubt, declare for a breach of contract, where there is one; but it is at his election to proceed as for a tort where there has been personal injury suffered by the negli-

gence or wrongful act of the carrier, or the agents of the company; and in such action the plaintiff is entitled to recover according to the principles pertaining to that class of actions, as distinguished from actions on contract. And this is the settled doctrine and practice in this state. *Stockton v. Frey*, 4 Gill, 406; *Balt. & Ohio R. Co. v. Blocher*, 27 Md. 277, 287; *Balt. & Yorktown Turnpike Co. v. Boone*, 45 Md. 344; *Stokes v. Saltonstall*, 13 Pet. 181. The motion for reargument must be overruled.

See *Bowers v. R. R.*, 107 N. C. 721, 12 S. E. 452, inserted at ch. 4, § 1, ante, and other cases cited in that section. *Bowers v. R. R.*, supra, and *Purcell v. R. R.*, 108 N. C. 414, at p. 422, 12 S. E. 954, 956, fully sustain the principal case. See also 14 L. R. A. (N. S.) 526, and note (passenger traveling under illegal contract); 14 Ib. 464, and note (passenger to whom wrong ticket has been sold by carrier's agent); 9 Ib. 1060, and note (passenger submitting to ejection to lay the foundation for an action); 5 Ib. 1012, and note (failure to furnish berth on a boat); 8 Ib. 880, and note (failure to stop train for intending passenger); 7 Ib. 188, 9 Ib. 1218, 21 Ib. 850, and notes (loss, etc., of baggage).

RAILROAD CO. v. JONES, 95 U. S. 439, 441-443. 1877.

Negligence and Contributory Negligence Defined.

[Action by Jones to recover damages resulting from the alleged negligence of the railroad company. Verdict and judgment against the railroad company, and it carried the case to the supreme court by writ of error. Reversed.]

Jones was employed as a laborer. The laborers were in the habit of riding on the pilot of the engine, when they chose to do so, although there was a box-car provided for them. Jones, while riding on the pilot, was hurt by a collision with some box-cars in a tunnel. Jones had been cautioned against riding on the pilot. There was room for him in the box car, and, if he had been in that car, he would not have been hurt. The judge was requested to charge that Jones could not recover if he knew that riding on the pilot was dangerous and that the box-car was the proper place for him. The refusal to give this instruction is the point in the case.]

Mr. Justice SWAYNE. . . . As to contributory negligence on the part of the plaintiff.

Negligence is the failure to do what a reasonable and prudent person would ordinarily have done under the circumstances of the situation, or doing what such a person under the existing circumstances would not have done. The essence of the fault may lie in omission or commission. The duty is dictated and measured by the exigencies of the occasion. See Wharton on Negligence, § 1, and notes.

One who by his negligence has brought an injury upon himself cannot recover damages for it. Such is the rule of the civil and of the common law. A plaintiff in such cases is entitled to no relief. But where the defendant has been guilty of negligence also, in the same connection, the result depends upon the facts. The question in such cases is: 1. Whether the damage was occasioned entirely

by the negligence or improper conduct of the defendant; or, 2. Whether the plaintiff himself so far contributed to the misfortune by his own negligence or want of ordinary care and caution, that but for such negligence or want of care and caution on his part the misfortune would not have happened. In the former case, the plaintiff is entitled to recover. In the latter, he is not. *Tuff v. Warman*, 5 C. B. (N. S.) 573; *Butterfield v. Forrester*, 11 East, 58; *Bridge v. Grand Junction R. Co.*, 3 M. & W. 244; *Davis v. Mann*, 10 Ib. 546; *Clayards v. Dethick*, 12 Q. B. 439; *Van Lien v. Seoville Manufacturing Co.*, 14 Abb. (N. Y.) Pr. (N. S.) 74; *Ince v. East Boston Ferry Co.*, 106 Mass. 149.

It remains to apply these tests to the case before us. The facts with respect to the cars left in the tunnel are not fully disclosed in the record. It is not shown when they were left there, how long they had been there, when it was intended to remove them, nor why they had not been removed before. It does appear that there was a watchman at the tunnel, and that he and the conductor of the train from which they were left, and the conductor of the train which carried the plaintiff, were all well selected, and competent for their places. For the purposes of this case, we assume that the defendant was guilty of negligence.

The plaintiff had been warned against riding on the pilot, and forbidden to do so. It was next to the cowcatcher, and obviously a place of peril, especially in case of collision. There was room for him in the box car. He should have taken his place there. He could have gone into the box car in as little, if not less, time than it took to climb to the pilot. The knowledge, assent, or direction of the company's agents as to what he did is immaterial. If told to get on anywhere, that the train was late, and that he must hurry, this was no justification for taking such a risk. As well might he have obeyed a suggestion to ride on the cowcatcher, or put himself on the track before the advancing wheels of the locomotive. The company, though bound to a high degree of care, did not insure his safety. He was not an infant nor non compos. The liability of the company was conditioned upon the exercise of reasonable and proper care and caution on his part. Without the latter, the former could not arise. He and another who rode beside him were the only persons hurt upon the train. All those in the box car, where he should have been, were uninjured. He would have escaped also if he had been there. His injury was due to his own recklessness and folly. He was himself the author of his misfortune. This is shown with as near an approach to a demonstration as anything short of mathematics will permit. The case is thus clearly brought within the second of the predicates of mutual negligence we have laid down. *Hickey v. Boston & Lowell R. Co.*, 14 Allen (Mass.) 429; *Todd v. Old Colony R. Co.*, 3 Id. 18; S. C., 7 Id. 207; *Gavett v. M. & L. R. Co.*, 16 Gray (Mass.), 501; *Lucas v. N. B. & T. R. Co.*, 6 Id. 64; *Ward v. R. Co.*, 2 Abb. (N. Y.) Pr. (N. S.) 411; *Galena & Chic. Un. R. Co. v. Yarwood*, 15 Ill. 468; *Doggatt v. Ill. Cent. R. Co.*, 34 Iowa, 284.

The plaintiff was not entitled to recover. It follows that the court erred in refusing the instruction asked upon this subject. If the company had prayed the court to direct the jury to return a verdict for the defendant, it would have been the duty of the court to give such direction, and error to refuse. *Gavett v. M. & L. R. Co.*, supra; *Merchants' Bank v. State Bank*, 10 Wall. 604; *Pleasant v. Fant*, 22 Wall. 121. Judgment reversed.

In North Carolina the defense of contributory negligence must be set up by answer. *Pell's Revisal*, sec. 483, and notes; *Dorsett v. Mfg. Co.*, 131 N. C. at p. 261, 42 S. E. 612. See "Negligence," *Century Dig.* §§ 1, 3, 4, 84; *Decennial and Am. Dig. Key No. Series* §§ 1, 2, 80; "Master and Servant," *Century Dig.* §§ 703, 786; *Dec. and Am. Dig. Key No. Series* §§ 233, 245.

DEANS v. RAILROAD, 107 N. C. 686, 12 S. E. 77. 1890.

Negligence. Contributory Negligence. "Last Clear Chance."

[Plaintiff, as administratrix of B. F. Deans, sued for damages resulting from the death of her intestate, caused by the alleged negligence of the defendant. In deference to an intimation from the judge, the plaintiff submitted to a nonsuit and appealed. Reversed.]

The evidence tended to prove that B. F. Deans was lying upon the track; that he could have been seen by the engineer in time to stop the train before reaching him; that the engineer's attention was called to Deans' position in time to have stopped the train, etc. The judge intimated that the plaintiff could not recover. The question presented is: If B. F. Deans was guilty of contributory negligence, but, notwithstanding that fact, the accident could have been avoided if the railroad company had exercised proper precaution, can the plaintiff recover?]

AVERY, J. When this court, in the case of *Gunter v. Wicker*, 85 N. C. 312, adopted the rule laid down in *Davies v. Mann*, 10 Mees. & W. 545, that "notwithstanding the previous negligence of the plaintiff, if at the time when the injury was committed it might have been avoided by the exercise of reasonable care and prudence on the part of the defendant, an action will lie for damages," it was thenceforth aligned with one of two classes, holding widely divergent views as to the effect of contributory negligence on the part of a plaintiff, under certain circumstances, upon his right of recovery. That ruling has been expressly approved in a large number of later cases, and is now firmly grounded as a part of our system, in so far as it is distinct from that of any other courts where the common law of England prevails. *Farmer v. Railroad Co.*, 88 N. C. 564; *Turrentine v. Railroad Co.*, 92 N. C. 638; *Aycock v. Railroad Co.*, 89 N. C. 321; *Troy v. Railroad Co.*, 99 N. C. 298, 6 S. E. Rep. 77; *McAdoo v. Railroad Co.*, 105 N. C. 140, 11 S. E. Rep. 316; *Daily v. Railroad Co.*, 106 N. C. 301, 11 S. E. Rep. 320; *Lay v. Railroad Co.*, 106 N. C. 404, 11 S. E. Rep. 412; *Bullock v. Railroad Co.*, 105 N. C. 180, 10 S. E. Rep. 988; *Carlton v. Railroad Co.*, 104 N. C. 365, 10 S. E. Rep. 516; *Wilson v. Railroad Co.*, 90 N. C. 69. See, also, *Weymire v. Wolfe*, 52 Iowa, 533, 3 N. W. Rep. 541; *Railroad Co. v. Kellam*, 92 Ill. 245; *Meeks v. Railroad*

Co., 56 Cal. 513; *Kenyon v. Railroad Co.*, 5 Hun. 479. In those states where the very opposite view was taken, it was held that where one went upon the track of a railroad company at a point other than a crossing, where the public have a right of way, without special license, he was a trespasser and could not recover for any injury inflicted upon him through the negligence of such company's agents or employees, unless it was wanton. *Mulherrin v. Railroad Co.*, 81 Pa. St. 366; *Rounds v. Railroad Co.*, 64 N. Y. 129; *Pennsylvania Co. v. Sinclair*, 62 Ind. 301; *Donaldson v. Railroad Co.*, 21 Minn. 293; *Beach*, *Contrib. Neg.*, § 67 et seq.; *Express Co. v. Nichols*, 33 N. J. Law. 434. In delivering the opinion in *Manly v. Railroad Co.*, 74 N. C. 655, Justice BYNUM, foreshadowed by an intimation the subsequent adoption by this court, in *Gunter v. Wicker*, *supra*, of the principle stated in *Davies v. Mann*, and after it had been approved in so many well-considered opinions, it became apparent that it would be illogical and inconsistent to adhere to the rule laid down in *Herring v. Railroad Co.*, 10 Ired. 402, or the interpretation generally given to Judge PEARSON'S language by the leading text writers of this country. In that case, the engineer might have seen two little negroes who were lying on the track asleep, according to conflicting testimony, from 200 yards to a half mile, before his engine reached them. He did not actually discover that the children were asleep till he was within twenty-five or thirty yards of them. The testimony showed also that the train could have been stopped by the engineer within from seventy-five to one hundred yards. The judge below charged the jury that the railroad company was not liable for the neglect of the engineer to keep a lookout along the track, except when he was approaching a crossing of a public road over the railway, and was not responsible for his failure to use the appliances at his command to stop the train, until he actually saw the children asleep on the track, at a distance of twenty-five or thirty yards. This instruction was sustained by the court in the face of the fact that counsel for the plaintiff cited and relied upon *Davies v. Mann*, *supra*, and the court failed even to advert to the doctrine laid down in that case. It must, therefore, have been the settled purpose of this court, when the doctrine of *Davies v. Mann* was approved, to modify this rule, whenever the point should be plainly presented, and that contingency has never arisen until the present time. We have reiterated the principle that, where an engineer sees a human being walking along or across the track in front of his engine, he has a right to assume without further information that he is a reasonable person, and will step out of the way of harm before the engine reaches him. *McAdoo v. Railroad Co.*, 105 N. C. 153, 11 S. E. Rep. 316; *Daily v. Railroad Co.*, *supra*; *Parker v. Railroad Co.*, 86 N. C. 221. It is not negligence in an engineer to act, in the absence of specific information, on the presumption that a man who is apparently awake and is moving, is in full possession of all of his senses and faculties. But it has been repeatedly held by this court that it is the duty of an engineer, while running an engine, to keep a careful outlook along the track in

order to avoid or avert danger, in case he shall discover any obstruction in his front, whether at a crossing or elsewhere. *Bullock v. Railroad Co.*, supra; *Carlton v. Railroad Co.*, supra; *Wilson v. Railroad Co.*, supra. If the engineer discover, or by reasonable watchfulness may discover, a person lying upon the track asleep, or badly intoxicated, or see a human being who is known by him to be insane, or otherwise insensible to danger, or unable to avoid it, upon the track in his front, it is his duty to resolve all doubts in favor of the preservation of life, and immediately use every available means, short of imperiling the lives of passengers on his train, to stop it. *Railroad Co. v. Miller*, 25 Mich. 279; *Railroad Co. v. St. John*, 5 Sneed, 524; *Railroad Co. v. Smith*, 52 Tex. 178; *Isbell v. Railroad Co.*, 27 Conn. 393; *Meeks v. Railroad Co.*, 56 Cal. 513. For similar reasons we have held that the test of negligence, where live stock are killed or injured by a train, is involved in the question whether the engineer, by keeping a proper lookout, could have discovered the animal in time to have prevented the injury. *Carlton v. Railroad Co.* and *Wilson v. Railroad Co.*, supra. In *Bullock v. Railroad Co.* the same criterion was applied, where it was alleged that an engineer might have discovered that a wagon was stalled at a crossing in time to prevent injury by stopping his train.

We think that his honor erred in declaring the testimony insufficient in any aspect of it to warrant the inference on the part of the jury that the defendant might have prevented the injury by the exercise of ordinary care. There must be a new trial.

The principal case is approved in *Daniel v. R. R.*, 145 N. C. 51, 58 S. E. 601. The doctrine of the case is called the doctrine of the "last clear chance," in *McLamb v. R. R.*, 122 N. C. at mid. p. 873, 29 S. E. 894. What are the proper issues to be submitted to the jury when this doctrine arises in a case, is discussed in *Baker v. R. R.*, 118 N. C. at p. 1021, 24 S. E. 415, and *Curtis v. R. R.*, 130 N. C. 437, 41 S. E. 929. See also *Pickett v. R. R.*, 117 N. C. 616, 23 S. E. 264, 30 L. R. A. 257, 52 Pac. 92, 40 L. R. A. 172, 7 L. R. A. (N. S.) 132, 17 Ib. 707, for further discussion of the doctrine of the last clear chance. See "Railroads," *Century Dig.* §§ 1324, 1325; *Decennial and Am. Dig. Key No. Series* § 390.

MITCHELL v. ROCHESTER R. CO., 151 N. Y. 107, 45 N. E. 354, 34 L. R. A. 781. 1896.

Actions for Fright Caused by Negligence.

[Plaintiff, Annie Mitchell, sued to recover damages caused by the alleged negligence of the defendant. Judgment against defendant. Defendant appealed. Reversed.]

The evidence tended to prove that the plaintiff came near to being run over in the street by the defendant's team; that the defendant was negligent; that the plaintiff was greatly frightened and suffered a miscarriage in consequence of such fright—that the mental shock she received produced the miscarriage and attendant illness.]

MARTIN, J. . . . Assuming that the evidence tended to show that the defendant's servant was negligent in the manage-

ment of the car and horses, and that the plaintiff was free from contributory negligence, the single question presented is whether the plaintiff is entitled to recover for the defendant's negligence which occasioned her fright and alarm, and resulted in the injuries already mentioned. While the authorities are not harmonious upon this question, we think the most reliable and better-considered cases, as well as public policy, fully justify us in holding that the plaintiff cannot recover for injuries occasioned by fright, as there was no immediate personal injury. *Lehman v. Railroad Co.*, 47 Hun, 355; *Commissioners v. Coultas*, 13 App. Cas. 222; *Ewing v. Railway Co.*, 147 Pa. St. 40, 23 Atl. 340. The learned counsel for the respondent in his brief very properly stated that "the consensus of opinion would seem to be that no recovery can be had for mere fright," as will be readily seen by an examination of the following additional authorities: *Haile v. Railroad Co.*, 60 Fed. 557, 9 C. C. A. 134; *Joch v. Dankwardt*, 85 Ill. 331; *Canning v. Inhabitants of Williamstown*, 1 Cush. 451; *Telegraph Co. v. Wood*, 6 C. C. A. 432, 57 Fed. 471; *Renner v. Canfield*, 36 Minn. 90, 30 N. W. 435; *Allsop v. Allsop*, 5 Hurl. & N. 534; *Johnson v. Wells Fargo & Co.*, 6 Nev. 224; *Wyman v. Leavitt*, 71 Me. 227. If it be admitted that no recovery can be had for fright occasioned by the negligence of another, it is somewhat difficult to understand how a defendant would be liable for its consequences. Assuming that fright cannot form the basis of an action, it is obvious that no recovery can be had for injuries resulting therefrom. That the result may be nervous disease, blindness, insanity, or even a miscarriage, in no way changes the principle. These results merely show the degree of fright, or the extent of the damages. The right of action must still depend upon the question whether a recovery may be had for fright. If it can, then an action may be maintained, however slight the injury. If not, then there can be no recovery, no matter how grave or serious the consequences. Therefore the logical result of the respondent's concession would seem to be, not only that no recovery can be had for mere fright, but also that none can be had for injuries which are the direct consequences of it. If the right of recovery in this class of cases should be once established, it would naturally result in a flood of litigation in cases where the injury complained of may be easily feigned without detection, and where the damages must rest upon mere conjecture or speculation. The difficulty which often exists in cases of alleged physical injury, in determining whether they exist, and, if so, whether they were caused by the negligent act of the defendant, would not only be greatly increased, but a wide field would be opened for fictitious or speculative claims. To establish such a doctrine would be contrary to principles of public policy. Moreover, it cannot be properly said that the plaintiff's miscarriage was the proximate result of the defendant's negligence. Proximate damages are such as are the ordinary and natural results of the negligence charged, and those that are usual, and may, therefore, be expected. It is quite obvious that the plaintiff's injuries do not fall within the rule as to prox-

mate damages. The injuries to the plaintiff were plainly the result of an accidental or unusual combination of circumstances, which could not have been reasonably anticipated, and over which the defendant had no control, and hence her damages were too remote to justify a recovery in this action. These considerations lead to the conclusion that no recovery can be had for injuries sustained by fright occasioned by the negligence of another, where there is no immediate personal injury. The orders of the general and special terms should be reversed, and the order of the trial term granting a nonsuit affirmed, with costs.

For whether or not a recovery can be had although no injury result except that caused by fright, see *Nowell v. Whitcher*, 53 Vt. 589, and note, inserted at sec. 4, ante; *Mack v. R. R.*, 29 S. E. 905, 40 L. R. A. 679. See also on this subject the elaborate note in 3 L. R. A. (N. S.) 49, and *Armour v. Kollmeyer*, 88 C. C. A. 242, 16 L. R. A. (N. S.) 1110. See "Damages," Century Dig. § 1000; Decennial and Am. Dig. Key No. Series § 52.

SO RELLE v. WESTERN UNION TEL. CO., 55 Tex. 308, 40 Am. Rep 805. 1881.

Mental Anguish Doctrine.

[Plaintiff sued for damages resulting from the negligence of defendant in not delivering a telegram which announced the death of the plaintiff's mother. Judgment against plaintiff. Plaintiff appealed. Reversed. The facts appear in the opinion.]

WATTS, J. The question presented by the record is as to the liability of a telegraph company for injury resulting to the feelings of a person from the wilful neglect of the agents of the company to transmit and deliver a message announcing the death of such person's mother, and requesting his presence at the funeral, etc. This question results from the ruling of the court below in sustaining exceptions to the petition.

[FACTS.] The allegations contained in the petition are, in effect, that appellant's mother died on the 16th day of January, 1874, near the town of Giddings; that on that day, W. M. Seallorn, a near relative prepared the message and delivered the same to the company's agent at said town, to be promptly transmitted and delivered to appellant at Austin, and that the charge for such service was then paid to such agent; that the agents of this company did not transmit and cause such message to be delivered to appellant within a reasonable time, notwithstanding he was in the city of Austin and at his usual place of business; but wilfully neglected and failed so to do for several days after the date aforesaid, and that by reason of such wilful neglect and failure he was prevented from being present at the funeral services of his mother and providing for her remains being properly cared for, and from paying to her the last tribute of respect, etc., claiming that he was thereby injured and damaged in the sum of \$50,000.

Actual damages are either general or special, the former are

such as naturally result from the act complained of, or which the law implies therefrom, and need not be specially pleaded, but may be recovered under the general averment of damages. 2 Sedg. on Dam. 606. It appears to be the settled rule in this state, that injury to the feelings, caused by the wilful neglect or fault of another, constitutes such actual damages for which a recovery may be had. *Hays v. H. & G. N. R. Co.*, 46 Tex. 279; *H. & G. N. R. Co. v. Randall*, 50 Tex. 261. In the last edition of *Shearman & Redfield on Negligence*, after fully considering the measure of damages, etc., in telegraph cases, the authors give it as their opinion, that "in case of delay or total failure of delivery of messages relating to matters not connected with business, such as personal or domestic matters, we do not think that the company in fault ought to escape with mere nominal damages, on account of the want of strict commercial value in such messages. Delay in the announcement of a death, an arrival, the straying or recovery of a child, and the like, may often be productive of an injury to the feelings which cannot be easily estimated in money, but for which a jury should be at liberty to award fair damages."

It appears to us that the natural consequences of a failure to promptly transmit and deliver a message like that in this case, and under the circumstances shown in appellant's petition, is to produce the keenest sense of grief incident to a disappointment. For it is a principle of our nature, implanted in the bosom of every reasonable being not devoid of human sensibilities, to promptly pay the last tribute of respect to the mother who bore and fostered us. And to be thwarted in the discharge of this duty, prompted as it is by natural desire, by the wilful fault or neglect of one whose business it is to communicate the news, and who has received his compensation therefor, in the very nature of things is calculated to, and will inflict upon the mind the sorest sum of disappointment and sorrow. This being the natural result of such neglect, the damages resulting therefrom are general, as contradistinguished from special damages, and may be recovered under the general averment of damages. In the case of *Phillips v. Hoyle*, 4 Gray, 568, it was held that injury to the feelings of a parent in consequence of the seduction of his daughter constituted general damages naturally resulting from the act, and need not be specially pleaded. A similar doctrine is asserted by the Supreme Court of the United States, in the case of *Roberts v. Graham*, 6 Wall. 578.

This being the natural result of such neglect, it must be held to have been contemplated by the company when its agent received the message, and agreed, for a compensation then paid, to promptly transmit and cause the same to be delivered. For all the importance that the message imports is fairly shown in its terms.

Telegraph companies exercise and enjoy special franchises and privileges under the law; the very purpose of their organization is to furnish for compensation the means of rapid and prompt communication; its use is expensive, and is rarely resorted to except

in matters of importance to the parties. Hence the resort to this mode of transmitting information should of itself be held sufficient notice to the company's agents, that, as between the sender and the party to whom sent, the message is deemed to be of some importance, unless the contrary is made known by strict information or strong implication, as time is the usual consideration that prompts the parties to the use of the wire.

The law will not permit any one to impose with impunity upon another, by his wilful fault or neglect, such injury to his feelings as is the natural result from the disappointment shown by the allegations of appellant's petition, and then protect himself under the plea of *dammum absque injuria*. Injury to the feelings, resulting from such disappointment, in our opinion constitutes general damages, recoverable under a general averment of damage; and the court erred in sustaining the exceptions to appellant's petition. It should be remarked that great caution ought to be observed in the trial of cases like this: as it will be so easy and natural to confound the corroding grief occasioned by the loss of the parent or other relative with the disappointment and regret occasioned by the fault or neglect of the company; for it is only the latter for which a recovery may be had; and the attention of juries might well be called to that fact. It is our conclusion that the proper disposition of this appeal is to reverse the judgment and remand the case. Reversed.

For authorities sustaining the doctrine of the principal case, see *Young v. Tel. Co.*, 107 N. C. 370, 11 S. E. 1044; *Green v. Tel. Co.*, 136 N. C. 489, 49 S. E. 165. For the opposite ruling, see *West. Un. Tel. Co. v. Ferguson*, 157 Ind. 64, 60 N. E. 674, where all the authorities on the subject are cited in the opinion and dissenting opinion, and 43 S. W. 965, 39 L. R. A. 463. *Green v. Tel. Co.*, *supra*, reviews all the cases, by states. See also 8 L. R. A. (N. S.) 249, 11 Ib. 497, 12 Ib. 886, 14 Ib. 499, 927, 15 Ib. 277, 19 Ib. 374, 475, 575, 23 Ib. 648, and notes (in telegram cases); 12 Ib. 184, and notes (expulsion of passenger from vehicle); 3 Ib. 225, and note (loss of intended bride's trunk); 6 Ib. 883, and note (mutilation of corpse); 2 Ib. 898, 7 Ib. 518, and notes (of parents for injury or death of child); 14 Ib. 1242, and note (exclusion from place of amusement); 16 Ib. 674, and note (of husband in cases of crim. con.); 17 Ib. 594, and note (injury to pregnant woman); 13 Ib. 159, and note (verbal abuse of passenger); 19 Ib. 409, and note (how proven); 19 Ib. 500, and note (on account of another's sufferings); 19 Ib. 564, and note (for breach of contract to transport a corpse); 19 Ib. 575, and note (failure of telegraph company to transmit money for preparing a corpse for burial); 15 Ib. 775, and note (contemplation of mutilated corpse); 20 Ib. 458, and note (passenger's apprehension of consumption from sitting in a cold reception room at a railroad station). See "Telegraphs and Telephones," *Century Dig.* §§ 55, 69, 70; *Decennial and Am. Dig. Key No. Series* §§ 65, 68.

SEC. 6. INJURIES TO HEALTH.

Injuries affecting a man's health are wrongs or injuries unaccompanied by force, for which there is a remedy in damages by special action on the case. 3 Blk. *122.

STORY v. HAMMOND, 4 Ohio, 376. 1831.

Sickness of an Individual Caused by a Public Nuisance.

[Action on the case to recover special damages sustained by the plaintiff in consequence of defendant's mill pond. Verdict against defendant. Defendant moved for a new trial, and it is upon that motion the opinion is written. The motion was overruled. The facts appear in the opinion.]

By the Court. . . . No other evidence was admitted on the trial than to show the sickness of the plaintiff, and that of his wife and children whom he was bound to support. It appeared upon the trial, that not only the plaintiff and his family, but the neighborhood, generally, suffered much sickness and disease, occasioned by the defendant's milldam, and it is insisted that this *general injury* is a legal bar to the recovery of individual damages. We consider it unnecessary to determine whether the injury complained of belongs to the class of public or private nuisances, as defined by the common law. Every member of society is bound, by the principles of natural justice, so to use his own property as not to injure the rights of others. If an individual erects a milldam which creates disease and sickness, he must be responsible for the consequences.

The defense set up is entirely without foundation. If a man were to sally forth into the public streets of a town and commit an assault and battery upon every person he met, it would hardly be competent for him, in a suit by an individual for special damages, to set up as a defense that he had not only beat the plaintiff, but had also beat the whole town. Or, if a man were to poison a reservoir of water, for the supply of a city, and thereby create a general sickness among the inhabitants, it would not be seriously contended that the magnitude of the offense was a bar to a private action; or, in other words, that the defendant might exculpate himself by proving that he had not only poisoned the plaintiff, but had poisoned all the inhabitants of the city. There is no foundation in the objection that the civil action was merged in the indictment. In England, actions of trespass or tort, in certain cases, were held to be merged in the felony. But this rule, it seems, did not operate after the offender was brought to justice. 1 Bac. Abr. 99; 4 Term, 333. Motion overruled.

For instances of recovery in cases similar to the principal case, see *Downs v. High Point*, 115 N. C. 182, 20 S. E. 385; *McManus v. R. R.*, 150 N. C. 655, 64 S. E. 766. See ch. 3, sec. 12. See "Nuisance," Century Dig §§ 164-169, 185; Decennial and Am. Dig. Key No. Series §§ 72, 76.

STATE v. MONROE, 121 N. C. 677, 28 S. E. 547, 43 L. R. A. 861. 1897.

Administering Croton Oil in Jest.

[Indictment for assault and battery. Defendant convicted, and he appealed. Affirmed. The defendant sold a drop of croton oil to a customer knowing that it was to be administered to another in jest.]

FAIRCLOTH, C. J. Will Horn administered to Ernest Barrett a dose of croton oil, and the oil had an injurious effect on Barrett. Defendant admits he sold the oil to Horn, and at his request dropped it into a piece of candy, but says he did not know that these parties were playing practical jokes on each other, and did not know for what purpose Horn wanted the oil. Another witness testified that defendant said that Horn said he wanted the oil "for a fellow." Defendant denied saying this. Another witness testified to the quinine episode, and to Barrett's and Horn's tricks with each other. Defendant testified that he knew that a day or two before Horn had given Barrett a dose of quinine as a joke, in lemonade. There were other witnesses on these matters. Defendant is indicted for an assault on Barrett. If guilty, he must be so as a principal, not as an accessory. His guilt, then, depends upon whether he knew, or had reason to believe, that the dose was intended for Barrett or some other person as a trick, and not for medicinal purposes. The whole evidence was submitted to the jury, who rendered a verdict of guilty. His honor instructed the jury that when the defendant sold the oil, if he "knew or had every reason to believe, and did believe, that it was intended for Barrett or some other person by way of a trick or a joke, and not for a medicinal purpose, the defendant would be guilty of assault and battery." He also charged that it was not necessary that it should be a poisonous or deadly dose; that it was sufficient if it was an unusual dose, likely to produce serious injury. To this instruction we see no objection, and we think it covers the substance of the defendant's prayers proper to go to the jury. There was no exception to the evidence. For duties of druggists, see Code, §§ 3143-3145. Affirmed.

See 13 L. R. A. (N. S.) 646, and note. See "Assault and Battery," Century Dig. §§ 68-74; Decennial and Am. Dig. Key No. Series § 48.

BISHOP v. WEBER, 139 Mass. 411, 1 N. E. 154. 1885.

Bad Provisions Sold at a Public Function. Want of Privity.

[Action of tort for damages resulting from bad provisions furnished by the defendant as caterer at a public ball. Demurrer by defendant sustained. Judgment against plaintiff, and he appealed.

The complaint alleged: That defendant was employed to act as caterer at a public ball and did act as such; that plaintiff was rightfully at the ball and bought from the defendant, and paid therefor, certain provisions which made the plaintiff sick; that the food was unwholesome, improperly and negligently prepared, poisonous, dangerous, and unfit to be eaten. The

principal ground of demurrer was, that the complaint failed to allege any duty or relation of the defendant to the plaintiff for the breach of which the plaintiff's action would lie; that it failed to allege any wrongful act or omission of duty by the defendant for which he could be held liable to the plaintiff.]

ALLEN, J. If one who holds himself out to the public as a caterer, skilled in providing and preparing food for entertainments, is employed as such by those who arrange for an entertainment, to furnish food and drink for all who may attend it, and if he undertakes to perform the services accordingly, he stands in such a relation of duty towards a person who lawfully attends the entertainment and partakes of the food furnished by him as to be liable to an action of tort for negligence in furnishing unwholesome food whereby such person is injured. The liability does not rest so much upon an implied contract as upon a violation or neglect of a duty voluntarily assumed. Indeed, where the guests are entertained without pay, it would be hard to establish an implied contract with each individual. The duty, however, arises from the relation of the caterer to the guests. The latter have the right to assume that he will furnish for their consumption provisions which are not unwholesome and injurious through any neglect on his part. The furnishing of provisions which endanger human life or health stands clearly upon the same ground as the administering of improper medicines, from which a liability springs irrespective of any privity of contract between the parties. *Norton v. Sewall*, 106 Mass. 144; *Longmeid v. Holliday*, 6 Exch. 767; *Pippin v. Sheppard*, 11 Price, 400.

The plaintiff's action was originally entitled "in an action of tort." The plaintiff obtained leave to amend by adding the words "or contract, the plaintiff being doubtful to which class of actions this action belongs." This amendment was unnecessary, and may be disregarded, all the amended counts upon which the plaintiff relies being in tort. It is not necessary to sustain the demurrer on account of the lack of literal precision in entitling the action.

The defendant relies on several other extremely fine points of objection, but, without dwelling on them in detail, it may be said in general terms that the several counts sufficiently set forth the facts from which the duty of the defendant towards the plaintiff springs, and it is not necessary to state, formally and in terms, that the defendant occupied such a relation towards the plaintiff that the law cast upon him the duty. They also sufficiently aver that the defendant neglected that duty, and that the plaintiff was injured by reason thereof. It is not necessary to aver that the defendant knew of the injurious quality of the food. It is sufficient if it appear that he ought to have known of it, and was negligent in furnishing unwholesome food, by reason of which the plaintiff was injured. Judgment reversed.

See "Food," *Century Dig.* § 18; *Decennial and Am. Dig. Key No. Series* § 25.

WELLINGTON v. DOWNER KEROSENE OIL CO., 104 Mass. 64. 1870.
Liability of Wholesaler to Consumer, for Dangerous Commodities. Want of Privity. Duty to the Public.

[Tort for injury to plaintiff's person and property by the explosion of a lamp. Verdict and judgment against plaintiff. Plaintiff excepted and appealed. Exceptions sustained.

The plaintiff sued upon two counts: (1) That defendant sold a barrel of naphtha to a retail dealer contrary to the provisions of a statute; that the retailer sold to plaintiff some of the naphtha under the name of oil for illuminating purposes; that the naphtha exploded a lamp and injured plaintiff's person and property; (2) That defendant was a manufacturer and dealer in oils, and, knowing that Chase was a retailer of illuminating oils, sold to him a barrel of dangerous fluid for the purpose of being retailed to consumers for burning in lamps; that the defendant knew of the dangerous character of the fluid, but that Chase did not; that plaintiff purchased from Chase and was injured, etc. The question presented is: As the plaintiff did not buy the oil from the defendant and had no dealings whatsoever directly with the defendant in connection with the oil, can the plaintiff maintain this action against the defendant?]

GRAY, J. This is an action of tort. Both counts of the declaration are framed, not upon any supposed privity between the parties, but upon a violation of duty in the defendants, resulting in an injury to the plaintiff. The first count is upon the St. of 1867, c. 286, and the second upon the common law. It will be convenient to consider the general question of the liability of the defendants at common law, before examining the construction and effect of the statute.

It is well settled that a man who delivers an article, which he knows to be dangerous or noxious, to another person, without notice of its nature and qualities, is liable for any injury which may reasonably be contemplated as likely to result, and which does in fact result, therefrom, to that person or any other who is not himself in fault. Thus a person who delivers a carboy, which he knows to contain nitric acid, to a carrier, without informing him of the nature of its contents, is liable for an injury occasioned by the leaking out of the acid upon another carrier to whom it is delivered by the first, in the ordinary course of business, to be carried to its destination. *Farrant v. Barnes*, 11 C. B. (N. S.) 553. So a chemist who sells a bottle of liquid, made up of ingredients known only to himself, representing it to be fit to be used for washing the hair and knowing that it is to be used by purchaser's wife, is liable for an injury occasioned to her by using it for washing her hair. *George v. Skivington*, L. R. 5 Ex. 1. And a druggist who negligently labels a deadly poison as a harmless medicine, and sells it so labelled to dealers in such articles, is liable for an injury to any one who afterwards purchases and uses it, if there is no negligence on the part of the intermediate sellers or of the person injured. *Thomas v. Winchester*, 2 Selden, 397; *Davidson v. Nichols*, 11 Allen, 519, 520; *McDonald v. Snelling*, 14 Allen, 290, 295.

The second count of the declaration expressly avers that the defendant sold naphtha to Chase for the purpose of being retailed

and resold to be burned in a lamp for illuminating purposes, knowing it to be explosive and dangerous to life when so used, and knowing Chase's business to be that of a retailer and his purpose to retail and resell the same to the public to be so used; that Chase resold a part thereof to the plaintiff to be so used, and, while he was so using it, it ignited and exploded, and injured his person and property; and that both Chase and the plaintiff were ignorant of its dangerous qualities. Proof of the facts thus alleged would show that the defendants were guilty of a violation of duty in selling an article which they knew to be explosive and dangerous, for the purpose of being resold in the market, without giving information of its nature, and were therefore bound to contemplate, as a natural and probable consequence of their unlawful act, that it might explode or ignite, and injure an innocent purchaser or his property, and to answer in damages for such a consequence if it should come to pass. The ruling of the learned judge who presided at the trial was therefore erroneous, and the exceptions must be sustained.

In *Carter v. Towne*, 98 Mass. 567, cited for the defendants, a declaration alleging that the defendants negligently and unlawfully sold and delivered gunpowder to the plaintiff, a boy eight years old, having neither experience nor knowledge in the use of gunpowder, and being an unfit person to be intrusted with it, all of which the defendants well knew, and that the child, in ignorance of its effects, and using that care of which he was capable, exploded the gunpowder and was burned thereby, was held good upon demurrer. In that case, no question was raised of the defendants' liability to any other person than the one to whom they delivered the article. The plaintiff was afterward held not entitled to recover of the defendants, because it appeared that the gunpowder had been carried home by the child, and put in the custody of his parents, and a part of it been fired off by him with their permission, before the explosion by which he was injured; and as the gunpowder had passed into the custody of adult persons who knew its dangerous qualities and had allowed him to use it, and was retaken by the child from their custody, before the accident sued for, the sale by the defendants was not the direct, proximate or efficient cause of the injury. *S. C.*, 103 Mass. 507. We cannot accede to the suggestion made by the counsel for the defendants in the case at bar, in opposition to the proof offered at the trial that Chase and the plaintiff must be deemed to have known the dangerous qualities of naphtha. . . . Exceptions sustained.

For similar ruling as to unwholesome provisions and medicines, see 19 L. R. A. (N. S.) 923, and note, 1 Ib. 1178. See 2 Ib. 303, and note (defective tools); 5 Ib. 1103 (defective machinery); 13 Ib. 382 (dangerous stove polish); 13 Ib. 646, and note (druggists' liability to third persons). See "Explosives," *Century Dig.* § 6; *Decennial and Am. Dig.* Key No. Series § 9.

MINOR v. SHARON, 112 Mass. 477. 1873.

Letting a House Infected With Smallpox.

[Action of tort for damages sustained from smallpox contracted by occupying a house demised to plaintiff by the defendant. The defendant, having knowledge that the house was infected, concealed that fact from the plaintiff who had no knowledge thereof. Verdict and judgment against defendant, and he excepted. The opinion is upon such exceptions, and they are overruled. The facts appear in the opinion.]

MORTON, J. It must be assumed that the jury found, under the instructions given them, that the defendant, being the owner of a tenement, knowing that it was so infected by the smallpox as to be unfit for occupation and to endanger the health and lives of the occupants, and concealing this knowledge from the plaintiff to induce him to hire it, leased it to the plaintiff; that the plaintiff and his children took the disease by reason of the infection of the tenement; that the plaintiff was ignorant of its dangerous condition, and that no negligence of his contributed to their taking the disease. Upon these facts the defendant is guilty of actionable negligence, and is liable for whatever injury the plaintiff has sustained by reason thereof.

In *Sweeney v. Old Colony & Newport R. R. Co.*, 10 Allen, 368, 372, the rule is stated to be, that "in order to maintain an action for an injury to person or property by reason of negligence or want of due care, there must be shown to exist some obligation or duty towards the plaintiff, which the defendant has left undischarged or unfulfilled. This is the basis on which the cause of action rests." Negligence consists in doing or omitting to do an act in violation of a legal duty or obligation. In this case the defendant knew that the tenement was so infected as to endanger the health and life of any person who might occupy it. It was a plain duty of humanity on his part to inform the plaintiff of this fact, or to refrain from leasing it until he had used proper means to disinfect it. If the defendant had invited any person to enter his tenement, knowing that there was a dangerous obstruction or pitfall in it, he would be liable; the negligence was no less gross because the danger was a secret one which could not be detected by inspection or examination. *Carleton v. Franconia Iron & Steel Co.*, 99 Mass. 216; *French v. Vining*, 102 Mass. 132.

The defendant contends that the injury complained of is not of such a nature as to give a right of action, "because in diseases which are usually designated as contagious, the connection between the origin of the disease and the disease itself is not a matter cognizable by our senses," and "the source from which and the manner in which the contagion is communicated is too uncertain and unsusceptible of proof to form the foundation for an action." In the trial of cases, as in the ordinary affairs of life, it is often impossible to establish the connection between cause and effect with absolute certainty. But evidence which produces a moral conviction is sufficient. It is upon such convictions that men act in the

important concerns of life, and no greater certainty is required or attainable in the administration of the law. The defendant's negligence was an adequate cause of the injury to the plaintiff. The evidence reasonably satisfied the minds of the jury that it was the operating cause, and the defendant cannot escape the consequences of his negligence upon the plea that the connection between cause and effect cannot be proved beyond the possibility of doubt.

Exceptions overruled.

See "Landlord and Tenant," Century Dig. § 636; Decennial and Am. Dig. Key No. Series § 164.

SLATER v. BAKER and STAPLETON, 2 Wilson, 359, 362. 1767.

Malpractice.

[Special action on the case against a surgeon and an apothecary for malpractice. Verdict against defendants, who moved to set the verdict aside. Motion overruled and judgment against defendants. The opinion is on the motion; and only so much of the opinion as discusses the remedy is inserted here.]

Plaintiff employed defendants, Baker being a surgeon and Stapleton an apothecary, "to cure his leg, which had been broken and set, and the callous of the fracture formed." The declaration sets out the contract of employment, and alleges that the defendants "ignorantly and unskillfully treated the plaintiff," in that they unskillfully and ignorantly broke and disunited the callous of the leg after it was set and the callous formed, whereby plaintiff was damaged. Several surgeons testified that the treatment was not according to the method of the profession. It was shown that defendants experimented with some new instrument.]

CURIA. [WILMOT, Lord Chief Justice.] . . . It is objected that this is not the proper action, and that it ought to have been trespass vi et armis; in answer to this, it appears from the evidence of the surgeons that it was improper to disunite the callous without consent, this is the usage and law of surgeons; then it was ignorance and unskillfulness in that very particular, to do contrary to the rule of the profession, what no surgeon ought to have done; and indeed it is reasonable that a patient should be told what is about to be done to him, that he may take courage and put himself in such a situation as to enable him to undergo the operation; it was objected this verdict and recovery cannot be pleaded in bar to an action of trespass vi et armis to be brought for the same damage; but we are clear of opinion it may be pleaded in bar. That the plaintiff ought to receive a satisfaction for the injury, seems to be admitted; but then it is said the defendants ought to have been charged as trespassers vi et armis; the court will not look with eagle's eyes to see whether the evidence applies exactly or not to the case; when they can see the plaintiff has obtained a verdict for such damages as he deserves, they will establish such verdict if it be possible. For any thing that appears to the court this was the first experiment made with this new instrument, and if it was, it was a rash action, and he who acts rashly acts ignorantly; and although the defendants in general may be as skilful in their re-

spective professions as any two gentlemen in England, yet the court cannot help saying that in this particular case they have acted ignorantly and unskillfully, contrary to the known rule and usage of surgeons. Judgment for the plaintiff per totam curiam.

Under the code practice the action for malpractice may be in tort or in contract, at the election of the plaintiff. *Goble v. Dillon*, 86 Ind. at p. 340, which was also a case against two defendants for malpractice in setting a broken leg. For an interesting case of alleged malpractice by a dentist, see *McCracken v. Smathers*, 122 N. C. 799, 29 S. E. 354, where the question of contributory negligence of the patient is discussed, as well as the degree of skill that the law requires of professional men. See further as to degree of skill required, 97 N. W. 882, 64 L. R. A. 126, and note. The case in 97 N. W. 882, 64 L. R. A. 126, is an interesting one on malpractice in the use of "Roentgen's X-rays," Christian Scientists, etc. There is a conflict of authority as to the liability for malpractice where treatment of disease is undertaken by Christian Scientists, Magnetic Healers, Clairvoyants, etc. See 1 L. R. A. 719; 64 Ib. 969; 68 Ib. 432. See also 9 L. R. A. (N. S.) 524, 12 Ib. 1005, and notes (malpractice of attorneys at law); 12 Ib. 449, 15 Ib. 160, and notes (of title abstractors); 20 Ib. 1003, 1030, and notes (of physicians and surgeons). See "Physicians and Surgeons," *Century Dig.* § 31; *Decennial and Am. Dig. Key No. Series* § 16.

SEC. 7. INJURIES TO REPUTATION.

"Case is the proper remedy where the right affected is not tangible and consequently cannot be affected by force—as reputation and health—the injuries to which are always remediable by action on the case; as libels and verbal slanders." 1 Chitty Pl. *137.

COMMONWEALTH v. CLAP, 4 Mass. 163, 168. 1808.

Criminal Libel Defined, etc. Justification. Justifiable Purpose.

[The defendant was indicted for libel. Verdict of guilty. Motion for a new trial. The opinion is upon this motion. Motion refused.

The defendant posted up in several public places the following: "Caleb Hayward is a liar, a scoundrel, a cheat, and a swindler. Don't pull this down." Hayward was an auctioneer. The other facts appear in the beginning of the opinion.]

PARSONS, C. J. The defendant has been convicted, by the verdict of a jury, of publishing a libel. On the trial, he moved to give in evidence, in his defense, that the contents of the publication were true. This evidence the judge rejected, and for that reason the defendant moves for a new trial.

It is necessary to consider what publication is libellous, and the reason why a libellous publication is an offense against the commonwealth. A libel is a malicious publication, expressed either in printing or writing, or by signs and pictures, tending either to blacken the memory of one dead, or the reputation of one who is alive, and expose him to public hatred, contempt, or ridicule. The

cause why libellous publications are offenses against the state, is their direct tendency to a breach of the peace, by provoking the parties injured, and their friends and families, to acts of revenge, which it would not be easy to restrain, were offenses of this kind not severely punished. And every day's experience will justify the law in attributing to libels that tendency which renders the publication of them an offense against the state. The essence of the offense consists in the malice of the publication, or the intent to defame the reputation of another. In the definition of a libel, as an offense against the law, it is not considered whether the publication be true or false; because a man may maliciously publish the truth against another, with intent to defame his character, and if the publication be true, the tendency of it to inflame the passions, and to excite revenge, is not diminished, but may sometimes be strengthened. The inference is, therefore, very clear, that the defendant cannot justify himself for publishing a libel, merely by proving the truth of the publication, and that the direction of the judge was right. If the law admitted the truth of the words in this case to be a justification, the effect would be a greater injury to the party libelled. He is not a party to the prosecution, nor is he put on his defense; and the evidence at the trial might more cruelly defame his character than the original libel.

Although the truth of the words is no justification in a criminal prosecution for libel, yet the defendant may repel the charge, by proving that the publication was for a justifiable purpose, and not malicious, nor with the intent to defame any man. And there may be cases, where the defendant, having proved the purpose justifiable, may give in evidence the truth of the words, when such evidence will tend to negative the malice and intent to defame. Upon this principle, a man may apply by complaint to the legislature to remove an unworthy officer; and if the complaint be true, and made with the honest intention of giving useful information, and not maliciously or with intent to defame, the complaint will not be a libel. And when any man shall consent to be a candidate for a public office conferred by the election of the people, he must be considered as putting his character in issue, so far as it may respect his fitness and qualifications for the office. And publications of the truth on this subject, with the honest intention of informing the people, are not a libel; for it would be unreasonable to conclude that the publication of truths, which it is the interest of the people to know, should be an offense against their laws. And every man holding a public elective office may be considered as within this principle; for as a re-election is the only way his constituents can manifest their approbation of his conduct, it is to be presumed that he is consenting to a re-election, if he does not disclaim it. For every good man would wish the approbation of his constituents for meritorious conduct.

For the same reason, the publication of falsehood and calumny against public officers, or candidates for public offices, is an offense most dangerous to the people, and deserves punishment, because the

people may be deceived, and reject the best citizens, to their great injury, and it may be to the loss of their liberties. But the publication of a libel maliciously and with intent to defame, whether it be true or not, is clearly an offense against law, on sound principles which must be adhered to, so long as the restraint of all tendencies to the breach of the public peace, and to private animosity and revenge, is salutary to the commonwealth.

The defendant took nothing by his motion, and was afterwards sentenced to two months' imprisonment, with costs.

In North Carolina the defendant may justify when indicted. Rev. sec. 3267. See "Libel and Slander," Century Dig. §§ 402, 414; Decennial and Am. Dig. Key No. Series §§ 141-150.

VILLERS v. MONSLEY, 2 Wilson, 403. 1769.

Civil Action for Libel. Libel and Slander Distinguished.

[Action upon the case against the defendant for maliciously writing and publishing a libel upon the plaintiff in the words following, viz.:

Old Villers, so strong of brimstone you smell,
As if not long since you had got out of hell,
But this damnable smell I no longer can bear,
Therefore I desire you would come no more here;
You old stinking, old nasty, old itchy old toad,
If you come any more, you shall pay for your board,
You'll therefore take this as a warning from me,
And never more enter the doors, while they belong to J. P."

The defendant pleaded not guilty, and a verdict was found for the plaintiff and sixpence damages. The defendant moved in arrest of judgment, for that this was not such a libel for which an action would lie.]

WILMOT, Lord C. J. I think this is such a libel for which an action well lies; we must take it to have been proved at the trial that it was published by the defendant maliciously; and if any man deliberately or maliciously publishes anything in writing concerning another which renders him ridiculous, or tends to hinder mankind from associating or having intercourse with him, an action well lies against such publisher; I see no difference between this and the cases of the leprosy or plague, and it is admitted that an action lies in those cases. The writ de leproso amovendo is not taken away, although the distemper is almost driven away by cleanliness, or new invented remedies; the party must have the distemper to such a degree before the writ shall be granted, which commands the sheriff to remove him without delay *ad locum folitarium ad habitandum ibidem prout moris est, ne per communem conversationem suam hominibus damnum vel periculum eveniat quovismodo*. The degree of leprosy is not material, if you say he has the leprosy it is sufficient, and the action lies; the reason of that case applies to this; I do not know whether the itch may not be communicated by the air without contact, it is said to be occasioned by animalcula in the skin, and must be cured by outward applica-

tion, nobody will eat, drink, or have intercourse with a person who has the itch and stinks of brimstone, therefore I think this libel actionable, and that judgment must be for the plaintiff.

GORTON, J. What my Brother Bathurst has said is very material here; there is a distinction between libels and words: a libel is punishable both criminally and by action, when speaking the words would not be punishable in either way; for speaking the words rogue or rascal of any one, action will not lie; but if those words were written and published of any one, I doubt not an action would lie; if one should say of another that he has the itch, without more, an action would not lie; but if he should write those words of another, and publish them maliciously, as in the present case, I have no doubt at all but the action well lies. What is the reason why saying a man has the leprosy or plague is actionable? It is because the having of either cuts a man off from society. So the writing and publishing maliciously that a man has the itch and stinks of brimstone cuts him off from society. I think the publishing anything of a man that renders him ridiculous is a libel and actionable, and in the present case I am of opinion for the plaintiff. Judgment for the plaintiff per tot' cur. without granting any rule to show cause.

As to what publications are libelous, see 66 L. R. A. 266, and note (calling a man a eunuch or a woman a hermaphrodite); 6 L. R. A. (N. S.) 919, and note (publishing the photograph of A as that of B, in an article imputing a crime to B); 7 Ib. 274, and note (placing photograph of an accused but unconvicted person in "Rogue's Gallery"). See "Libel and Slander," Century Dig. §§ 3-90; Decennial and Am. Dig. Key No. Series §§ 6-10.

SHAFFER v. AHALT, 48 Md. 171, 30 Am. Rep. 456. 1877.

Slander of Women by Imputations of Unchastity, when Not Actionable per se.

[Action by husband and wife for the slander of the wife by charging her with adultery. Verdict and judgment against the defendant, and he appealed. Reversed. The question presented is: Can damages be recovered for orally charging a woman with adultery in the absence of proof of actual damage resulting from such slander? In other words, is such a charge actionable per se?]

ROBINSON, J. In suits for slander, pecuniary loss to the plaintiff is the gist of the action. Whether it was necessary at first to prove in all cases such pecuniary loss, it is not now necessary to inquire. The courts, at an early time, recognized a distinction between words actionable, and words not actionable in themselves. In the former, the law presumed pecuniary loss, while in the latter, it was necessary, in addition to the words, to prove special damage to the plaintiff. Whatever difficulty there may be in defining the precise line of demarcation between these actions, it is well settled, that where one charges another with the commission of an offense,

it must be such an offense as subjects the party to corporal punishment, in order to render the words actionable per se.

Now, adultery was a spiritual offense cognizable by the spiritual courts, and the punishment was confined to the infliction of penance, "*pro salute animae*." And hence it was held that to charge one with adultery was not actionable per se, and in order to maintain the action, the plaintiff must prove special damage. In this state, adultery is made punishable by a pecuniary fine, and to charge one with the commission of the offense is not therefore actionable per se.

This is a suit by the husband and wife to recover damages of the defendant for charging the plaintiff's wife with adultery, and the question is, whether the sickness of the wife resulting from this slanderous charge is sufficient to prove special damage. In cases of this kind special damage is that which is naturally the consequence of the words spoken. *Allsop v. Allsop*, 2 L. T. R. (N. S.) 290. Now it cannot be said that sickness is the natural consequence of defamatory or slanderous words. Such might or might not be the result, depending in a great measure upon the sensibilities and temperament of the person. The rule of law in regard to special damage was adopted with reference to common and usual effects and not such as are occasional and accidental. And hence in *Allsop v. Allsop*, above referred to, the defendant said that the plaintiff's wife had committed adultery with him, and the declaration alleged that in consequence of said charge, the wife became and was ill for a long time and unable to attend to her business, and the plaintiff was put to and incurred much expense in and about the endeavoring to cure her of her illness, and it was held, upon demurrer that the declaration disclosed no cause of action.

POLLOCK, C. B., said: "I can find no authority, nor has any been cited in the history of the law of this country, for any such special damage as that stated in this case, being made the ground of an action, or to make actionable that which otherwise would not be so. The important distinction in this case, although not the only one, is, that the mischief done depends entirely on the temperament of the individual affected by the words spoken, whether any damage would result or not."

MARTIN, B. "The special damage is that which is naturally the consequence of the act done, and the peculiar temperament of the party injured would be a bad standard by which to estimate damage." *Bramwell, B., and Wilde, B.*, were of the same opinion. See also *Terwilliger v. Wands*, 17 N. Y. 54, and *Wilson v. Golt*, Id. 442, where the question was considered and decided as in *Allsop v. Allsop*. . . . Judgment reversed.

See "Libel and Slander," *Century Dig.* §§ 18, 72, 97; *Decennial and Am Dig. Key No. Series* §§ 7, 12.

BOIS v. BOIS, 1 Levinz, 134. 1665.

Slander of Women by Imputations of Unchastity. When Actionable per se.

Case for calling a widow, who held an estate while sole and chaste, whore, falsely and maliciously, with intent to oust her of her estate, and saying he would oust her thereof; and at another time calling her whore. After verdict for the plaintiff on the issue not guilty, it was moved in arrest of judgment, that no special damage being laid, the words were not actionable: But by the court, they import damage in themselves in this case, in respect of her estate; as for calling a man a thief, an action lies without special damage, because the words import it in themselves. But for the last words spoken at another time, which are not actionable in themselves, and the damage being entire, the judgment was therefore stayed till the matter be examined, whether the damages were given entirely or not. For on the back of the writ where the damages are entered, there seemed to have been some alteration.

In Pollard v. Lyon, 91 U. S. 225, is an exhaustive discussion of the law governing both oral and written imputations of unchasteness to women, married and single. The decision with regard to oral slanders of this kind is: (1) Unless there is some statute rendering fornication, adultery, etc., by women, a crime, oral slanders of this kind are not actionable per se; (2) In actions for such slanders there must be allegation and proof of special loss or injury sustained by the plaintiff. A declaration or complaint which merely alleges that the plaintiff "has been damaged and injured in her name and fame," is not good on a motion in arrest of judgment.

For the crime of slandering an innocent woman in North Carolina, see Pell's Revisal, sec. 3640, and notes.

"Where there is merely an accusation of immorality, in words which might be spoken of any one, whether having any particular occupation or not, it has been held that a charge of special damages, from loss of custom or society, must include the names of those who have cut off from the plaintiff in consequence of the imputation. This rule has not been strictly held in cases where the accusation has been made for the express purpose of injuring the plaintiff in his trade or profession and has had that effect; and in various cases and for different reasons the rule in such cases has been relaxed and a general averment of loss of customers has been held sufficient. Evans v. Harries, 1 H. & N. 251; Riding v. Smith, 1 Ex. D. 91; Clark v. Morgan, 38 L. T. (N. S.) 354; Hapwood v. Thorn, 8 C. B. 293, 308, 309; Weiss v. Whittemore, 28 Mich. 366; Trenton Ins. Co. v. Perrine, 3 Zab. 402, 415. See also Hargrave v. Le Breton, 4 Burr. 2422; Hartley v. Herring, 8 T. R. 130." Morasse v. Brochu, 151 Mass. 567, 25 N. E. 74. See 4 L. R. A. (N. S.) 560. See "Libel and Slander," Century Dig. §§ 71-78; Decennial and Am. Dig. Key No. Series § 7.

SKINNER v. WHITE, 18 N. C. 471. 1836.

Words which Are and Are Not Actionable per se.

[Action of slander. Verdict for plaintiff subject to the opinion of the court. The judge ruled that the words were not actionable per se, and there was judgment against the plaintiff, and he appealed. Affirmed. The facts appear in the beginning of the opinion.]

DANIEL, J. An act of Assembly passed in the year 1821 (Taylor's Rev. ch. 1120), declares, that if any person shall harbor or maintain any runaway slave, such person shall be subject to indictment for such offense, and being convicted, shall be fined not exceeding \$100, and be imprisoned not exceeding six months. The declaration states, that the defendant said of the plaintiff, that "he harbored a runaway negro belonging to Jonathan Reddick; and he could prove it; and he should be prosecuted for it." The question is, whether the words spoken are slanderous, and in themselves actionable. From the contradictory decisions in England, it is not easy to say what is now the rule to determine what words are actionable of themselves, and what not. In *Ogden v. Turner*, 2 Salk. 696, Lord Holt said, to render words actionable, it is not sufficient that the party may be fined and imprisoned for the offense, if true; for, says he, there must not only be imprisonment, but an infamous punishment. This decision, which seemed to establish a fixed rule, was shaken and materially contradicted by what fell from De Grey, Chief Justice, in giving judgment in the case of *Onslow v. Horne*, 3 Wils. 177. Mr. Starkie, in his Treatise on Slander, p. 41, says, from all the British authorities, perhaps, it may be inferred generally, that to impute any crime or misdemeanor for which corporal punishment may be inflicted in a temporal court, is actionable without proof of special damage. Any objection to the extent of the above rule, he says, is in a great measure obviated by the statute, which enacts that when the damage does not amount to forty shillings, the costs shall be limited to the amount of the damages. In *Chitty's Gen. Prac.* 44, the same rule appears to be laid down. He, in classing slanderous words, says, "nor can any action be supported, unless the words either, first, impute the guilt of some temporal offense, for which the party slandered, if guilty, might be indicted and punished in the temporal courts, and which words are technically said to endanger a man in law:" he then proceeds to give the other classes of slander, which are not applicable to this case. The rule, as to the extent of words actionable in themselves, has never been carried in this country as far as the above respectable common-place authors state it to be in England. In several of the states, it seems to be, that where the charge, if true, will subject the party to an indictment involving moral turpitude, or subject him to an infamous punishment, then the words are actionable in themselves, otherwise not. *Brooker v. Coffin*, 5 Johns. 188; *Widrig v. Oyer*, 13 Johns. 124; 2 Bibb. 473; *Shaffer v. Kintzer*, 1 Binn. 542; *Ross v. McClurg*, Id. 218; *Chapman v. Gillett*, 2 Conn. 51. In *Andreas v. Hoppenheffer*, 3 Serg. & Rawle, 255, the judges concurred in opinion, that it must be either a felony, or a misdemeanor affecting reputation, and, therefore, to charge a man with having committed an assault and battery, a nuisance, or the offense of forcible entry and detainer, though the party would be subject to indictment and imprisonment, would not be actionable. See also 19 Johns. 367. In *Shipp v. McCraw*, 7 N. C. 466, it was held, that the gravamen

in an action of slander is the social degradation arising from the imputation of an infamous offense, and the infamy of the offense is tested by that of the punishment which follows on conviction—the loss of the *libera lex*: no other degradation will give an action, for no other degradation is a social loss. In *Brady v. Wilson*, 11 N. C. 94, the court said, “inasmuch as the words did not impute to the plaintiff any felony or other crime, the temporal penalty of which would be legally infamous, the action could not be supported.” In the other states, when the courts say, the words are actionable if they subject the party to indictment and infamous punishment, provided they be true, we clearly understand what is the extent of the rule; but when they go further to say, “or subject the party to an indictment involving moral turpitude,” we are left in doubt what charges are embraced within the sentence—it lacks precision; we are compelled to search moral and ethical authors, rather than legal writers, in order to ascertain whether the case made be within the rule. It seems to us, that the rule laid down by Lord Holt, *that the words, if true, must not only subject the party to imprisonment, but an infamous punishment, is the settled rule of law in this state*. The rule being thus precisely defined, gentlemen of the profession can never be at a loss how to advise their clients, nor can a judge be at a loss how to charge the jury. In this case, the charge made by the defendant imported an offense punishable with fine and imprisonment; but the judgment would not render the person guilty of such an offense, infamous. He still would retain his *liberam legem*, and belong to the *boni et legales homines* of society, which appears to be the test by which to ascertain whether words of this class be actionable or not. The judgment must be affirmed.

“Words are held to be actionable *per se*, which convey an imputation upon one in the way of his profession or occupation. In such cases there need be no averment of special damages.” *Morasse v. Brochu*, 151 Mass. at mid. p. 575, 25 N. E. 74. It is sometimes said that words not defamatory, though malicious and false and uttered with intent to injure one, will not support an action, even though the words were calculated to cause damage and do, in fact, have that effect. But the better rule is, that such an imputation, whether defamatory or not, will support an action under the above circumstances. Such words may not support a technical action of slander, but they will support an action of some kind—the name of the action is of no consequence. To illustrate: To call a man a dissenter is not defamatory; but to do so in a small prejudiced community, with intent to injure his trade, is actionable if such injury results therefrom. *Ibid.* at p. 574.

For what words are and are not actionable, see 2 L. R. A. (N. S.) 691, 3 Ib. 1139, and notes (charging public officials, witnesses, and others, with bribery and accepting bribes); 5 Ib. 498, 15 Ib. 497, and notes (charging public official with “graft”); 2 Ib. 741, 3 Ib. 339, 4 Ib. 973, 977, 8 Ib. 783, and notes (words damaging to credit and business; and black-listing); 4 Ib. 861, and note (pseudo praise and irony); 18 Ib. 622, and note (matter capable of a double meaning). For actions by and against a corporation for libel and slander, see 2 L. R. A. (N. S.) 741, 21 Ib. 873. For liability of an editor for a libel published without his knowledge, see 10 Ib. 332. For liability of telegraph company for sending a libelous message, see 9 Ib. 140. See “Libel and Slander,” *Century Dig.* §§ 10, 19; *Decennial and Am. Dig. Key No. Series* §§ 6, 7.

WATSON v. TRASK, 6 Ohio, 532. 1834.

When Damage Must, and Need Not, be Shown.

[Action for libel. Verdict for plaintiff. Defendant moved in arrest of judgment, and upon that motion the opinion is written. Motion overruled and judgment against the defendant. The plaintiff manufactured and sold bark mills. The defendant published a notice to the effect that plaintiff was guilty of infringing upon another's patent, in making and selling bark mills. Infringing upon a patent is indictable.]

WRIGHT, J. Where one, falsely and maliciously, orally charges another with anything involving moral turpitude, which, if true, will subject him to infamous punishment, or that tends to exclude him from society, or to prejudice him in his office, profession, trade, or business, the parties accused may seek redress by a suit in slander, and recover without proof of actual damage. Where the words are false, the law infers malice, and where their natural tendency is to injure, the law presumes damages. 6 Bac. Abr. 205; Starkie on Slander, 11, 12, 100-110; 5 Johns. 188, 476; 17 Johns. 217. Where the slander is written and published, it is denominated libel. A libel in reference to individual injury may be defined to be a false and malicious publication against an individual, either in print or writing, or by pictures, with intent to injure his reputation, and expose him to public hatred, contempt, or ridicule. 4 Mass. 163; 3 Johns. Cas. 354, 9 Johns. 214. Whatever charge will sustain a suit for slander where the words are merely spoken, will sustain a suit for libel, if they are written or printed and published, and it will be seen, at one glance, that many charges, which, if merely spoken of another, would not sustain a suit for slander, will, if written or printed and published, sustain a suit for libel. Words of ridicule only, or of contempt, which merely tend to lessen a man in public esteem, or to wound his feelings, will support a suit for libel, because of their being embodied in a more permanent and enduring form; of the increased deliberation and malignity of their publication, and of their tendency to provoke breaches of the public peace. This we understand to be the settled law of libel in this state, sustained by the uniform decisions of our courts, without a single exception within our knowledge.

Subject the publication in question to the test of the definitions given. The publication is declared to be of the plaintiff in his business of maker and vender of bark mills. It imputes to him the infraction of another's patent. This, if true, would subject him, and those purchasing and using his mills, to prosecution. Nothing could have a more direct tendency to the entire destruction of his business. It denies the plaintiff's right to deal in the subject of his occupation, and asserts an adverse inconsistent right which he knew and acknowledged. It thus imputes to him falsehood, fraud, the want of capacity to confer a legal right by the sale of his manufactures. It does not stop here. It asserts, moreover, in direct terms, that he perseveres in this fraudulent and pirating trade upon the right of the Trasks, because he is "shielded from prosecu-

tion by his want of responsibility." If irresponsible to the inventor whose right he was charged with infringing, he was equally so to those who should purchase of him. The charge is, if you deal with this man you incur the risk of lawsuits for violating the rights of others, and he is insolvent, irresponsible to indemnify. Would not such a charge, if true, blacken a man's reputation, injure his business, expose him to hatred and contempt? In our understanding, the publication is unequivocally libelous. . . .

Mailing a postal card on which libellous matter is written, is actionable. *Logan v. Hodges*, 146 N. C. 38, 59 S. E. 349. See "Libel and Slander," *Century Dig.* §§ 80-90; *Decennial and Am. Dig.* Key No. Series § 9.

RAMSEY v. CHEEK, 109 N. C. 270, 13 S. E. 775. 1891.

Privileged Communications. Absolute and Qualified Privilege. Malice.

[Action for libel. In deference to an intimation of the judge, the plaintiff submitted to a nonsuit and appealed. Reversed.]

The alleged libel consisted of a letter written by defendant to the superintendent of the United States census, in which letter the character of the plaintiff was attacked. The answer admits that defendant sent the letter, and that his object in so doing was to secure the removal of the plaintiff from office. Plaintiff offered evidence tending to show that the charges against him were untrue, and that his character was good; but the only proof of defendant's express malice was the letter itself. Defendant insisted that the letter was a privileged communication, and that plaintiff could not recover unless he proved express malice, which, he contended, the plaintiff had failed to do. The plaintiff insisted that the letter itself was evidence of express malice. The substance of the letter and other facts appear in the opinion.]

CLARK, J. The words used charged the plaintiff with an indictable offense, and also were calculated to disparage him in his office. They were actionable per se. The defendant introduced no evidence, neither to prove the truth of the allegations, nor to show that he had written the letter for an honest, bona fide purpose; but contended that the letter was a privileged communication, and that the burden was on the plaintiff to show express malice, which he had failed to do. The court being of opinion with the defendant, the plaintiff took a nonsuit and appealed. Ordinarily, in libel and slander, if the words are actionable per se, the law presumes malice, and the burden is on the defendant to show that the charge is true. It is otherwise if the communication is privileged. Privileged communications are of two kinds: (1) Absolutely privileged,—which are restricted to cases in which it is so much to the public interests that the defendant should speak out his mind fully and freely that all actions in respect to the words used are absolutely forbidden, even though it be alleged that they were used falsely, knowingly, and with express malice. This complete immunity obtains only where the public service or the due administration of justice requires it, e. g., words used in debate in congress and the state legislatures, reports of military or other officers to

their superiors in the line of their duty, everything said by a judge on the bench, by a witness in the box, and the like. In these cases the action is absolutely barred. 13 Amer. & Eng. Enc. Law, 406.

(2) Qualified privilege. In less important matters, where the public interest does not require such absolute immunity, the plaintiff will recover in spite of the privilege if he can prove that the words were not used bona fide, but that the defendant used the privileged occasion artfully and knowingly to falsely defame the plaintiff. Odger, Sland. & L. 184. In this class of cases an action will lie only where the party is guilty of falsehood and express malice. 13 Amer. & Eng. Enc. Law, supra. Express malice is malice in fact, as distinguished from implied malice, which is raised as a matter of law by the use of words libelous per se, when the occasion is not privileged. Whether the occasion is privileged is a question of law for the court, subject to review, and not for the jury, unless the circumstances of the publication are in dispute, when it is a mixed question of law and fact. The present case is one of qualified privilege. The plaintiff was not in government employ under Porter. He was not called upon by any moral or legal obligation to make the report, and it was not made in the line of official duty. It was not absolutely privileged. But he was an American citizen, interested in the proper and efficient administration of the public service. He had, therefore, the right to criticise public officers; and if he honestly and bona fide believed and had probable cause to believe that the character and conduct of the plaintiff were such that the public interests demanded his removal, he had a right to make the communication in question, giving his reasons therefor, to the head of the department. The presumption of law is that he acted bona fide, and the burden was on the plaintiff to show that he wrote the letter with malice or without probable cause. *Briggs v. Garrett*, 111 Pa. St. 404, 2 Atl. Rep. 513; *Bodwell v. Osgood*, 3 Pick. 379. "Malice," in this connection, is defined as "any indirect and wicked motive, which induces the defendant to defame the plaintiff. If malice be proved, the privilege attaching to the occasion is lost at once." Odger, Sland. & L. 267; *Clark v. Molyneux*, 3 Q. B. Div. 246; *Bromage v. Prosser*, 4 Barn. & C. 247; *Hooper v. Truscott*, 2 Bing. N. C. 457; *Dickson v. Earl of Wilton*, 1 Fost. & F. 419. The rules applicable to an ordinary action for libel apply in such cases whenever malice is proved. Proof that the words are false is not sufficient evidence of malice, unless there is evidence that the defendant knew at the time of using them that they were false. *Fountain v. Boodle*, 43 E. C. L. 605; Odger, Sland. & L. 275. That the defendant was mistaken in the words used by him on such confidential or privileged occasions is, taken alone, no evidence of malice. *Kent v. Bongartz*, 15 R. L. 72, 22 Atl. Rep. 1023, and cases cited.

We do not assent to the opposite doctrine, which would seem to be laid down by PARSON, J., in *Wakefield v. Smithwick*, 4 Jones (N. C.) 327, which is not supported by the authority he cites and doubtless intended to follow; for, if the words are true, a defend-

ant does not need the protection of privilege. It is when they are false that he claims it. To strip him of such protection there must be both falsehood and malice. To hold that falsehood is itself proof of malice in such cases reduces the protection to depend on the presumption of the truth of the charges. If, however, there were means at hand for ascertaining the truth of the matter, of which the defendant neglects to avail himself, and chooses rather to remain in ignorance when he might have obtained full information, there will be no pretense for any claim of privilege. *Odger, Sland. & L.* 199. "To entitle matter otherwise libelous to the protection [of qualified privilege] which attaches to communications made in the fulfillment of duty, bona fides, or, to use our own equivalent, honesty of purpose, is essential; and to this again two things are necessary: (1) That it be made not merely on an occasion which would justify making it, but also from a sense of duty; (2) that it be made with a belief of its truth." *COCKBURN, C. J.*, in *Dawkins v. Lord Paulet*, *L. R.* 5 Q. B. at page 102. The malice may be proved by some extrinsic evidence, such as ill feeling, or personal hostility, or threats, and the like, on the part of the defendant towards the plaintiff; but the plaintiff is not bound to prove malice by extrinsic evidence. He may rely on the words of the libel itself, and on the circumstances attending its publication, as affording evidence of malice. *Odger, Sland. & L.* 277-288; 13 *Amer. & Eng. Enc. Law*, 431.

[FACTS.] In the present case, the letter charged the plaintiff with murder, and with having cheated the defendant out of his election. There was evidence tending to prove that these charges were untrue, and that the character of plaintiff was good. There was no evidence in reply, and the answer admits that the object of the communication was to secure the removal of plaintiff from the office he held. There was evidence on the face of the letter tending to show that the motive of the plaintiff was ill will to the plaintiff by reason of his alleged action in defrauding defendant of his election, and spleen on account of his (the defendant's) not having had his recommendation more considered, and his friends appointed to the offices to which Ramsey and others, named in the letter, had been appointed. There being evidence tending to prove malice as above defined (which need not be personal ill will to the plaintiff), his honor erred in not submitting the case to the jury. If the defendant made the communication, not recklessly or maliciously, but bona fide, and out of a desire to benefit the public service, the plaintiff cannot recover, though the charges made by the defendant may be untrue. That the plaintiff was of a different political party from himself gave him, however, no license to make to the appointing power false and defamatory charges against him maliciously or without probable cause, simply to secure his removal from office. If the defendant thought the plaintiff should be removed from office because belonging to a different political party, and therefore, in his judgment, unsuitable or unfit to hold the office, he should have put his letter on that ground, and there

could have been no complaint. He had no right to make defamatory charges, if false, to secure defendant's removal, the motive not being a bona fide one to purge the public service of a felon and ballot-box stuffer, but merely to remove one who was objectionable to him either as being of an opposite party or by having injured him personally, or from having been appointed instead of his own recommendee for the place. If the defendant's motive was to injure Hawkins, and to do that he recklessly made false and defamatory allegations against the plaintiff, that is malice which would entitle the plaintiff to damages. It is to the public interest that the unfitness or derelictions of public officials should be reported to the authority having the power of removal, and any citizen bona fide making such report does no more than his duty, and is protected by public policy against the recovery of damages, even though the charge should prove to be false. But public justice will not permit the government archives to be made with impunity the receptacle of false and defamatory charges, made to secure the removal of an officer, whereby the malice of the party making such charge may be gratified, or that some benefit or advantage, direct or indirect, may come to him. *Proctor v. Webster*, 16 Q. B. Div. 112 (1885). If the party knows the charge to be false, or makes it without probable cause, this is evidence of malice. *Wakefield v. Smithwick*, 4 Jones (N. C.), 327. If the charge in such cases is false, the law looks to the motive. If the defendant, not moved by the public welfare, but by some wicked and indirect motive, such as to gratify his malice, or his love of patronage, to assert his own influence, or the like, by false charges has wilfully or recklessly defamed the plaintiff, the latter is entitled to recover damages at the hands of the jury. Error.

See further as to privilege, *Nissen v. Cramer*, 104 N. C. 574, 10 S. E. 676; *Logan v. Hodges*, 146 N. C. at p. 41, 59 S. E. 349; *Krebs v. Oliver*, 12 Gray, at p. 243; *Rice v. Coolidge*, 121 Mass. 393, 23 Am. Rep. 279; *Kirkpatrick v. Eagle Lodge*, 40 Am. Rep. 316; 25 Cyc. 376 et seq.; 18 Am. & Eng. Enc. L. 1023 et seq. See also *Sweeney v. Baker*, 13 W. Va. 158, inserted post, in this section. See 4 L. R. A. (N. S.) 1126, 16 Ib. 1017, and notes (character of servant); 5 Ib. 163, and note (official reports); 14 Ib. 565 and note (hospital records); 16 Ib. 953, and note, 19 Ib. 862 (publication of charges contained in pleadings and other court proceedings); 19 Ib. 862, and note (publication of the proceedings of corporation meeting); 21 Ib. 33, and note (letter from defendant to plaintiff's counsel); 20 Ib. 361, and note (as affected by extent of publication—excessive publication). See "Libel and Slander," Century Dig. §§ 124, 363; Decennial and Am. Dig. Key No. Series §§ 39, 123.

COOMBS v. ROSE, 8 Blackf. 155. 1846.

Privilege. Church Trials.

[Action for libel, brought by Coombs against Rose. Judgment against Coombs, who carried the case to the supreme court by writ of error. Reversed.]

Defendant pleaded specially, that he and plaintiff were members of the Methodist church, and that the alleged libel consisted of charges preferred

against plaintiff by defendant under the rules of the church; that the charges were made in good faith and for the purpose of having them investigated according to the rules of the church; that he deemed such a course necessary to sustain the character of the church; and that he did not maliciously publish the charges.

After deciding that the publication complained of was, if unexplained, clearly libelous, the opinion proceeds:]

DEWEY, J. . . . It remains to inquire whether the special plea is a bar to the action.

It is contended that the occasion of making the publication complained of shows that it was a privileged communication, and rebuts the prima facie malice inferable from the language used. We have no doubt that words spoken or written, in the regular course of church discipline, to or of members of the church, have, as among the members themselves, very properly been held to be privileged communications, and not actionable unless express malice be shown in the speaker or publisher. *The King v. Hart*, 1 Blacks. 386; *Jarvis v. Hathaway*, 3 Johns. 180; *Remington v. Congdon*, 2 Pick. 310. But, with a good deal of hesitation, we have come to the conclusion that it is not proper to extend the protection to a member of the church, when, on such an occasion, he implicates the character of a stranger to the rules of the church, who is not amenable to its authority, and who has no opportunity to repel an opprobrious accusation before the tribunal which is to try it. We are aware that the restriction of the privilege to actions between the members of a church, may sometimes embarrass the enforcement of wholesome rules of discipline; but it is equally obvious, that to extend it beyond such actions may sometimes occasion irreparable injury to the character of innocent persons. On the whole, we think that an accusation made by a member of a church, in the regular course of church discipline, against a person not a member, cannot, as to him, be considered as a privileged communication. The special plea being no bar to the action, the judgment should have been for the plaintiff. Judgment reversed.

But see *Etchison v. Pergerson*, 88 Ga. 620, 15 S. E. 680, cited in 18 Am. & Eng. Enc. L. 1036, where the point covered by the principal case is treated. See also 25 Cyc. 390. The principal case is apparently approved in *Kleizer v. Symmes*, 40 Ind. 562; and it is fully approved in *Nix v. Caldwell*, 81 Ky. 293, 50 Am. Rep. 163. See "Libel and Slander," Century Dig. § 114; Decennial and Am. Dig. Key No. Series § 36.

FITZGERALD v. ROBINSON, 112 Mass. 371, 378-381. 1873.

Privilege. Excommunication.

[Action of slander. Demurrer by defendant. Demurrer sustained, and plaintiff appealed. In the supreme court the demurrer was sustained as to some of the counts and overruled as to others. Only so much of the opinion as relates to the question of privilege and excommunication is here inserted.]

AMES, J. . . . Taking the whole count together, it is apparent that it is intended to charge more than a mere slander upon

the plaintiff's good name. His complaint is in substance, and when relieved of all unnecessary averments, that the defendant made a charge against him which (whether criminal in its nature or not) was wholly false and malicious; that for the alleged reason contained in that false charge he proceeded on a certain Sunday, in the presence of the congregation and during service, in his official character as a priest, to pronounce an anathema upon the plaintiff, and to go through a ceremonial which was understood, and was intended to be understood, as a formal, authoritative, ecclesiastical sentence of excommunication, depriving him of all his rights and privileges as a member of the Roman Catholic Church; and which had the effect of injuring him in his business as a trader by depriving him of the custom and trade of a large number of persons, enumerated in the declaration.

As the question of the sufficiency of this count in the declaration is raised on a demurrer, we are to inquire whether, assuming the facts averred to be true, they are sufficient as a matter of law to enable the plaintiff to maintain this action. As a member of that communion, he was subject to its discipline in matters spiritual, as administered by its proper officers, and in accordance with its rules. The power of excommunication resides somewhere in that church, and if the defendant, in virtue of his priestly office, was vested with that power, as the declaration seems to imply, the exercise of it was in the nature of a judicial act. The declaration does not distinctly inform us what his authority was in that respect, but if the act done amounted to a valid excommunication, it is not for the civil courts to inquire into the reasonableness or propriety of the act. If the defendant was competent to pass sentence of excommunication, we cannot inquire into the grounds and regularity of the proceedings. *Remington v. Congdon*, 2 Pick. 310; *Bouldin v. Alexander*, 15 Wall. 131; *Shannon v. Frost*, 3 B. Mon. 253; *Farnsworth v. Storrs*, 5 Cush. 412; *Gregg v. Mass. Med. Soc.*, 111 Mass. 185. We say that the declaration seems to imply that the charge made by the defendant, if true in fact, would have rendered the plaintiff liable to spiritual censure, according to the discipline of that church. There is no other view of the case, in which the falsity of the charge can be said to be material. The plaintiff apparently rests his case on the falsity and not on the trivial and frivolous nature of the charge.

But if, on the other hand, the defendant had no authority to pronounce such a sentence, and his act in doing so was a mere bald assumption of power not intrusted to him, the plaintiff has not been excommunicated at all. It is not for us to decide what remedy he has, or whether he has any whatever in such case, as to his spiritual rights. It must always be remembered that in a court of law the only inquiry is as to civil rights. If the declaration is to be understood as presenting the plaintiff's case in this aspect, the amount of his grievance is that the effect of the language and ceremonies complained of was to induce certain persons to consider him as laid under an interdict, and to avoid all intercourse and busi-

ness with him for that reason. But as the words complained of do not charge the plaintiff with any misconduct which the law can take notice of, the misconstruction of those words by such persons is not sufficient to furnish a ground for an action at law. The declaration does not charge an intent to injure the plaintiff in any of his business relations.

The difficulty of the plaintiff's case as presented in this court lies in the fact, that in this country and in this age, a sentence of excommunication, even if pronounced by competent authority, and still more, if possible, when pronounced without authority, is incapable of impairing or affecting a man's civil rights. There was a time when excommunication was attended with many serious temporal inconveniences: the object of it was excluded from the society of all Christians, and disabled to do any act required to be done by one that is *probus et legalis homo*. He could not serve on juries, nor be a witness in any court, and, which is still more serious, he could not bring an action, real or personal, to recover lands, or money due him. He was further liable to the writ *de excommunicato capiendo*, by which the sheriff was directed to take the offender, and imprison him in the county jail, until he was reconciled to the church. On these grounds, says Mr. Starkie, the case of *Barnabas v. Traunter*, 1 Vin. Abr. 396, may perhaps be considered as authority consistent with the general rule. Starkie on Slander (3rd ed.) 104. This case is cited and relied upon by the plaintiff, but it is hardly necessary to say that none of the reasons suggested by Mr. Starkie as being "perhaps" sufficient to sustain it, have any existence under our laws. That was a case in which the rector of a parish, under pretense of written directions from the ordinary, falsely and maliciously announced from his pulpit that the plaintiff had been excommunicated. The plaintiff's action was sustained; but it is clear that this case is not law in this commonwealth. The result of this examination is that the demurrer to the first count must be sustained. The second and third counts, which present the same cause of action in other forms, are liable to substantially the same objections, and must also be adjudged bad on demurrer. . . .

See further as to excommunication as a basis for an action for defamation, *Landis v. Campbell*, 79 Mo. 433, 49 Am. Rep. 239. See "Libel and Slander," Century Dig. § 114; Decennial and Am. Dig. Key No. Series § 26.

SWEENEY v. BAKER, 13 W. Va. 158, 31 Am. Rep. 757. 1878.
Privilege. "Freedom of the Press." "Liberty of the Press." Criticism of Candidates.

[Action for libel. Plaintiff was a candidate for the House of Delegates. Defendants were proprietors of a newspaper. Judgment against defendants. Affirmed.]

The defendants published many articles against the plaintiff. Some contained charges libelous per se, while others, though very abusive, did not reach that point. Only so much of the opinion as bears upon the question of privilege is here inserted.]

GREEN, Pres. Before considering directly the questions involved in this case, I will briefly consider the rights and duties of the parties to this action, arising from their relations to each other.

The plaintiff was a candidate to represent the county of Ohio in the House of Delegates of the state of West Virginia; and the defendants were proprietors of the Wheeling Daily Register, a newspaper published in said county. A newspaper proprietor is just as liable for what he publishes in his newspaper as any other person; and he is liable in the same manner and to the same extent. The law takes no cognizance of newspapers; and there is no distinction between the publication by the proprietors of a newspaper, and a publication by any other person. The terms "freedom of the press" and "liberty of the press" have misled some to suppose that the proprietors of a newspaper had a right to publish that with impunity, for the publication of which others would have been held responsible. But the proper signification of these phrases is, if so understood, misapprehended. The "liberty of the press" consists in a right in the conductor of a newspaper to print whatever he chooses *without any previous license*, but subject to be held responsible therefor to exactly the same extent, that any one else would be responsible for the publication.

In the case of *Stebbins v. Merritt*, 10 Cush. 25, the instruction given by the court below, and approved by the supreme court, was: "It has been urged upon you, that conductors of the public press are entitled to peculiar indulgence, and have especial rights and privileges. The law recognizes no such peculiar rights, privileges, or claims to indulgence. They have no rights but such as are common to all. They have just the same rights that the rest of the community have, and no more. They have the right to publish the truth, but no right to publish falsehoods to the injury of others with impunity." In *Davidson v. Duncan*, 7 El. & Bl. 231 (90 E. C. L.), COLERIDGE, J., says: "There is no difference in law whether the publication is by the proprietor of a newspaper or by some one else. There is no legal duty on either to publish what is injurious to another; and if any person does do so, he must defend himself on some legal ground."

But the fact that one is a candidate for an office in the gift of the people affords in many instances a legal excuse for publishing language concerning him as such candidate, for which publication there would be no legal excuse, if he did not occupy the position of such candidate, whether the publication be made by the proprietors of a newspaper, or by a voter, or other person having an interest in the election. The conduct and actions of such candidate may be freely commented upon; his acts may be canvassed, and his conduct boldly censured. Nor is it material that such criticism of conduct should be in the estimate of a jury be just. The right to criticise the action or conduct of the candidate is a right, on the part of the party making the publication, to judge himself of the justness of the criticism. If he was liable for damages in an action of libel for a publication criticising the conduct or action of such a

candidate, if a jury should hold his criticism to be unjust, his right of criticism would be a delusion, a mere trap. The only limitation to the right of criticism of the act or conduct of a candidate for an office in the gift of the people is, that the criticism be bona fide. As this right of criticism is confined to the acts or conduct of such candidate, whenever the facts which constitute the act or conduct criticised, are not admitted, they must, of course, be proven. But as respects his person there is no such large privilege of criticism, though he be a candidate for such office. This large privilege of criticism is confined to his acts. The publication of defamatory language, affecting his moral character, can never be justified on the ground that it was published as a criticism. His talents and qualification mentally and physically for the office he asks at the hands of the people, may be freely commented on in publications in a newspaper, and though such comments be harsh and unjust, no malice will be implied; for these are matters of opinion, of which the voters are the only judges; but no one has a right by a publication falsely to impute crimes to such a candidate, or publish allegations falsely affecting his character. . . .

It is proper to say, that what I have said with reference to the right to publish certain remarks in a newspaper relative to a candidate for office, within the gift of the people, should be understood as confined to candidates for office to be elected by the people, and cannot be extended to candidates for an office, the appointment to which is made by a board of limited members, such as a city council. The right to make unjust and false commentaries on the qualifications of a candidate for an office of this description is much more limited. See *Kren v. Bennett*, 19 N. Y. 174. Judgment affirmed.

See 20 L. R. A. (N. S.) 361, and note. See *Ramsey v. Cheek*, 109 N. C. 270, inserted ante in this section. See "Libel and Slander," *Century Dig.* § 146; *Decennial and Am. Dig. Key No. Series* § 48.

KNOTT v. BURWELL, 96 N. C. 272, 277-280, 2 S. E. 588. 1887.

Mutual Libels. Retaliation.

[Action for libel. Verdict and judgment against defendant, and he appealed. Reversed. Defendant, in his answer, set up, by way of defense and counterclaim that the libel complained of was published because of certain slanders uttered against him by the plaintiff, and explains the circumstances which provoked him to publish the article complained of as a means of self-vindication. The proof offered to sustain these allegations and show the circumstances etc., was not admitted. Such proof was offered in mitigation of damages. The substance of the rejected evidence appears in the opinion, and only that part of the opinion which bears upon the exclusion of this evidence, is here inserted.]

SMITH, C. J. . . . The rulings of the court in refusing the proffered evidence deprive the defendant of the means of showing the provocation given by the plaintiff for the retaliatory and vindicating utterance of the words penned in the form of an appeal to

the public, and deny him the opportunity of showing the facts of the plaintiff's own misconduct which are set out in the cards. This leaves him with no shadow of excuse for what he uttered in a moment of irritation, and smarting under a sense of injury, and under the imputation of being influenced solely by a feeling of malignity towards the plaintiff, and a revengeful spirit excited by no just cause. It cannot be that the same punitive consequences are to be measured out in the one case as in the other, nor is such the law. It is true, under former technical rules of pleading applicable to actions for defamation, it was held that the general issue did not let in evidence offered to sustain it to be considered in mitigating damages, as is decided in *Smith v. Smith*, 8 Ired. 29; but this has been superseded by the more equitable provision found in the code (§ 266), which allows in the answer "both the truth of the matter charged as defamatory and any mitigating circumstances to reduce the amount of the damages;" and whether the defendant "prove the justification or not, he may give in evidence the mitigating circumstances."

As malice is involved in the utterance of false defamatory words, and separate proof of it is not essential to the maintenance of the action, it is a material element in aggravating damage; and especially so, whenever the jury are at liberty to make them exemplary, it is but reasonable to allow the defendant to disprove its presence, and lessen its intensity in reducing the damages. "Even in states where truth of the words is not permitted in mitigation under the general issue, yet proof tending to show that the plaintiff might be guilty of such acts as are charged may be given to disprove malice, and thus reduce the damage, as that, prior to the speaking of the words, a common report or suspicion existed that the plaintiff had committed the act charged,"—with numerous references in the footnote, found on page 711 of *Folkard & Starkie on Slander and Libel*, from the note to which, inserted by the editor (Woods), the extract is taken. Among the cases cited is that of *Nelson v. Evans*, 1 Dev. 9, where it is said a prevalent general report of the truth of the words spoken may be proved in mitigation, but not in justification.

"In cases of libel," we quote from *Wood's Mayne on Damages* (§ 122), "the defendant may give any evidence in reduction of damages which goes to prove the absence of malice, or he may show previous provocation received from the plaintiff. This provocation ought to originate in the same subject-matter, or be closely connected with it, out of which the defendant's slander arose." *May v. Brown*, 3 Barn. & C. 113, 10 E. C. L. 124.

[FACTS.] Now to apply the rule to the facts of the present case. The defendant, in a forbearing spirit, on hearing that a serious charge had been made against him for false weighing, sends his brother to the plaintiff to ascertain from him if he was not in error in his statements about the defendant's short weighing, and to obtain from him a written correction. The interview takes place. The current report, so prejudicial to the defendant, is com-

municated to the plaintiff, who says it was a mistake of his, and that he would in the morning sign a card to that effect. It was prepared by the editor of another newspaper; and, when presented to the plaintiff, he peremptorily refuses to put his name thereto, nor does he suggest any modification in its form which would be acceptable. This, when reported to the defendant, was followed very soon by the alleged libel. Ought not these facts to have been heard by the jury, and, if accepted as true, ought they not to have been considered in determining the punishment to be suffered by the defendant in giving expression to his resentment in the form adopted? Was it to be expected that he would rest silent under so injurious a charge, and repress all resentment at the plaintiff's refusal of any correction? Was it without any palliating circumstances that, in repelling the charge, he struck back at his assailant? Certainly, one feeling himself so wronged, and with correction refused by the wrongdoer, does not stand in the same light as one who so acts with no provocation and from sheer malignity; and yet the exclusion of the evidence leaves him equally defenseless before the jury as would be the other.

So, too, we think the statements in the depositions, with the information possessed by the defendant, should have been heard by the jury in mitigation, because the evidence shows that the charge about the "nested tobacco" was not a mere fabrication of the defendant, and hence the damages should not be as great as if it was the unsupported coinage of the defendant's own brain, and conceived and brought out from a malicious and wicked heart.

For these reasons the verdict must be set aside, and a *venire de novo* awarded in the superior court.

See further as to mutual libels, retaliation, etc., *Jauch v. Jauch*, 50 Indiana, 135, which holds that defendant may show that he spoke the slanderous words in a moment of heat and passion under the provocation from the plaintiff immediately preceding his utterances. Under such circumstances all acts, etc., constituting parts of the *res gestae* are admissible in mitigation of damages. Heat and passion alone do not mitigate; but when such emotions are directly attributable to contemporaneous provocation by the plaintiff, they do mitigate the damages. See 25 Cyc. 421, 518; 18 Am. & Eng. Enc. L. 1108. See "Libel and Slander," Century Dig. §§ 164, 318; Decennial and Am. Dig. Key No. Series § 63.

CHILD v. HOMER, 13 Pickering, (Mass.), 503, 510. 1833.

Mutual Libels. Retaliation.

[Action on the case for alleged libels by the publishers of a newspaper. Verdict and judgment against defendants, and they moved for a new trial because of the ruling out of evidence offered by them. It is upon this motion that the portion of the opinion here inserted, was written. The court sustained the motion and ordered a new trial.]

The matter complained of was admitted to be libellous and the contest was over the amount of damages, and that was the only question argued before the jury. Plaintiff and defendants had been publishing poems, etc., about each other in the newspapers. These skits were begun

in pleasantry, but became caustic and finally degenerated into abusive epithets which culminated in libel. The evidence ruled out was to show the articles published by the plaintiff concerning the defendants. The judge ruled that it was not competent to prove a separate and independent libellous attack, made by the plaintiff on the defendants, either in justification or in mitigation of damages, unless such publications were referred to in the libel sued upon. Defendants insisted that the publications were so referred to. After reference to the contents of the various articles written by the plaintiff and the defendants, the opinion proceeds:]

WILDE, J. . . . On both sides, it is apparent, they were intended to be abusive and provoking, to wound the feelings, and to exasperate the passions of each other. Both parties were in the wrong, both violated the law; how then can either of them be entitled to any considerable damages? On the 3rd of July the plaintiff throws out a challenge or defiance to the other party to continue the contest, which before appears to have been conducted in a harmless manner; certainly it was not very offensive. If one challenges another to strike him, and afterwards brings his action for a consequent assault, there can be no doubt that such challenge may be proved in mitigation of damages; but as the defendants are not prosecuted for the publication of the 4th in reply, this part of the controversy is not perhaps of much importance. But on the 9th the plaintiff follows up his challenge, and then followed a continued combat until the 13th; a war of words and abusive epithets, of reproach and ridicule. These publications, we think, ought to go to the jury in connection, as explanatory of each other, and to show a provocation. This course of administering justice we cannot think will violate any settled rule of law; and it may have a salutary effect in discouraging that licentious abuse of the liberty of the press, which has become a great and growing evil, and ought to be diminished. If parties will engage in newspaper controversies, and yielding to their angry passions, will lavish abuse and slanderous imputations on each other with an unsparing hand, let them be prosecuted and punished, if the public good requires it; but when both parties are in *pari delicto*, neither of them should be encouraged in a claim for damages and indemnity. Such a claim must be brought forward with a very bad grace, especially when the party complaining was the one who commenced the controversy.

But we must not be understood in too broad a sense. We do not admit the doctrine, that distinct and independent libels may be set off against each other; or that in an action for one, the other may be given in evidence in mitigation of damages. This would undoubtedly lead to confusion and embarrassment. I confine my remarks to cases of recent provocations, and to those where the libels offered in evidence are explanatory of the meaning of the libels complained of, and of the occasion of writing them; all being parts of a connected and continued controversy. In all such cases such evidence of provocation, or explanatory matter, may be received in evidence, as we think, without violating any principle of law, or established rule of evidence. New trial granted.

For a full discussion of the principles announced in the principal case, see 16 South. 192, 28 L. R. A. 721. See "Libel and Slander," Century Dig. §§ 164, 318; Decennial and Am. Dig. Key No. Series § 63.

PITTOCK v. O'NEILL, 63 Penn. St. 253, 3 Am. Rep. 544. 1870.

Province of the Jury in Libel. Lord Erskine's Victory. Distinction Between Criminal and Civil Proceedings for Libel, as Regards the Powers of the Judge and Jury.

[O'Neill sued Pittock for libel. Verdict and judgment against Pittock and he appealed. Affirmed. The action was against Pittock and Mills, the editor and publisher, respectively, of a newspaper, for publishing an article alleged to be libellous. The publication was admitted. The judge assumed the power of determining, as a matter of law, whether or not the article published was libellous, and he instructed the jury that it was, without doubt, "libellous and grossly so." To this Pittock and Mills excepted.]

SHARSWOOD, J. As the rule is well expressed by an elementary writer, "the quality of the alleged libel as it stands on the record, either simple or as explained by averments and innuendoes, is purely a question of law for the consideration of the court." 2 Starkie on Slander and Libel, 281. That this was the law in England, both in civil and criminal proceedings, up to 1792, was maintained so rigidly that nothing was submitted to the jury in such cases but the fact of publication and the truth of the innuendoes. *Rex v. Woodfall*, 5 Burr. 2661; *The King v. The Dean of St. Asaph*, 3 T. R. 428, note; *The King v. Withers*, Id. 428. In consequence of these decisions the statute of 32 Geo. III. ch. 60, commonly known as Mr. Fox's act, was passed. This statute is confined in terms to trials of indictments or informations when an issue or issues are joined between the king and the defendant or defendants on the plea of not guilty pleaded, in which case it is declared and enacted that the jury may give a general verdict of guilty or not guilty upon the whole matter put in issue, and should not be required or directed to find the defendant guilty merely on proof of the publication, and of the sense ascribed to the same in the indictment or information. By the second section it was provided "that on every such trial the court or judge, before whom such indictment or information shall be tried, shall, according to their or his discretion, give their or his opinion and direction to the jury on the matter in issue between the king and the defendant or defendants, in like manner as in other criminal cases." It has never been pretended that this statute had any application to civil actions (*Levi v. Milne*, 4 Bing. 195), and its obvious intention was merely to restore to juries their common law right to give a general verdict in cases of libel, just as in other criminal cases, of which they had been unconstitutionally deprived. Hence the law was carefully made declaratory. The 7th section of the 9th article of the constitution of Pennsylvania has expressed the same constitutional doctrine and incorporated it with the declaration of

rights: "In all indictments for libels the jury shall have a right to determine the law and the facts, under the direction of the court, as in other cases." There can be no doubt that both in criminal and civil cases the court may express to the jury their opinion as to whether the publication is libelous. The difference is, that in criminal cases they are not bound to do so, and if they do, their opinion is not binding on the jury, who may give a general verdict in opposition to it, and if that verdict is for the defendant, a new trial cannot be granted against his consent. As our declaration of rights succinctly expresses it, the jury have the right to determine the law and the facts in indictments for libel as in other cases. But in civil cases the court is bound to instruct the jury as to whether the publication is libellous supposing the innuendoes to be true, and if that instruction is disregarded, the verdict will be set aside as contrary to law.

In England the courts have recently disregarded, to some extent, this plain distinction between criminal and civil proceedings. It appears to be upon the ground that Mr. Fox's act, though limited in terms to indictments and informations, was declaratory of the law in all cases of libel: upon what principle of construction, however, it is not very easy to understand. It is there the approved practice for the judge in civil actions, after explaining to the jury the legal definition of a libel, to leave to them the question whether the publication upon which the action is founded falls within that definition. *Folkard's Stark*, 202; *Baylis v. Lawrence*, 11 Ad. & El. 920; *Parniter v. Coupland*, 6 M. & W. 105; *Campbell v. Spottiswoode*, 3 B. & G. 781; *Cox v. Lee*, 4 Exch. L. R. 284. These cases were followed in *Shattuck v. Allen*, 4 Gray, 540.

Yet it is clearly held that a verdict for the defendant upon that issue will be set aside and a new trial granted. *Hakewell v. Ingram*, 28 Eng. Law & Eq. 413. "Though in criminal proceedings for libel," said JERVIS, C. J., "there may be no review, in civil matters there are cases in which verdicts for the defendant are set aside upon the ground that the matter was a libel, though the jury found it was not." This must be conceded to be an anomaly: and it will be best to avoid a practice which leads to such a result. The law, indeed, may be considered as settled in this state by long practice, never questioned, but incidentally confirmed in *McCorkle v. Binns*, 5 Binn. 340, and *Hays v. Brierly*, 4 Watts, 392. It was held in the case last cited that where words of a dubious import are used, the plaintiff has a right to aver their meaning by innuendo, and the truth of such innuendo is for the jury. In New York, since the recent English cases, the question has been ably discussed and fully considered in *Snyder v. Andrews*, 6 Barb. 43; *Green v. Telfair*, 20 Id. 11; *Hunt v. Bennett*, 19 N. Y. 173, and the law established on its old foundations.

The Dean of St. Asaph's case is the cause celebre out of which grew Mr. Fox's act. In that case it was insisted by the prosecution that whether or not a publication was a libel was no question for the jury,

and that they were bound to convict the defendant in a criminal prosecution for libel if they believed that he caused the publication of the article alleged to be libellous. 8 Camp. Lives L. C. 273. Lord Erskine, who appeared for the Dean of St. Asaph, took the opposite ground and argued to the jury that they were to pass on the question of libel or no libel as well as upon the question of publication. "Mr. Justice BULLER, however, began his summing up by telling the jury that, there being no doubt as to the innuendoes, the only question they had to decide was, whether the defendant was or was not proved to have published the pamphlet? He overruled all that had been contended for on this subject by the defendant's counsel, saying, How this doctrine ever comes to be now seriously contended for is a matter of some astonishment to me, for I do not know any one question in the law which is more thoroughly established; and, after a great many similar observations, he thus concluded: Therefore, I can only say that, if you are satisfied that the defendant did publish this pamphlet, and are satisfied as to the truth of the innuendoes, you ought in point of law to find him guilty.

"The jury withdrew, and in about half an hour returned into court. When their names had been called over, the following scene was enacted. Clerk. 'Gentlemen of the jury do you find the defendant guilty or not guilty?' Foreman. 'Guilty of publishing only.' Erskine. 'You find him guilty of publishing only?' A Juror. 'Guilty only of publishing.' Buller, J. 'I believe that is a verdict not quite correct. You must explain that one way or the other. The indictment has stated that G means 'Gentleman,' F, Farmer,' the King, 'the King of Great Britain,' and the Parliament, 'the Parliament of Great Britain.' Juror. 'We have no doubt about that.' Buller, J. 'If you find him guilty of publishing, you must not say the word "only." Erskine. 'By that they mean to find there was no sedition.' Juror. 'We only find him guilty of publishing. We do not find anything else.' Erskine. 'I beg your Lordship's pardon: with great submission, I am sure I mean nothing that is irregular. I understand they say, "We only find him guilty of publishing." Juror. 'That is all we do find.' Buller, J. 'If you only attend to what is said, there is no question or doubt.' Erskine. 'Gentlemen, I desire to know whether you mean the word "only" to stand in your verdict?' Jurymen. 'Certainly.' Buller, J. 'Gentlemen, if you add the word "only," it will be negating the innuendoes.' Erskine. 'I desire your Lordship, sitting here as judge, to record the verdict as given by the jury.' Buller, J. 'You say he is guilty of publishing the pamphlet, and that the meaning of the innuendoes is as stated in the indictment.' Juror. 'Certainly.' Erskine. 'Is the word "only" to stand as part of the verdict?' Juror. 'Certainly.' Erskine. 'Then I insist it shall be recorded.' Buller, J. 'Then the verdict must be misunderstood; let me understand the jury.' Erskine. 'The jury do understand their verdict.' Buller, J. 'Sir, I will not be interrupted.' Erskine. 'I stand here as an advocate for a brother citizen, and I desire that the word only be recorded.' Buller, J. 'Sit down, sir; remember your duty, or I shall be obliged to proceed in another manner.' Erskine. 'Your Lordship may proceed in what manner you think fit; I know my duty as well as your Lordship knows yours. I shall not alter my conduct.'

"The learned judge took no notice of this reply, and, quailing under the rebuke of his pupil, did not repeat the menace of commitment. This noble stand for the independence of the Bar would of itself have entitled Erskine to the statue which the profession affectionately erected to his memory in Lincoln's Inn Hall. We are to admire the decency and propriety of his demeanor during the struggle, no less than the spirit and the felicitous precision with which he meted out the requisite and justifiable portion of defiance. The example has had a salutary effect in illustrating and establishing the relative duties of judge and advocate in England.

"The jury, confounded by the altercation, expressed a wish to withdraw, and the verdict was finally entered, 'Guilty of publishing, but whether a libel or not we do not find.'" [At an ensuing term, Erskine

made a motion to set aside the verdict, which was overruled by Lord Mansfield. He then moved in arrest of judgment, and judgment was arrested.]

"So ended this famous prosecution. It seemed to establish forever the fatal doctrine, that libel or no libel was a pure question of law, for the exclusive determination of judges appointed by the Crown. But it led to the subversion of that doctrine, and the establishment of the liberty of the press, under the guardianship of English juries. The public mind was so alarmed by the consequences of this decision, that Mr. Fox's Libel Bill was called for, which declared the right of jurors in cases of libel; and I rejoice always to think that it passed as a declaratory act, although all the judges unanimously gave an opinion in the House of Lords, that it was inconsistent with the common law. I have said, and still think, that this great constitutional triumph is mainly to be ascribed to Lord Camden, who had been fighting in the cause for half a century, and uttered his last words in the House of Lords in its support; but had he not received the invaluable assistance of Erskine, as counsel for the Dean of St. Asaph, the Star Chamber might have been re-established in this country." Campbell's Lives of Lord Chan. vol. 8, 276-279.

The sum and substance of the Libel Act is as stated by Lord Erskine in defense of Mr. Cuthell, before Lord Kenyon, to wit: "An indictment for libel is, therefore, considered an anomaly in the law. It was held so, undoubtedly; but the exposition of that error lies before me; the Libel Act lies before me, which expressly and in terms directs that the trial of a libel shall be conducted like every other trial for every other crime; and that the jury shall decide, not upon the mere fact of printing and publishing, but upon the whole matter put in issue, i. e. the publication of the libel with the intention charged by the indictment. This is the rule by the Libel Act, and you, the jury, as well as the court, are bound by it." To this statement Lord Kenyon naively replied, that the passing of the Libel Act was "a race for popularity between two seemingly contending parties, who then chose to run amicably together;" and under his instruction the defendant was found guilty. Campb. Lives L. C. vol. 8, 346. When Mr. Cuthell heard the sentence imposed upon him by Lord Kenyon, he doubtless thought that he had experienced a practical realization of his peculiar name.

In answer to an inquiry from the editors, Chief Justice CLARK, of the North Carolina supreme court, writes: "It is not my understanding that we ever enacted Fox's Libel Bill. We have acted on the understanding that as our statute makes the truth of the charge a full defense, the act is not needed."

The same battle that was fought by Lord Erskine in the Dean of St. Asaph's case was fought in America by Alexander Hamilton in *People v. Croswell*, 3 Johns. Cas. (N. Y.) 337, and with a like result. Fox's Libel Bill was, in effect, passed by the legislature of New York in consequence of Hamilton's defeat. The act was introduced and advocated by William W. Van Ness, Hamilton's associate counsel in the Croswell case. That the legislature indorsed Hamilton's position is shown by the fact that the statute is declaratory of the law. For a full history and elaborate discussion of the whole matter, see *People v. Croswell*, supra; *State v. Croteau*, 23 Vermont, 14; *Com. v. Anthes*, 5 Gray, 185; *Sparf and Hansen v. U. S.*, 156 U. S. 51, 77, 117, 15 Sup. Ct. 273, and the instructive biography of Alexander Hamilton by Mr. Scott in *Great American Lawyers*, vol. 1 at pp. 372-381. See "Libel and Slander," *Century Dig.* §§ 356-364, 443; *Decennial and Am. Dig. Key No. Series* §§ 123, 158.

FRANCIS et al. v. FLINN, 118 U. S. 385, 6 Sup. Ct. 1148. 1886.

Injunction Against Libel.

[Bill in equity by Flinn to restrain Francis and others from doing certain things—making certain publications in newspapers—intended to injure Flinn's business. Demurrer filed and overruled. An injunction pendente lite was granted and the decree of the court below made the injunction perpetual. Francis et al. appealed. Reversed. Among other things it was alleged in the bill that Francis and others had combined for the purpose of destroying the business and property of the plaintiff by publications in the newspapers. What the publications were of which Flinn complained, the bill failed to disclose.]

Mr. Justice FIELD. . . . If the publications in the newspapers are false and injurious, he can prosecute the publishers for libel. If a court of equity could interfere and use its remedy of injunction in such cases, it would draw to itself the greater part of the litigation properly belonging to courts of law.

We think the court below should have sustained the demurrer of the defendants for want of equity in the bill. The decree must therefore be reversed, and the cause remanded, with instructions to dismiss the bill; and it is so ordered.

See "Injunction," Century Dig. §§ 174-176; Decennial and Am. Dig. Key No. Series §§ 101, 102

RAYMOND v. RUSSELL et al., 143 Mass. 295, 9 N. E. 544. 1887.

Injunction Against Libel.

[Bill in equity to restrain defendants, proprietors of a mercantile agency, from publishing the plaintiff's name and business standing in their records and books. Demurrer filed, and the case heard by the supreme court on bill and demurrer. Bill dismissed.]

MORTON, C. J. It is not within the jurisdiction of a court of equity to restrain, by injunction, representations as to the character and standing of the plaintiff or as to his property, although such representations may be false, if there is no breach of trust or of contract involved. *Boston Dialite Co. v. Florence Manuf'g Co.*, 114 Mass. 69, and cases cited; *Whitehead v. Kitson*, 119 Mass. 484; *Prudential Assur. Co. v. Knott*, L. R. 10 Ch. 142. The bill before us alleges that the defendants have published, and intend to publish in the future, the name and business standing of the plaintiff in the records and books of a mercantile agency. It does not even allege that the representations are false or malicious. If he has any remedy, which we do not mean to intimate, it is by an action at law. The bill does not state a case within the equity jurisdiction of the court. Bill dismissed.

The English practice was very strict in former times against granting injunctions to restrain libels; but such injunctions are granted now, by reason of an act of parliament passed in 1873, where the publication would

injure trade, property, or reputation. But the rule in America may be said to be that of the principal cases. Where the publication is not a mere libel but a boycott, injunction will issue. 18 Am. & Eng. Enc. Law, 1120, 1121.

For injunctions, etc., in cases of publishing a picture of a person—infringing the supposed law of privacy, such as printing a young lady's picture on sacks of flour as a trade-mark or advertisement, see 80 N. W. 285, 46 L. R. A. 219; 64 N. E. 442, 59 L. R. A. 478, and cross-references in both cases; 7 L. R. A. (N. S.) 274.

An interesting feature of the law of injunction against publications in newspapers, arose in the Buck Stove and Range case, in which Samuel Gompers, Frank Morrison, and John Mitchell, officers of the American Federation of Labor, were sentenced to imprisonment for contempt, because they were held to have violated an order of injunction forbidding the publication of the Buck Stove and Range Co. in a boycott list. The case was brought in the supreme court of the District of Columbia and the ruling of that court was affirmed on Nov. 2, 1909, by the court of appeals of the District of Columbia. The case will go to the supreme court of the United States. See "Libel and Slander," Century Dig. §§ 169-171; Decennial and Am. Dig. Key No. Series § 98.

SEC. 8. DEPRIVATION OF LIBERTY.

(a) *Habeas Corpus.*

SIMMONS v. GEORGIA IRON & COAL CO., 117 Ga. 305, 43 S. E. 780, 61 L. R. A. 739. 1902.

History and Nature of the Remedy. Practice in Such Proceedings.

[Winnie Simmons sued out a writ of habeas corpus in a city court for the discharge of her husband. Petition dismissed, and she carried the case to the supreme court by writ of error. Reversed. The petitioner alleged that her husband had been convicted of certain offenses and sentenced to fine and imprisonment, and that he was unlawfully detained in prison by the Georgia Iron & Coal Co., a private corporation doing a mining business. Only so much of the opinion as discusses the history and nature of the remedy of habeas corpus and the practice in such proceedings, is here inserted.]

COBB, J. . . . 1. Questions growing out of an alleged illegal restraint of a person's liberty are always questions of much delicacy and importance. They impose upon the judiciary the duty of instituting a careful and painstaking investigation into the cause of the detention, and, if it be shown to be illegal, the courts should not be too astute in finding technical objections to the manner in which the legality of the restraint is called in question. On account of the character and importance of the questions made by the record, it is necessary to make some inquiry into the nature and object of the writ of habeas corpus, and the proceedings upon which it is issued. Many are accustomed to regard the writ as almost obsolete and of little practical value, and this results, doubtless, from the fact that it is so seldom called into operation. But the writ is as much a palladium of liberty to-day as it was during the abuses existing in the days of the ancient English sovereigns.

It is to the credit of an advanced civilization that the necessity for the issuance of the writ rarely ever arises, but the Constitution of this state declares that the privilege of the writ shall never be suspended, and it stands to-day, as it did in the days of King Charles, to protect and safeguard the liberty of the citizen. The origin of the writ has been left in some obscurity. There is ample evidence, however, that it was in use before the days of Magna Charta. See 2 Spell. Extra. Rel. §§ 1154, 1157; 15 Am. & Eng. Enc. L. (2d ed.), 128, 129. The common-law writ became so little respected that it no longer afforded real or substantial benefits to English subjects, and it was not until after the passage of St. 31, Chas. II, known as the "Habeas Corpus Act," that the writ came to be thoroughly reorganized in its fullest scope. This act, by virtue of our adopting statute, became a part of the law of this state. See Schley's Dig. p. 262; Cobb's Dig. p. 1131. Numerous changes have since been made in the act by statutes passed since its adoption. See Cobb's Dig. 543; Pen. Code 1895, § 1210 et seq. The writ with which we are now dealing was the one known to the common law as the "habeas corpus ad subjiciendum," and was issued in cases of illegal detention. 3 Bl. Com. p. 131. The proceeding by habeas corpus was, strictly speaking, neither a civil nor criminal action. "It was not a proceeding in a suit but was a summary application by the person detained. No other party to the proceeding was necessarily before or represented before the judge except the person detaining, and that person only because he had the custody of the applicant, and was bound to bring him before the judge to explain and justify, if he could, the fact of imprisonment. It was, as Lord Coke described it 'festinum remedium.'" Church, Hab. Cor. § 88, p. 140. See, also, in this connection, 3 Bl. Com. p. 131; 2 Spelling, Extra. Rel. § 1152. The act of Charles II certainly did not change the nature of the proceeding, or the practice of the courts in granting the writ. See Church, Hab. Cor. § 100. On the contrary, it was designed to correct the imperfections of the common-law writ, and make it a speedy remedy for a person to regain his liberty when illegally detained by another. It seems to have been doubted whether, under the common law, the writ could be issued in vacation, and this was doubtless one of the reasons which brought about the passage of the act. See, in this connection, 3 Bl. Com. 131; 4 Bacon's Ab. pp. 568, 593; Church, Hab. Cor. § 171; 15 Am. & Eng. Enc. L. (2d ed.), 129. The great purpose of this act, therefore, was to make the remedy speedy and effective. The proceeding is sometimes characterized as a "cause" or "action," but erroneously so; and it has been called a civil or criminal proceeding, according to whether the person is held in custody on a criminal charge, or by private restraint. While instances may arise where it is important to determine whether it is a civil or criminal proceeding, it can never be accurately characterized as a technical suit or action. See, in this connection, 15 Am. & Eng. Enc. L. pp. 157, 158; 2 Spell. Extra. Rel. § 1161. It may be analogized to a proceeding in rem, and is in-

stituted for the sole purpose of having the person restrained of his liberty produced before the judge, in order that the cause of his detention may be inquired into, and his status fixed. The person to whom the writ is directed makes response to the writ, not to the petition. 9 Enc. P. & P. 1035. When an answer is made to the writ, the responsibility of the respondent ceases. See, in this connection, *Barth v. Clise*, 12 Wall. 400, 20 L. Ed. 393. The court passes upon all questions, both of law and fact, in a summary way. The person restrained is the central figure in the transaction. The proceeding is instituted solely for his benefit. It is not designed to obtain redress against anybody, and no judgment can be entered against anybody. There is no plaintiff and no defendant, and hence there is no suit, in a technical sense. The judgment simply fixes the status of the person for whose benefit the writ was issued; and, while any one disobeying the judgment may be dealt with as for a contempt, the judgment does not fix the rights of any one interested, further than to declare that the person detained must be restored to liberty. The respondent, in his answer to the writ, seeks simply to justify his conduct, and relieve himself from the imputation of having imprisoned without lawful authority a person entitled to his liberty. He comes to no issue with the applicant for the writ. He answers the writ. The applicant may traverse the answer, and thus take issue with the respondent as to the truth or legal effect of the facts which he sets up. If, upon an investigation into the matter, it appears that the detention was without color of authority the person detained will, of course, be discharged; and he may bring a civil action for damages, or prosecute the person by whom he was restrained of his liberty for false imprisonment. But the proceeding itself is not in any sense a suit between the applicant and the respondent. Our habeas corpus law, as above stated, is made up partly of the common law and partly of the statute of Charles, with the changes that have been made from time to time by the General Assembly. Such portions of this law as are material in the present investigation will be referred to in the appropriate places. It is certain that there is nothing in the law which takes away any of the substantial benefits of the English statute, or modifies it in any material respect.

2. But while the writ of habeas corpus is a "writ of right," it did not, either under the common law or the statute of Charles, issue as a matter of course, but only on probable cause shown. It was, under the English practice, incumbent upon the party moving for the writ to make a *prima facie* showing, under oath, authorizing the discharge of the person restrained of his liberty. 4 Bacon's Ab. p. 568; 1 Tidd's Pr. p. 346. And this is also the rule in the courts of America. Church, Hab. Cor. § 92; 25 Am. Dig. 1 Cent. Ed. 3 cols. 995, 996, § 55; 2 Spell. Extra. Rel. §§ 1193, 1318. Penn. Code, § 1211, provides how such an application shall be made, and what shall be its contents, and the application must state, among other things, "the cause or pretense of the restraint, and, if under pretext of legal process," a copy of the process, if possible, must

be annexed to the petition; and the application must contain "a distinct averment of the alleged illegality in the restraint, or the reason why the writ of habeas corpus is sought." When Judge Montgomery, in *Broomhead v. Chisolm*, 47 Ga. 392, used the language that every judge whose duty it is to grant the writ, "must do so when any person shall apply for it," he, of course, did not mean to say that the application need not state sufficient facts to authorize the writ to issue, and the application with which the learned judge was dealing in that case met unquestionably the requirements of the rule just referred to. Mr. Justice Bleekley, in *Perry v. McLendon*, 62 Ga. 604, says that the writ should be issued, "provided the petition contains the requisite matter, is in due form, duly authenticated, duly presented, and does not show on its face that the imprisonment, though complained of as illegal, is in fact legal." It is therefore the duty of the court in every case, before issuing the writ, to inspect the application, to see if it contains sufficient averments and is properly verified. If it lacks these essential requisites, he should decline to issue the writ. If it does not, it is "his duty to grant it," and for a failure to do so the law imposes a penalty upon him. Pen. Code 1895, § 1234. The provisions of this section just cited as to the imposition of a penalty and the character of the penalty are, in substance, what was provided in the act of Charles II. Cobb's Dig. p. 1131, § 10; Sehley's Dig. p. 275. But we know of no law which authorizes either the person against whom the writ is prayed, or any one else, to come into court and object to the issuance of the writ. There is no precedent for an objection of this character. It is a matter to be determined solely by the judge. And even after the writ has issued, and the respondent has appeared in answer to it, the sufficiency of the petition cannot be tested by a demurrer, though it seems that a motion may be made to quash the writ because of insufficient averments in the petition. 9 Enc. P. & P. 1021; 2 Spell. Extra. Rel. § 1335. Mr. Church, however, in his work on *Habeas Corpus*, § 156, p. 241, states that a motion was made to quash the writ on the ground that it had been issued improvidently, before Justice Wilson, of the queen's bench, in Canada, and the justice stated: "Even if it were clear to me that I have the power, I do not know that I would exercise it, now that the writ has been returned and filed, and the prisoner is here awaiting my judgment." See *In re Ross*, 3 P. R. (Can.) 301. So, states the author, instead of quashing the writ on motion made for that purpose, he discharged the prisoner on defects in the warrant returned. This practice commends itself very strongly to our minds. When the writ has been answered, and the prisoner produced, why fritter away his rights with technical niceties and rules of pleading? Let it be granted that the writ ought not to be issued until probable cause is shown, when it is issued, even though improvidently, if it accomplishes its purpose and results in the production of the person detained, why remand to the place from whence he came a man deprived of his liberty without any color of legal authority, because, forsooth, the

petition is defective in form, or even in substance? The writ of habeas corpus is a writ of right, and its beneficent effects ought not to be dissipated by subtle objections and technical niceties. Of course, if the petition clearly shows on its face that the detention is lawful, there is nothing to investigate. But if it is merely lacking in that fullness which the statute and good pleading requires, and shows that a claim is made by the applicant that the detention is illegal, the writ ought not to be quashed after the person detained has been brought into court, but an inquiry into the cause of the detention ought to be instituted. Especially ought this rule to be applied where the petition is made by a person other than the party restrained of his liberty. Let the party detained be given an opportunity to show that his detention is not lawful. It may be said in the administration of the law due forms must be observed. This is true, but this writ was framed to meet an emergency and for a special purpose, and was intended to be used in a summary and speedy manner, and its beneficent purposes and wholesome effects must not be lessened by legal refinements. See, in this connection, *Broomhead v. Chisolm*, 47 Ga. 390. . . .

There is one other point, which, though not made in the record or suggested in the argument, we have thought it proper to notice, for the benefit of those who may in the future apply for the writ under similar circumstances as those appearing in the present proceeding. The petition prayed for the issuance of the writ to the "Georgia Iron & Coal Company, a corporation, . . . and its officers, agents, and employes who have the charge and custody of the said Wess Simmons." The writ was directed to the corporation, "and to its officers, agents, and employes." It was served upon the superintendent of the corporation. The writ must be directed to the person having the person in custody, whether he be an officer of the law or a private individual. 4 Bacon's Ab. p. 581; 15 Am. & Eng. Enc. L. (2d ed.), p. 194. "If this cannot readily be determined, it may be addressed to any one countenancing or consenting to the illegal detention or restraint." Church, Hab. Cor. § 106, p. 167. We find no precedent in the books, however, for directing the writ to a corporation; and, from the very nature of the case, it would seem to be clear that it cannot be so directed. See, in this connection, *Hall Machine Co. v. Barnes*, 115 Ga. 945, 946, 42 S. E. 276. A corporation is an artificial being—an entity—and it is not conceivable how it can restrain the liberty of anybody. It, of course, could authorize the detention, and would doubtless be liable in a civil action for so doing. But how could a judgment ordering a corporation to discharge a person wrongfully held in custody be enforced? The corporation could not be attached for contempt, and we do not think that an officer or servant of the corporation could be attached for refusing to obey a writ directed to the corporation. Restraining another's liberty is necessarily a matter of individual conduct and responsibility, and it would certainly be no defense, on an attachment for contempt against an individual, that the restraint was

ordered by a corporation, or even by another individual. But these views are not of serious moment now, for, applying the rule of liberal construction heretofore referred to, we think the writ may be treated as directed to the individuals concerned in the illegal restraint of the prisoner. It was directed to the agents of the corporation, and served upon one of such agents, who responded, and presumably brought the prisoner into court; and hence the irregularity in the address of the writ presented no obstacle to an inquiry into the cause of the restraint. But such a method of addressing a writ is irregular and improper. It should be directed to the individual having the actual physical custody and control of the person detained, and if this cannot readily be done, where the application is made by a third party, to some one who is manifestly a party to the detention, and aids and abets it. Judgment reversed.

That habeas corpus proceedings are, to all intents and purposes, civil actions, both under the common law and Code practice, see *Ex parte Tom Tong*, 108 U. S. 556, 2 Sup. Ct. 871; also 85 N. W. 1046, 62 L. R. A. 700. See "Habeas Corpus," Century Dig. §§ 1, 46, 64; Decennial and Am. Dig. Key No. Series §§ 1, 48, 72.

EX PARTE WATKINS, 3 Pet. (U. S.) 193, 202, 203. 1830.

Habeas Corpus When Applicant in Custody Under Final Judgment of a Court of Competent Jurisdiction.

[Habeas corpus in the supreme court of the United States to inquire into the legality of the confinement of Tobias Watkins, who was confined in prison under the final judgment of the circuit court of the United States. The imprisonment was claimed to be illegal because the indictment, upon which the conviction was had, charged no offense of which the court had jurisdiction. After stating that there is no doubt of the power of the supreme court to award a writ of habeas corpus under the 14th section of the Judiciary Act, and that the only question is, whether this be a case in which that power ought to be exercised, the opinion proceeds:]

MARSHALL, C. J. . . . The writ of habeas corpus is a high prerogative writ known to the common law, the great object of which is the liberation of those who may be imprisoned without sufficient cause. It is in the nature of a writ of error, to examine the legality of the commitment. The English judges, being originally under the influence of the crown, neglected to issue this writ where the government entertained suspicions which could not be sustained by evidence; and the writ, when issued, was sometimes disregarded or evaded, and great individual oppression was suffered in consequence of delays in bringing prisoners to trial. To remedy this evil, the celebrated habeas corpus act of the 31st Charles II. was enacted, for the purpose of securing the benefits for which the writ was given. This statute may be referred to as describing the cases in which relief is, in England, afforded by this writ to a person detained in custody. It enforces the common

law. This statute excepts from those who are entitled to its benefits persons committed for felony or treason, plainly expressed in the warrant, as well as persons convicted or in execution.

The exception of persons convicted applies particularly to the application now under consideration. The petitioner is detained in prison by virtue of the judgment of a court, which court possesses general and final jurisdiction in criminal cases. Can this judgment be re-examined upon a writ of habeas corpus? This writ is, as has been said, in the nature of a writ of error, which brings up the body of the prisoner, with the cause of commitment. The court can undoubtedly inquire into the sufficiency of that cause; but if it be the judgment of a court of competent jurisdiction, especially a judgment withdrawn by law from the revision of this court, is not that judgment in itself sufficient cause? Can the court, upon this writ, look beyond the judgment, and re-examine the charges on which it was rendered? A judgment, in its nature, concludes the subject on which it is rendered, and pronounces the law of the case. The judgment of a court of record, whose jurisdiction is final, is as conclusive on all the world as the judgment of this court would be. It is as conclusive on this court as it is on other courts. It puts an end to inquiry concerning the fact, by deciding it.

The counsel for the prisoner admit the application of these principles to a case in which the indictment alleges a crime cognizable in the court by which the judgment was pronounced; but they deny their application to a case in which the indictment charges an offense not punishable criminally, according to the law of the land. But with what propriety can this court look into the indictment? We have no power to examine the proceedings on a writ of error, and it would be strange, if, under color of a writ to liberate an individual from unlawful imprisonment, we could substantially reverse a judgment which the law has placed beyond our control. An imprisonment under a judgment cannot be unlawful, unless that judgment be an absolute nullity; and it is not a nullity if the court has general jurisdiction of the subject, although it should be erroneous. The circuit court for the District of Columbia is a court of record, having general jurisdiction over criminal cases. An offense cognizable in any court, is cognizable in that court. If the offense be punishable by law, that court is competent to inflict the punishment. The judgment of such a tribunal has all the obligation which the judgment of any tribunal can have. To determine whether the offense charged in the indictment be legally punishable or not, is among the most unquestionable of its powers and duties. The decision of this question is the exercise of jurisdiction, whether the judgment be for or against the prisoner. The judgment is equally binding in the one case and in the other; and must remain in full force unless reversed regularly by a superior court capable of reversing it. . . . Without looking into the indictments under which the prosecution against the petitioner was conducted, we are unanimously of opin-

ion that the judgment of a court of general criminal jurisdiction justifies his imprisonment, and that the writ of habeas corpus ought not to be awarded.

That one under sentence of the final judgment of a court of competent jurisdiction will not be discharged under habeas corpus proceedings, see *In re Brittain*, 93 N. C. 587; but if there be *a want of jurisdiction in the court*, or if its action be *unconstitutional*; or in execution of an unconstitutional law; or if it be void, as distinguished from erroneous or voidable—one may be discharged though in custody under the final judgment of a court. *Ex Parte Siebold*, 100 U. S. 371; *State v. Queen*, 91 N. C. 659; *In re Boyett*, 136 N. C. 415, 48 S. E. 789 (this case involving the detention of the criminal insane under an unconstitutional statute); *Re Tani*, 91 Pac. 137, 13 L. R. A. (N. S.) 518; 1 lb. 540, and note. See "Habeas Corpus," *Century Dig.* § 19½; *Decennial and Am. Dig. Key No. Series* § 22.

IN RE SCHNEIDER, Petitioner, 148 U. S. 162, 13 Sup. Ct. 572. 1892.

Habeas Corpus as a Substitute for Writ of Error or Appeal.

[Habeas corpus in supreme court of the United States. The petition set out, *inter alia*, that the prisoner was detained under the judgment and sentence of the supreme court of the District of Columbia, sentence of death having been passed upon him by such judgment; that the judgment was unlawful, void and unconstitutional, in that the prisoner had not been allowed a proper trial by jury, because certain challenges for cause were overruled by the judge—setting forth the causes of challenge assigned at the trial.]

The Chief Justice FULLER: Leave to file petition for writs of habeas corpus and certiorari is denied. The ground of the application does not go to the jurisdiction or authority of the supreme court of the district, and mere error cannot be reviewed in this proceeding. *Ex parte Parks*, 93 U. S. 18; *Ex parte Bigelow*, 113 U. S. 328, 5 Sup. Ct. 542; *Ex parte Wilson*, 114 U. S. 417, 5 Sup. Ct. 935; *Nielson*, pet. 131 U. S. 176, 9 Sup. Ct. 672.

That habeas corpus cannot be used as a writ of error or as an appeal, to correct errors in criminal cases, see *In re Schenck*, 74 N. C. 607; *Terlinden v. Ames*, 184 U. S. 270, 278, 279, 22 Sup. Ct. 484. One unlawfully confined under a final judgment—his sentence being for a longer term than that allowed by the statute prescribing the punishment—may have relief by certiorari. *State v. Lawrence*, 81 N. C. 523. See "Habeas Corpus," *Century Dig.* § 25; *Decennial and Am. Dig. Key No. Series* § 30.

WALES v. WHITNEY, 114 U. S. 564, 571-575, 5 Sup. Ct. 1050. 1884.

What Detentions May, and What May Not, Be Relieved by Habeas Corpus. Wives, Children, etc. Physical and Moral Restraint.

[Appeal from a judgment of the supreme court of the District of Columbia refusing a writ of habeas corpus to Wales from an order of arrest issued by the secretary of the navy. Affirmed.]

The petitioner, Wales, was a medical director in the United States navy and was placed under arrest by the secretary of the navy by an order addressed to him, as follows: ". . . . You are hereby placed un-

der arrest, and you will confine yourself to the limits of the city of Washington." This was all. There was no physical arrest or detention of the petitioner.]

Mr. Justice MILLER. . . . The writ of habeas corpus is not a writ of error, though in some cases in which the court issuing it has appellate power over the court by whose order the petitioner is held in custody, it may be used with the writ of certiorari for that purpose. In such case, however, as the one before us, it is not a writ of error. Its purpose is to enable the court to inquire, first, if the petitioner is restrained of his liberty. If he is not, the court can do nothing but discharge the writ. If there is such restraint, the court can then inquire into the cause of it, and if the alleged cause be unlawful, it must then discharge the prisoner. There is no very satisfactory definition to be found in the adjudged cases of the character of the restraint or imprisonment suffered by a party applying for the writ of habeas corpus, which is necessary to sustain the writ. This can hardly be expected from the variety of restraints for which it is used to give relief. Confinement under civil and criminal process may be so relieved. Wives restrained by husbands, children withheld from the proper parent or guardian, persons held under arbitrary custody by private individuals, as in a madhouse, as well as those under military control, may all become proper subjects of relief by the writ of habeas corpus. Obviously, the extent and character of the restraint which justifies the writ, must vary according to the nature of the control which is asserted over the party in whose behalf the writ is prayed.

In the case of a man in the military or naval service, where he is, whether as an officer or a private, always more or less subject in his movements, by the very necessity of military rule and subordination, to the orders of his superior officer, it should be made clear that some unusual restraint upon his liberty of personal movement exists to justify the issue of the writ; otherwise every order of the superior officer directing the movements of his subordinate, which necessarily to some extent curtails his freedom of will, may be held to be a restraint of his liberty, and the party so ordered may seek relief from obedience by means of a writ of habeas corpus.

Something more than moral restraint is necessary to make a case for habeas corpus. There must be actual confinement or the present means of enforcing it. The class of cases in which a sheriff or other officer, with a writ in his hands for the arrest of a person whom he is required to take into custody, to whom the person to be arrested submits without force being applied, comes under this definition. The officer has the authority to arrest, and the power to enforce it. If the party named in the writ resists or attempts to resist, the officer can summon by-standers to his assistance, and may himself use personal violence. Here the force is imminent and the party is in presence of it. It is physical power which controls him, though not called into demonstrative action.

It is said in argument that such is the power exercised over the appellant under the order of the secretary of the navy. But this is, we think, a mistake. If Dr. Wales had chosen to disobey this order, he had nothing to do but take the next or any subsequent train from the city and leave it. There was no one at hand to hinder him. And though it is said that a file of marines or some proper officer could have been sent to arrest, and bring him back, this could only be done by another order of the secretary, and would be another arrest, and a real imprisonment under another and distinct order. Here would be a real restraint of liberty, quite different from the first. The fear of this latter proceeding, which may or may not keep Dr. Wales within the limits of the city, is a moral restraint which concerns his own convenience, and in regard to which he exercises his own will.

The present case bears a strong analogy to *Dodge's Case* in 6 Mart. (La.) 569. It appeared there that the party who sued out the writ had been committed to jail on execution for debt, and having given the usual bond by which he and his sureties were bound to pay the debt if he left the prison bounds, he was admitted to the privilege of those bounds. The plaintiff in execution failing to pay the fees necessary to the support of the prisoner, the latter sued out a writ of habeas corpus. That eminent jurist, Chief Justice MARTIN, said, on appeal to the supreme court: "It appears to us that the writ of habeas corpus was improperly resorted to. The appellee was under no physical restraint, and there was no necessity to recur to a court or judge to cause any moral restraint to cease. The sheriff did not restrain him, since he had admitted him to the benefit of the bounds; the doors of the jail were not closed on him, and if he was detained it was not by the sheriff or jailor. If his was a moral restraint it could not be an illegal one. The object of the appellee was, not to obtain the removal of an illegal restraint from a judge, but the declaration of the court that the plaintiffs in execution had by their neglect lost the right of detaining him. A judgment declaring such neglect, and pronouncing on the consequences of it, was what the appellee had in view." The judgment awarding the writ was reversed. The analogy to the case before us is striking.

A very similar case was passed upon by the supreme court of Pennsylvania in *Respublica v. Arnold*, 3 Yeates, 263. A party who had been indicted for arson, and had given bail for his appearance to answer the indictment, applied, while out under bail, to be discharged by writ of habeas corpus, on the ground of delay in the prosecution. The court held that the statute of Pennsylvania, which was a re-enactment of the habeas corpus act of 31st Charles II., c. 2, spoke of persons committed or detained, and clearly did not apply to a person out on bail. And Mr. Justice YEATES very pertinently inquires, "Would not a habeas corpus directed to the bail of a supposed offender be perfectly novel?" And SMITH, J., said that the inclination of his mind was that habeas corpus could not lie to the bail.

In a note to the cases of *Rex v. Dawes* and *Rex v. Kessel*, 1 Burr. 638, the same principle is stated, though by whom the note is made does not appear. Both these persons were brought before Lord Mansfield, in the king's bench, on a rule against the commissioners to enforce an act of parliament to increase the army. In both cases the ground on which the discharge was asked, was that they were illegally pressed into the service. Lord Mansfield discharged one because his statement was found to be correct, and refused the other because his statement was not true. The note to the report, apparently in explanation of the fact that they were not brought before the court by writ of habeas corpus, and that no objection was taken to the rule by the commissioner, says: "Neither of these could have brought a habeas corpus; neither of them was in custody. Dawes had deserted and absconded, and Kessel had been made a corporal. No objection was made by the commissioner to the propriety of the method adopted." Chief Baron Comyn cites the cases as showing that the parties could not bring habeas corpus, because they were not in custody. 4 Com. Dig. 313, "Habeas Corpus" B. . . .

All these provisions contemplate a proceeding against some person who has the immediate custody of the party detained, with the power to produce the body of such party before the court or judge, that he may be liberated if no sufficient reason is shown to the contrary.

In case of a person who is going at large, with no one controlling or watching him, or detaining him, his body cannot be produced by the person to whom the writ is directed, unless by consent of the alleged prisoner, or by his capture and forcible traduction into the presence of the court. The record in the present case shows that no such thing was done. The secretary denies that Wales is in his custody, and he does not produce his body; but Wales, on the direction of the secretary, appears without any compulsion, and reports himself to the court and to Justice Cox, as he did to the court-martial. We concur with the supreme court of the district in the opinion that the record does not present such a case of restraint of personal liberty as to call for discharge by a writ of habeas corpus. In thus deciding we are not leaving the appellant without remedy, if his counsel are right in believing the court-martial has no jurisdiction of the offense of which he is charged. He can make that objection to that court before trial. He can make it before judgment after the facts are all before that court. He can make it before the reviewing tribunal. If that court finds him guilty, and imposes imprisonment as part of a sentence, he can then have a writ to relieve him of that imprisonment. If he should be deprived of office, he can sue for his pay and have the question of the jurisdiction of the court which made such an order inquired into in that suit. If his pay is stopped, in whole or in part, he can do the same thing. In all these modes he can have relief if the court is without jurisdiction, and the inquiry into that jurisdiction will be more satisfactory after the court shall have decided on the na-

ture of the offense for which it punishes him than it can before. And this manner of relief is more in accord with the orderly administration of justice and the delicate relations of the two classes of courts, civil and military, than the assumption in advance by the one court that the other will exercise a jurisdiction which does not belong to it.

The judgment of the supreme court of the District of Columbia is affirmed.

A person confined under arrest and bail proceedings in a civil action may resort to habeas corpus to test the legality of his detention. *Claflin v. Underwood*, 75 N. C. 485; *Stewart v. Bryan*, 121 N. C. 46, 28 S. E. 18. See "Habeas Corpus," Century Dig. §§ 10-12; Decennial and Am. Dig. Key No. Series §§ 8-11.

IN RE NEAGLE, Petitioner, 135 U. S. 1, 69, 75, 10 Sup. Ct. 658. 1889.
Power of United States Courts to Discharge Those in Custody Under the Laws and Judicial Proceedings of a State.

[Appeal to the supreme court of the United States by the sheriff of San Joaquin county, California, from a judgment of the circuit court of the United States, discharging Neagle from the custody of the sheriff. Affirmed. At the time such order was made, the sheriff held Neagle under process of the courts of California on a charge of murder.

Under orders from the executive department at Washington, Neagle, a deputy United States marshal, had been directed by the United States marshal to protect Justice Field from threatened violence. In the discharge of this duty Neagle had killed Terry as a matter of necessity to prevent an assault—apparently with intent to kill—upon Justice Field. Thereupon Neagle was confined in jail under a commitment duly issued by a justice of the peace of San Joaquin county, upon a charge of murder. Neagle then sued out a writ of habeas corpus. Only so much of the opinion as bears upon the power of the courts of the United States in such cases, is here inserted.]

Mr. Justice MILLER. . . . It is urged against the relief sought by this writ of habeas corpus that the question of the guilt of the prisoner of the crime of murder is a question to be determined by the laws of California, and to be decided by its courts, and that there exists no power in the government of the United States to take away the prisoner from the custody of the proper authorities of the state of California, and carry him before a judge of the court of the United States, and release him without a trial by jury according to the laws of the state of California. That the statute of the United States authorizes and directs such a proceeding and such a judgment in a case where the offense charged against the prisoner consists in an act done in pursuance of a law of the United States, and by virtue of its authority, and where the imprisonment of the party is in violation of the constitution and laws of the United States, is clear by its express language. The enactments now found in the Revised Statutes of the United States on the subject of the writ of habeas corpus are the result of a long course of legislation forced upon congress by the attempt of the states of the Union to exercise the power of imprisonment

over officers and other persons asserting rights under the federal government or foreign governments, which the states denied. . . . The result at which we have arrived upon this examination is that, in the protection of the person and the life of Mr. Justice Field while in the discharge of his official duties, Neagle was authorized to resist the attack of Terry upon him; that Neagle was correct in the belief that, without prompt action on his part, the assault of Terry upon the judge would have ended in the death of the latter; that, such being his well-founded belief, he was justified in taking the life of Terry, as the only means of preventing the death of the man who was intended to be his victim; that in taking the life of Terry, under the circumstances, he was acting under the authority of the law of the United States, and was justified in so doing; and that he is not liable to answer in the courts of California on account of his part in that transaction. We therefore affirm the judgment of the circuit court authorizing his discharge from the custody of the sheriff of San Joaquin county.

Habeas corpus lies to discharge one in custody under process of a state court, when such action of the state court is in violation of the constitution of the United States, or of a treaty, or law thereof: but this power is exercised with caution and under the discretion of the court, rather than as a matter of course, even in those cases in which the power clearly exists. *Whitten v. Tomlinson*, 160 U. S. 231, 16 Sup. Ct. 297, reviewing many cases; *Ex parte Young*, 209 U. S. 123, 167, 28 Sup. Ct. 441, involving the Minnesota passenger rate law of 1907; *Hunter v. Wood*, 209 U. S. 205, 28 Sup. Ct. 472, involving the North Carolina passenger rate law of 1907—for the decision of the state supreme court on the validity of this law, see *State v. So. R. R. Co.*, 145 N. C. 495, 59 S. E. 570. See "Habeas Corpus," *Century Dig.* §§ 38-45; *Decennial and Ann. Dig. Key No. Series* § 45; "Courts," *Century Dig.* §§ 1376-1385.

TARBLE'S CASE, 13 Wallace, 397, 401, 402, 409, 410. 1871.

Power of State Courts to Discharge Those in Custody Under the Laws and Judicial Proceedings of the United States.

[Proceeding by habeas corpus in a state court for the discharge of Tarble held in custody by a recruiting officer of the United States as an enlisted soldier. The writ was issued by the court commissioner of Dane county, Wisconsin, and directed to the United States officer, who brought Tarble before the court, but pleaded want of jurisdiction. Tarble claimed to be under 18 years of age and to have been duped into enlisting. The court ordered the discharge of Tarble from custody. The officer carried the case to the supreme court of the state where the order of the lower court was affirmed. The case was then carried to the supreme court of the United States by writ of error sued out by the United States government. The question presented is: Can one in custody under the laws of the United States be discharged by a state court under habeas corpus proceedings? Only so much of the opinion as bears upon the question, is here inserted.]

MR. JUSTICE FIELD. The important question is presented by this case, whether a state court commissioner has jurisdiction, upon habeas corpus, to inquire into the validity of the enlistment of sol-

diers into the military service of the United States, and to discharge them from such service when, in his judgment, their enlistment has not been made in conformity with the laws of the United States. The question presented may be more generally stated thus: Whether any judicial officer of a state has jurisdiction to issue a writ of habeas corpus, or to continue proceedings under the writ when issued, for the discharge of a person held under the authority, or claim and color of authority, of the United States, by an officer of that government.

State judges and state courts, authorized by laws of their states to issue writs of habeas corpus, have undoubtedly a right to issue the writ in any case where a party is alleged to be illegally confined within their limits, unless it appear upon his application that he is confined under the authority, or claim and color of authority, of the United States, by an officer of that government. If such fact appear upon the application, the writ should be refused. If it do not appear, the judge or court issuing the writ has a right to inquire into the cause of imprisonment, and ascertain by what authority the person is held within the limits of the state; and it is the duty of the marshal, or other officer having the custody of the prisoner, to give, by a proper return, information in this respect. His return should be sufficient, in its detail of facts, to show distinctly that the imprisonment is under the authority, or claim and color of authority, of the United States, and to exclude the suspicion of imposition or oppression on his part. And the process or orders, under which the prisoner is held, should be produced with the return and submitted to inspection, in order that the court or judge issuing the writ may see that the prisoner is held by the officer, in good faith, under the authority, or claim and color of authority, of the United States, and not under the mere pretense of having such authority.

This right to inquire by process of habeas corpus, and the duty of the officer to make a return, "grows necessarily," says Mr. Chief Justice Taney, "out of the complex character of our government and the existence of two distinct and separate sovereignties within the same territorial space, each of them restricted in its power, and each within its sphere of action, prescribed by the constitution of the United States, independent of the other. But, after the return is made, and the state judge or court judicially apprised that the party is in custody under the authority of the United States, they can proceed no further. They then know that the prisoner is within the dominion and jurisdiction of another government, and that neither the writ of habeas corpus nor any other process issued under state authority can pass over the line of division between the two sovereignties. He is then within the dominion and exclusive jurisdiction of the United States. If he has committed an offense against their laws, their tribunals alone can punish him. If he is wrongfully imprisoned, their judicial tribunals can release him and afford him redress."

It follows, from the views we have expressed, that the court

commissioner of Dane county was without jurisdiction to issue the writ of habeas corpus for the discharge of the prisoner in this case, it appearing, upon the application presented to him for the writ, that the prisoner was held by an officer of the United States, under claim and color of the authority of the United States, as an enlisted soldier mustered into the military service of the national government; and the same information was imparted to the commissioner by the return of the officer. The commissioner was, both by the application for the writ and the return to it, apprised that the prisoner was within the dominion and jurisdiction of another government, and that no writ of habeas corpus issued by him could pass over the line which divided the two sovereignties. The conclusion we have reached renders it unnecessary to consider how far the declaration of the prisoner as to his age, in the oath of enlistment, is to be deemed conclusive evidence on that point on the return of the writ. Judgment reversed.

See *Dillingham v. Booker*, 163 Fed. 696, 18 L. R. A. (N. S.) 956, and note.

The opposite of the ruling in the principal case was held by Pearson, C. J., in a case involving the same question of conflict of authority between the state and the Confederate States government. In *re Bryan*, 60 N. C. 1. One who is in the custody of state officials under extradition proceedings, may be discharged under habeas corpus issued by either a state or federal court, although the detention is necessarily under color of authority derived from the constitution and laws of the United States, for from that source alone is interstate extradition derived. In such cases, however, the person is not in the custody of, or under restraint by, *an officer of the United States*. *Roberts v. Reilly*, 116 U. S. 80, at pp. 94, 95, 6 Sup. Ct. 291; *Robb v. Connolly*, 111 U. S. 624, 4 Sup. Ct. 544; In *re Sultan*, 115 N. C. 57, 20 S. E. 375. So it is when one is in custody under international extradition proceedings, though in such cases the courts are to some extent circumscribed in the exercise of their powers. *Terlinden v. Ames*, 184 U. S. 270, 278 et seq., 22 Sup. Ct. 484. One wrongfully brought into a state, with or without extradition proceedings, and who is in its custody under a criminal charge, will not be released on habeas corpus on account of irregularity in such proceeding. *Ex parte Davis*, 103 S. W. 891, 12 L. R. A. (N. S.) 225, and note; 12 Ib. 227. See "Habeas Corpus," *Century Dig.* §§ 40-42; *Decennial and Am. Dig.* Key No. Series § 42.

STATE v. HERNDON, 107 N. C. 934, 12 S. E. 268. 1890.

Duty of Judge in Habeas Corpus Proceedings. Rights of Prisoner on Refusal to Discharge Him. Appeal. Certiorari.

[Application to a judge of the superior court for a writ of habeas corpus. Upon return of the writ the judge refused to examine witnesses, with a view to admitting the prisoner to bail, upon the ground that a true bill for murder had been found by the grand jury, which, per se, showed probable cause for detaining the prisoner in jail. The prisoner was, therefore, remanded to jail. Thereupon the prisoner applied to the supreme court for a writ of certiorari to review this action of the judge. A copy of the record being filed with the petition for a certiorari and taken, by consent, as a return to the writ, the court proceeded to pass upon the errors assigned. Reversed.]

CLARK, J. If the judge, upon the investigation of the evidence on a petition for habeas corpus, adjudges that there is or is not probable cause, and admits or refuses to admit to bail, no appeal or certiorari lies either in favor of the state or the petitioner. *Walton v. Gatlin*, 60 N. C. 310; *State v. Miller*, 97 N. C. 451, 1 S. E. 776. The quantum of evidence, and the number of witnesses to be examined, must necessarily be left also to the sound discretion of the judge who hears the writ, and his action in that regard cannot be reviewed. When, however, on the return of the writ, the judge declines to hear evidence because an indictment for a capital offense has been found against the petitioner, this presents a ruling of law which the petitioner is entitled to have reviewed by this court. The statute nowhere provides for an appeal in such case, but the constitution (article 1, § 18) guaranties the writ of habeas corpus, and if such ruling has the effect to deny its efficacy to any one who, on investigation of the evidence, might have been entitled to bail, this court by virtue of the constitution (article 4, § 8) has "the power to issue any remedial writ necessary to give it a general supervision and control over the proceedings of the inferior courts." It appearing that, upon the return of the writ, the judge declined to hear evidence or investigate the charge, the writ of certiorari should issue that we may be further advised concerning the matter. *Walton v. Gatlin*, *supra*; *Ex parte Biggs*, 64 N. C. 202; *State v. Jefferson*, 66 N. C. 309. . . . The judge having refused to hear the evidence, and to pass upon the right of the prisoner to be admitted to bail, committed error, and it must be so adjudged. *Lynch v. People*, 38 Ill. 494; *Com. v. Rutherford*, 5 Rand. (Va.) 646; *Lumm v. State*, 3 Ind. 293; *People v. Cole*, 6 Park. Crim. R. 695; 2 Hawk. P. C. c. 15, § 79; *Hurd, Hab. Corp.* 439; *Church, Hab. Corp.* p. 540. There are other cases, as where the prisoner is so sick as to be in danger of his life, or the prosecution is unreasonably delayed, and the like, in which the prisoner has been let to bail after indictment found. *Kirk's Case*, 5 Mod. 454; *U. S. v. Jones*, 3 Wash. C. C. 224, Fed. Cas. No. 15,495; *Bac. Abr.* "Bail in Criminal Cases," D; *Hurd, Hab. Corp.* 445. But these and like cases stand on a different footing from the present application, and are only authority that a habeas corpus may lie after indictment found for a capital offense. A statutory remedy is now given where the trial is unreasonably delayed by Code, § 1658. In a recent historical case, Jefferson Davis, after an indictment found for treason, was admitted to bail by the United States court. Where the charge is of a capital felony, which is *prima facie* not bailable, the courts are very slow to admit to bail, for there is good authority that "all that a man hath will he give in exchange for his life," and, after indictment found, it is only in a clear case, and with great caution, that a judge will admit to bail; for, while the indictment is no presumption of guilt on the trial before the petit jury, it is otherwise in the application for bail. The presumption then is in favor of the correctness of the action of the grand jury, and it may be that testimony was before them, which

is not produced before the judge. We merely decide that the finding of the true bill does not preclude the application. Of course, after indictment found, the judge cannot absolutely discharge the prisoner in any case, however clear a case of innocence may be made out, but must require his appearance at the next term of court. . . .

During the civil war, President Lincoln practically suspended the privileges of the writ of habeas corpus. Chief Justice Taney issued a writ of habeas corpus, from the circuit court of Maryland, directing that the body of one in the custody of the officers of the United States army be brought before him. The officers, acting under the orders of the president as commander in chief of the army, refused to obey the writ. The chief justice wrote an opinion in which he held that the president's action was unlawful, because the power to suspend the privileges of the writ of habeas corpus was vested exclusively in Congress. As the writ was still disobeyed, the chief justice declared that, having exhausted the powers of the judiciary, he could do no more. The writ was never obeyed. *Merryman's Case*, Taney's Circuit Court Rep. 246, Fed. Cas. No. 9,487. For similar action by Chief Justice Pearson, see *Ex parte Moore and others*, 64 N. C. 802, 810. After discussing the curt refusal of Col. Kirk of the state militia, to obey the writ of habeas corpus issued by the chief justice—Kirk's refusal being in obedience to the orders of the governor, as commander in chief of the militia—the chief justice says: "If the sheriff demands the petitioner of Col. Kirk, with his present orders, he will refuse, and then comes war. The country has had war enough. But it was said by the counsel of the petitioner, 'if in the assertion of civil liberty, war comes, let it come. The blood will not be on your hands, or on ours; it will be on all who disregard the sacred writ of habeas corpus. Let justice be done if the heavens fall.' It would be to act with the impetuosity of youth, and not with the calmness of age, to listen to such counsels. 'Let justice be done if the heavens fall,' is a beautiful figure of speech, quoted by every one of the five learned counsel. Justice must be done, or the power of the judiciary be exhausted; but I would forfeit all claim to prudence tempered with firmness should I, without absolute necessity, add fuel to the flame, and plunge the country into civil war, provided my duty can be fully discharged without that awful consequence. Wisdom dictates if justice can be done, 'let heaven stand.' Unless the governor revokes his orders, Col. Kirk will resist; that appears from the affidavit of service. The second branch of the motion, that the power of the county be called out if necessary to aid in taking the petitioner by force out of the hands of Kirk, is as difficult of solution as the first. The power of the county, or '*posse comitatus*,' means the men of the county in which the writ is to be executed—in this instance Caswell, and that county is declared to be in a state of insurrection. Shall insurgents be called out by the person who is to execute the writ, to join in conflict with the military forces of the state? It is said that a sufficient force will volunteer from other counties. They may belong to the association, or be persons who sympathize with it. But the '*posse comitatus*' must come from the county where the writ is to be executed; it would be illegal to take men from other counties. This is settled law. Shall illegal means be resorted to in order to execute a writ? . . . The writ will be directed to the marshal of the supreme court, with instructions to exhibit it and a copy of this opinion to his excellency the governor. If he orders the petitioner to be delivered to the marshal, well; if not, following the example of Chief Justice Taney, in *Merryman's case*, I have discharged my duty: the power of the judiciary is exhausted, and the responsibility must rest on the executive."

The state has no appeal from a judgment releasing a prisoner under habeas corpus proceedings. *State v. Miller*, 97 N. C. 451, 1 S. E. 776;

149 N. C. 436. Whether a *prisoner* can appeal in such proceedings, or will be forced to resort to a certiorari, is not satisfactorily determined. In *State v. Herndon*, 107 N. C. 334, 12 S. E. 268, the matter was carried up by certiorari; in *Claffin v. Underwood*, 75 N. C. 485, the point was waived; in *Stewart v. Bryan*, 121 N. C. 46, 28 S. E. 18, and in *re Boyett*, 136 N. C. 415, 48 S. E. 789, the prisoner appealed but whether or not that was the proper practice, is not discussed. See 21 Cyc. 335, 347, note 85. An appeal does lie in cases involving the custody of children. *State v. Miller*, 97 N. C. 451, 1 S. E. 776; *Revisal*, § 1854; *Walton v. Gatling*, 60 N. C. 311; *Ex parte Williams*, 149 N. C. 436, 63 S. E. 108; and see 2 L. R. A. (N. S.) 244, for the effect of the appeal on the custody of the child.

A prisoner may appeal from the circuit court of the United States to the United States supreme court where his petition alleges that he is imprisoned in violation of the United States constitution, *Dimmick v. Tompkins*, 194 U. S. 540, 24 Sup. Ct. 780; such appeals are restricted to those cases provided for by sec. 5 of the act of March 3, 1891, in *re Lennon*, 150 U. S. 393, 14 Sup. Ct. 123. The case of *Hunter v. Wood*, 209 U. S. 205, 28 Sup. Ct. 472, was carried up by the appeal of the officer from whose custody the prisoner was discharged.

See further, on the subject of Habeas Corpus, Injuries to Relative Rights—Husband and Wife, ch. 6, § 1 (a); and Parent and Child, ch. 6, § 2 (a). See "Habeas Corpus," Century Dig. §§ 96, 116; Decennial and Am. Dig. Key No. series §§ 107, 114.

(b) *False Imprisonment.*

STATE v. LUNSFORD, 81 N. C. 528. 1879.

What is, and What is Not an Imprisonment.

[Indictment for false imprisonment. The bill of indictment charged that defendant assaulted the prosecutor and unlawfully and injuriously, against his will and the laws of the state and without any legal warrant, authority, or reasonable or justifiable cause whatsoever, did imprison and detain the prosecutor. The jury rendered a special verdict to the effect that defendant and others went to the prosecutor's house in the night, and, under pretense of being strangers in search of a stolen horse, deceived him into riding behind one of the party on a horse. The defendants were disguised. After going about a quarter of a mile the prosecutor complained of the pain incident to his ride, and he was allowed to dismount and go home. The prosecutor went voluntarily. No violence was offered to him, and his only injury was the pain from the rapid ride. The whole thing was a mere practical joke at prosecutor's expense. Upon the verdict, judgment of guilty was pronounced by the judge, and the defendant appealed. Reversed.]

ASHB. J. False imprisonment is the illegal restraint of the person of any one against his will. The common law was so jealous of the personal liberty of the citizen, that it was regarded as a heinous offense, and the infringement of this right in England, under certain circumstances, was visited with severe punishment. False imprisonment generally included an assault and battery, and always at least a technical assault; and hence the form of the indictment, which is for an assault and battery and false imprisonment; though there may be a false imprisonment without touching the person of the prosecutor, as where a constable showed a magistrate's warrant to the prosecutor and desired him to go before the

magistrate, which he did, without further compulsion. This was held to be a sufficient imprisonment, because the officer exhibited a warrant for his arrest, and in going with him, he yielded to what he supposed to be a legal necessity. But there must be a detention, and the detention must be unlawful. 3 Blk. 127.

The prosecutor in this case went voluntarily with the defendants, with the expectation of a reward for his trouble. Instead of walking to the point of destination, a short distance from his house, he preferred to mount on the crupper of one of the horses ridden by some of the party, and after going about one fourth of a mile and discovering that he was the victim of a hoax, he complained of the uncomfortable mode of transportation, and dismounted without objection from any one. He was left all the while to exercise his own free will. There was no violence, no touching of his person, no threat, no intimidation of any sort. And the ruse employed by the defendants to decoy him from his house we do not think was such a fraud as to impress the transaction with the character of a criminal act. It seems to have been one of those practical jokes that is sometimes practised without any intention of doing harm or violating the law; and we are of the opinion that there was no violation of the criminal law in this case. There is error. Let this be certified, etc. Reversed.

What amounts to an imprisonment is discussed in 20 L. R. A. (N. S.) 967, and note. See "False Imprisonment," Century Dig. § 122; Decennial and Am. Dig. Key No. Series § 43.

BRYAN v. STEWART, 123 N. C. 92, 96-98, 31 S. E. 286. 1898.

When Trespass and When Case the Remedy. Remedy Under Code Practice. Void and Erroneous Process.

[Action for damages for false imprisonment. Judgment against the plaintiff, and he appealed. Affirmed.]

Stewart caused Bryan to be arrested under ancillary proceedings in arrest and bail. Bryan was discharged under habeas corpus proceedings, upon the ground that the clerk who issued the warrant of arrest, had no authority for doing so. Bryan then brought this action for false imprisonment against Stewart. By consent the judge tried the case without a jury. He found as a fact that Stewart caused Bryan to be arrested and imprisoned wrongfully and unlawfully. In the case on appeal it was admitted that this action was not for malicious prosecution, nor for the malicious abuse of legal process, but for the alleged false imprisonment under illegal process.]

FITCHES, J. . . . At common law there were two actions for an illegal arrest. One was where there was no legal excuse or justification for making the arrest, as where it was made without legal process, or, if made under the form of legal process, where the same was absolutely void. This was an action of trespass *vi et armis*. The other was where the process was erroneous, but not absolutely void. This was an action of trespass on the case, and was subject to the same rules and requirements as if it were an

action for malicious prosecution. Bish. Noncont. Law, § 211; Carman v. Emerson, 18 C. C. A. 38, 71 Fed. 264; Pol. Torts, 148. If the process is absolutely void, it will not protect the defendant who procured it to be issued, nor will it protect the officer making the arrest; but if the process is erroneously issued, but not void, it will protect the officer making the arrest. Murfree, Sheriffs, § 929; Pol. Torts, 148. And it will protect the defendant, who procured it to be issued, in an action *vi et armis* for false imprisonment, though such process, erroneously issued, will not protect the party procuring it to be issued from an action on the case, in the nature of malicious prosecution, where the want of probable cause and malice are alleged and shown. Newell, Mal. Pros. 199, 200; Pol. Torts, 148.

Under the present code practice, we are of the opinion that what was formerly an action *vi et armis* and an action of trespass on the case, in the nature of false imprisonment, might be joined with each other in the same action, and declared on in the same complaint. But, if this were done, still the allegation, on the case in the nature of malicious prosecution, would have to be sustained by evidence of malice and the want of probable cause, to entitle the plaintiff to recover. But by the agreement of the parties, entered of record, the action of trespass on the case, in the nature of an action for malicious prosecution, is eliminated and taken entirely out of consideration in this case, and it is left to be considered as an action of trespass *vi et armis* for false imprisonment alone. This being so, the correctness of the ruling of the court below and the defendant's liability for damages depend upon the question as to whether the process upon which the plaintiff was arrested was void or only erroneous; and this depends upon the fact as to whether the clerk who issued it was acting in a judicial capacity, or simply in the discharge of a ministerial duty. . . . That the clerk, in issuing the order of arrest, was acting in his judicial capacity, is sustained in *Austin v. Vrooman* (N. Y. App.), 28 N. E. 477. Bish. Noncont. Law, § 211. It is admitted that the clerk had the right—the jurisdiction—to issue the process under which the plaintiff was arrested; and we are clearly of the opinion that, in doing so, he acted in his judicial capacity, and not simply as a ministerial officer. This being so, the *causas* under which the plaintiff was arrested was not void, although it was erroneous. *Tucker v. Davis*, 77 N. C. 330; *Carman v. Emerson*, *supra*; Pol. Torts, 148; Bish. Noncont. Law, § 211. This process, having been issued by a judicial officer, in the exercise of the judicial functions of his office, was not void (though erroneous), and was a justification for the plaintiff's arrest in this action. . . . Affirmed.

See "Action," Century Dig. §§ 236-255; Decennial and Am. Dig. Key No. Series, § 50; "False Imprisonment," Century Dig. §§ 8-10, 32-42, 48-50; Decennial and Am. Dig. Key No. Series § 7.

COLTER v. LOWER, 35 Ind. 285, 9 Am. Rep. 735. 1871.

False Imprisonment Distinguished from Malicious Prosecution.

[Action for false imprisonment. Judgment against plaintiff, and he appealed. Reversed. The complaint alleged that the defendant falsely, wrongfully, and unlawfully seized and arrested the plaintiff "and confined him in unlawful imprisonment" in jail, no cause for which arrest and imprisonment, nor charge of any kind, having been at any time preferred against the plaintiff in any court; by reason whereof plaintiff suffered in mind, body and estate, etc. Defendant demurred because the complaint did not allege that the imprisonment was *malicious and without probable cause*. Demurrer sustained, and plaintiff excepted.]

DOWNEY, C. J. . . . The only question for our decision is as to the sufficiency of the complaint, for the court did not pass on the sufficiency of the answer, and therefore that question is not before us as a court of error. It is insisted by the appellees that the complaint is bad for the reason that it does not allege that the imprisonment was malicious and without probable cause. It must be conceded that if the approved precedents in the best works on pleading are to be received as evidence of what the law is on the subject, the allegation in question is essential. 2 Chit. Pl. 857, et seq. That the allegation is essential in an action for *malicious prosecution*, is well understood, and is recognized as the rule by this court. *Wilkinson v. Arnold*, 11 Ind. 45; *Ammerman v. Crosby*, 26 Ind. 451; *Stancliff v. Palmeto*, 18 Ind. 321. But we do not think it essential in an action for *false imprisonment*, such as the one in question.

There is a marked distinction between malicious prosecution and false imprisonment. At common law, the former was the subject of an action of trespass on the case, while for the latter, trespass vi et armis was the remedy. 1 Chit. Pl. 133, 167. If the imprisonment is under legal process, but the action has been commenced and carried on maliciously and without probable cause, it is malicious prosecution. If it has been extrajudicial, without legal process, it is false imprisonment. In *Turpin v. Remy*, 3 Blackf. 210, it was said by Stevens, J., in delivering the opinion of the court, "an action for a malicious prosecution can only be supported for the malicious prosecution of some legal proceeding, before some judicial officer or tribunal. If the proceedings complained of are extrajudicial, the remedy is trespass, and not an action on the case for a malicious prosecution." In *Johnstone v. Sutton*, 1 T. R. 544, it is said in speaking of the action for malicious prosecution, "there is no similitude or analogy between an action of trespass, or false imprisonment, and this kind of action. An action of trespass is for the defendant's having done that, which, upon the stating of it, is manifestly illegal. This kind of action is for a prosecution, which, upon the stating of it, is manifestly legal."

The cases for false imprisonment in this court, we think, fully maintain this distinction, and show that malice does not enter into

consideration in actions for that cause. The case of *Taylor v. Moffatt*, 2 Blackf. 305, was for false imprisonment, and the defendant was held liable because the judge, who awarded an attachment, at his instance, for violation of an injunction, was held to have no jurisdiction to do so, and the defendant was subjected to the payment of three thousand dollars damages. There was no indication of malice. In *Hall v. Rogers*, 2 Blackf. 429, the defendant was held liable, because the charge on which the arrest and imprisonment took place was not legally sufficient. See also *Wasson v. Canfield*, 6 Blackf. 406; *Poult v. Slocum*, 3 Blackf. 421. No proof of malice or want of probable cause is necessary to make out a case for false imprisonment. 2 Starkie's Ev. 1112. It frequently happens that false imprisonment includes a battery, but it is obvious that the latter is not necessarily included in the former. 2 Starkie's Ev. 1113. An action for malicious prosecution may be maintained, although there has been no imprisonment. That the plaintiff was assaulted and beaten, or that the arrest and imprisonment were otherwise accompanied with malice or other indignities, may, no doubt, be given in evidence, as tending to affect the amount of damages. 2 Starkie's Ev. 1114.

We regard the complaint as setting out a good cause of action. If there was any legal justification for the acts alleged to have been committed by the defendants, it devolves on them to set it up in their defense. The judgment is reversed, with costs, and the cause remanded.

See "False Imprisonment," Century Dig. §§ 2, 87; Decennial and Am. Dig. Key No. Series §§ 3, 20.

TAYLOR v. MOFFATT, 2 Blackf., 305. 1830.

Judicial Process Void for Want of Jurisdiction.

[Moffat was imprisoned for contempt of court. Taylor made the affidavit upon which the contempt was adjudged. The judge who committed Moffatt had no jurisdiction in vacation to commit for contempt, and this commitment was in vacation. Moffatt sued Taylor for false imprisonment. Verdict and judgment against Taylor, who carried the case to the supreme court by writ of error. Affirmed.]

HOLMAN, J. . . . The merits of the defense made by Taylor depend on the authority of the judge to order the attachment for the contempt. If the judge was acting within his jurisdiction, the plea of Taylor was a bar to the action, without any reference to the manner in which the judge's authority was exercised. Much has been said, in this case, about the ordering an attachment without giving Moffatt an opportunity of being heard, and about the commitment for an unlimited time; but we conceive that these are subjects that cannot affect the merits of Taylor's defense. For if a judicial officer, whether possessed of a general or a special jurisdiction, act erroneously, or even oppressively, in the exercise of his authority, an individual at whose suit he acts is not answerable, as

a trespasser, for the error or misconduct of the officer. But if a judicial officer, whose jurisdiction is special and limited, transcend his authority, and act in a case of which he has no cognizance, his proceedings are *coram non judge*, and no person, much less a suitor, can justify under them. . . .

In this case, as we learn from the plea of Taylor, the judge awarded the injunction at his chambers, on the 29th of September, 1827. The writ of injunction was issued on the 1st of October; the affidavits show a vending of merchandise by Moffat on the 4th, 5th, and 6th of the latter month; and the order for the attachment is dated at the judge's chambers on the 8th. So that, from the foregoing view of the subject, the judge had no jurisdiction of the case at the time he ordered the attachment. The order was a nullity, and Taylor could not justify under it. The plea was no bar to the action, and the circuit court very properly sustained the demurrer. See an extensive view of the doctrine of chancery attachments in *Yates v. The People*, 6 Johns. 337, and *Yates v. Lansing*, 9 Johns. 395. . . . Judgment affirmed.

A master, such as a railroad company, for instance, is liable for the acts of his servant in causing the unlawful imprisonment of another, when such servant acts within the scope of his authority. The measure of damages in such cases is "actual damages including injury to feelings and mental sufferings, and not punitive damages, unless the arrest was accompanied with malice, gross negligence, insult, or other aggravating circumstances." *Lovick v. R. R.*, 129 N. C. 427, 435, 40 S. E. 191, citing *Lewis v. Clegg*, 120 N. C. 292, 26 S. E. 772, and *Neal v. Joyner*, 89 N. C. 287; *Levin v. Burlington*, 129 N. C. 184. See also as to liability of employer for the acts of his agent or deputy in such cases, *Milton v. M. P. R. R. Co.*, 91 S. W. 949, 4 L. R. A. (N. S.) 282, and note. See "False Imprisonment," *Century Dig.* §§ 48, 49; *Decennial and Am. Dig.* Key No. Series, § 7.

(c) Malicious Prosecution and Abuse of Legal Process.

HOLMES v. JOHNSON, 44 N. C. 44. 1852.

Malicious Prosecution Defined. What Damages Must be Shown to Support the Action.

[Action on the case for Malicious Prosecution. Submission to arbitration. Award that judgment be entered against the plaintiff on the ground that this action could not be maintained. Motion to set aside the award. Motion overruled, and judgment against plaintiff, from which he appealed. Reversed.]

The proof was, that the defendant procured a warrant for larceny to be drawn up by a justice of the peace against the plaintiff; but the warrant was never placed in the hands of an officer and was not further proceeded with.]

BATTLE, J. It is stated in an elementary work of high authority, 3 Step. N. P. 2274, that "the foundation of an action for a malicious prosecution is the *malice of the defendant*, either expressed or implied; and whatever engines of the law malice may employ to accomplish its evil designs against innocent and unoffending per-

sons, whether in the shape of indictment or information, which charge a party with crimes injurious to his fame and reputation, and tend to deprive him of his liberty; or whether such malice be evinced by malicious arrests, or by exhibiting groundless accusations, merely with a view to occasion expense to the party, who is under the necessity of defending himself against them, the action on the case affords an adequate remedy to the party injured." There are three sorts of damage, any of which would be sufficient to support an action for malicious prosecution: 1st, "The damage to a man's fame, as if the matter thereof be scandalous; 2nd, Where a man is put in danger to lose his life, limb or liberty; 3rd, Damage to a man's property, as where he is forced to expend money in necessary charges to acquit himself of the crime, of which he is accused." Per Holt, C. J., in *Savile v. Roberts*, 1 *Ld. Ray.* 374.

The case before us seems to fall directly within the first class of damages, for which Lord Holt says the action will lie. It certainly cannot be contended, that taking out a warrant upon an accusation of larceny, has no tendency to endanger a man's reputation—that the matter whereof he is accused is not scandalous. Yet, if he be not allowed to avail himself of this action, he is entirely without remedy. He cannot sue for the slanderous words merely, because they were spoken in the course of a judicial proceeding. 3 *Step. N. P.* 2565. His reputation, it must be admitted, may be as much injured where the warrant was only sued out from a justice, and not put into the hands of an officer, as if it had been prosecuted to the utmost extent. Nay, more, for in the latter case the party might have vindicated his character by proving his innocence. Analogous to this is, we think, the case of a bill of indictment preferred and returned ignoramus (*Payne v. Porter*, *Cro. Jac.* 490); or that of a bill preferred coram non iudice. 1 *Roll. Abr.* Action sur case, (P) 112. Both upon principle and authority then, we think his honor in the court below erred in refusing to set aside the award, and in giving judgment for the defendant. For this error, the judgment must be reversed, and the award set aside.

See 9 *L. R. A.* (N. S.) 171, and note (making a criminal charge which is not followed by arrest). See "Malicious Prosecution," *Century Dig.* § 8; *Decennial and Am. Dig.* Key No. Series § 8.

GROVE v. BRANDENBURG, 7 Blackford, 234. 1844.

Stirring up Vexatious Litigation.

[Action of trespass on the case for inciting a person to bring an action of slander against the plaintiff. Defendant demurred. Demurrer sustained and judgment against plaintiff. Plaintiff carried the case to the supreme court by writ of error. Affirmed.]

The complaint alleged that the defendant falsely and maliciously informed Archibald Estep that plaintiff had said he was a horse-thief; that defendant had wickedly and maliciously procured Estep to sue

plaintiff for slander for the supposed speaking of such words; that defendant had testified as a witness in such action for slander and falsely swore that plaintiff had called Estep a horse-thief; by reason of all which Estep obtained a judgment against plaintiff, upon which plaintiff had been forced to pay out money, etc. There was a second count to the same effect, omitting the charge that defendant had testified as a witness and the result of the action for slander.]

BLACKFORD, J. . . . Both counts in this case charge the defendant with falsely and maliciously procuring Estep to sue the plaintiff in an action of slander; and the first count also charges the defendant with perjury, in swearing as a witness on the trial of that suit that the plaintiff had spoken the slanderous words. The law is said to be, that if one procures another to sue me *without cause*, an action lies not against him who sued without cause; but that for this falsity in procuring my vexation an action well lies. *Perren v. Bud*, Cro. Eliz. 793; *Savil v. Roberts*, 1 Salk. 13. It must be observed that the suit for vexation, etc., cannot be sustained, unless there was no cause for the action which was procured to be instituted. In the present case, the first count is bad, because it shows, by the verdict and judgment set out, that there was good ground for Estep's action; and the second is bad for not alleging the failure of that action. The charge of perjury against the defendant in giving testimony, etc., alleged in the first count, does not aid the plaintiff. See *Nelson v. Robe*, 6 Blackford, 204, and note; *Harding v. Bodman*, Hutton, 11. Judgment affirmed.

See "Torts," Century Dig. §§ 17, 18; Decennial and Am. Dig. Key No. Series §§ 13, 14.

PLUMMER v. GHEEN, 10 N. C. 66, 14 Am. Dec. 572. 1824.

Malice in Prosecuting One Who is Guilty. What Malicious Prosecutions are Actionable. Probable Cause.

[Action on the case for Malicious Prosecution. Judgment against defendant, and he appealed. Reversed.]

Plaintiff proved a state's warrant against him for perjury; that the defendant procured the issuing of the warrant; a bill of indictment on which the defendant was marked as prosecutor; that the bill of indictment was indorsed "not a true bill;" and that plaintiff had been thereupon discharged.

The judge charged, *inter alia*, that although probable cause was partly a question of law, yet it was so dependent on facts and circumstances of which the jury were the only judges, that in a case like this the court deemed it most proper to leave it to the jury to say whether the defendant had not probable ground for a suspicion amounting to probable cause. The defendant excepted to this charge on the ground that probable cause is a question of law, and the judge should not have left it to the jury to say whether reasonable suspicion was probable cause—for that permits the jury to substitute an inference of law for an inference of fact; but the judge should have defined probable cause and left it to the jury to say, whether, under the definition, it existed in this case upon the facts as the jury should find them to be. The judge below explained to the jury that probable cause by no means meant a good cause; that such circumstances as would warrant a reasonable suspicion in the

mind of the defendant that plaintiff had committed the crime of which defendant had accused him, and for which defendant had caused him to be prosecuted, would make out a case of probable cause.]

TAYLOR, C. J. The most material ground of this action is, that a legal prosecution was carried on against the plaintiff without probable cause, and this it was incumbent on him to prove expressly, for it cannot be implied. Where *probable cause is absent*, it is usual to imply malice as well as the knowledge of the defendant: but the want of probable cause *cannot be implied from the most express malice*. If a man prosecute another from real guilt, however malicious his motives may be, he is not liable in this action; nor is he liable if he prosecute him from apparent guilt, arising from circumstances which he honestly believes. These principles have been repeatedly laid down and sanctioned, and are necessary to be kept in view in considering the nature of the action. 1 T. R. 544. . . . As the question of probable cause is compounded of law and fact, the defendant had a right to the opinion of the court distinctly on the law, on the supposition that he had established, to the satisfaction of the jury, certain facts. Whether the circumstances were true was a question for the jury; whether, being true, they amounted to probable cause is a question of law.

It is true that the court explained to the jury what probable cause was, and explained it correctly; but then, in the subsequent part of the charge, it is left at large for the jury to say whether the defendant had not this probable ground for suspicion amounting to probable cause. Whereas, the right instruction was, that if the defendant had, in their opinion, this probable ground of suspicion, *it amounted in point of law to probable cause*. I am of opinion, therefore, that there ought to be a new trial.

Whether there was probable cause is a question of law, but the jury must find the facts which constitute it. If there is evidence tending to show probable cause, the judge must explain what constitutes probable cause and leave the jury to ascertain from the facts whether or not it existed: but where the evidence, if all taken to be true, fails to make out probable cause, the judge should so instruct the jury. *Jones v. R. R.*, 125 N. C. at p. 229, 34 S. E. 398, citing the principal case and other authorities. See also *Moore v. Bank*, 140 N. C. 293, 52 S. E. 944. For the rule laid down in the principal case, see 26 Cyc. 22. See 9 L. R. A. (N. S.) 1087 (when malice may be inferred). See "Malicious Prosecution," Century Dig. §§ 21, 22, 161, 169; Decennial and Am. Dig. Key No. Series §§ 16, 71, 72.

ALLEN v. GREENLEE, 13 N. C. 370. 1830.

Malicious Prosecution Distinguished from False Imprisonment. Does Trespass or Case Lie for Malicious Prosecution?

[Action on the Case for Malicious Prosecution. Verdict and judgment against defendant, and he appealed. Reversed.]

Defendant had procured the plaintiff's arrest on a charge which defendant preferred before a justice of the peace, and, while thus under arrest, the defendant grossly abused the plaintiff, struck him, and spit in his face. Upon examination of the charge the justice discharged the plaintiff. The defendant proved that the plaintiff had done the acts for

which defendant had prosecuted him before the justice. The judge charged that there was no probable cause shown, and if the defendant maliciously procured the issuing of the warrant for plaintiff's arrest, the jury should find for the plaintiff. The acts for which the defendant prosecuted the plaintiff criminally were not criminal under the law, but mere civil trespasses.]

RUFFIN, J. It is proper that the boundaries of actions should not be confounded; but that for every wrong the appropriate remedy should be pursued. An action of trespass lies for all injuries of which force is the immediate cause, and for which the defendant cannot produce a justification. If one person cause another to be arrested without process, it is a trespass and false imprisonment. So, if he arrest him upon process that is void in itself, or is issued by a court or magistrate having no jurisdiction. An action for malicious prosecution, on the other hand, is a special action on the case, for the abuse of the process of law from malicious motives. It presupposes valid process, and case is given because trespass will not lie. It is given against the party suing it out, because the hand which executes the process is justified by it, and it is not guilty of a trespass. There being no other remedy, this special action is provided.

In the case before us, the propriety of this rule is made very manifest. The charge in the warrant is for a mere civil injury, of which a justice of the peace has no jurisdiction. It constitutes no crime. But every fact alleged in the warrant is fully proved. That did not justify Greenlee in taking it out; because admitting the facts to be true, the magistrate could not take cognizance of the case, since it was not an indictable offense, nor a private wrong which he could redress. The prosecutor, magistrate, and sheriff were, therefore, all guilty of a trespass. But how can malicious prosecution lie? That can only be sustained where the party has been *lawfully* arrested, and where the prosecutor had no probable cause to believe the party guilty of the acts charged to him. Now, every fact charged here was proved. If that does not constitute probable cause, nothing can. It is true, they do not constitute probable cause to think that Allen was guilty of a crime, but no crime is charged, and they do make probable cause to think that he did the acts charged, since it is in proof that he, in fact, did them. The judge confounded two distinct principles when, in order to maintain this suit for what appears to have been insulting and oppressive conduct on the part of the defendant, he told the jury that there was no probable cause. There was full proof. Had the action been trespass, he would have been perfectly right in saying the evidence proved no justification. This action cannot be maintained, and there must be a new trial. Reversed.

For distinction between false imprisonment and malicious prosecution, see 19 Cyc. 321. For the remedy for false imprisonment, see 19 Cyc. 357. For the remedy for malicious prosecution, see 26 Cyc. 68. See "False Imprisonment," Century Dig. §§ 2, 81; Decennial and Am. Dig. Key No. Series §§ 3, 16; "Malicious Prosecution," Century Dig. §§ 23-55; Decennial and Am. Dig. Key No. Series §§ 17-24.

BARFIELD v. TURNER, 101 N. C. 357, 360, 8 S. E. 115. 1888.

What the Complaint Should Contain in Malicious Prosecution.

[Action intended to be for Malicious Prosecution. There was a demurrer ore tenus. Demurrer sustained, and judgment against the plaintiff, from which he appealed. Affirmed.]

Plaintiff alleged that the defendant procured his arrest and imprisonment under process sued out by the defendant in a justice's court, whereby plaintiff suffered in mind, body, financial standing, and estate. What the complaint lacked is shown in the opinion, only so much of which as bears upon this defect is here inserted.]

MERRIMON, J. . . . The plaintiff does not allege that the process was void, or that it was groundless, or that it was issued without probable cause, or that it was prompted by malice, or that it was ended. The substance of these things he should have alleged, if he intended to allege a cause of action for malicious prosecution, as it seems he intended to do. Judgment affirmed.

2 L. R. A. (N. S.) 927, and note (when an action is deemed terminated). The opinion in the principal case says, inferentially, that the complaint might have alleged that the process was void. Is that correct? See the preceding cases under this sub-section. See "Malicious Prosecution," Century Dig. §§ 91-99; Decennial and Am. Dig. Key No. Series §§ 47-51.

CRESCENT LIVE STOCK CO. v. BUTCHERS' UNION, 120 U. S. 141, 7 Sup. Ct. 472.

Malicious Prosecution. Essential Points. Effect of a Judgment Reversed on Appeal as Probable Cause. Judgment of Committing Magistrate as Probable Cause.

[Action in a state court for malicious prosecution, in which the Butchers' Union was plaintiff and Crescent Live Stock Co. was defendant. Appeal to the supreme court of the state from a judgment against the Crescent Live Stock Co. Judgment affirmed in that court, and the cause carried to the supreme court of the United States by writ of error. Reversed.]

The defendant showed a decree of the circuit court of the United States granting and perpetuating an injunction, and insisted that it was conclusive proof of probable cause for the prosecution of the suit which is claimed in this action to have been a malicious prosecution. The defendant requested the court to charge that the decree of the United States court was, per se, conclusive that probable cause existed for the prosecution of the suit in which the decree was rendered, even though such decree was subsequently reversed. This charge the judge refused to give. Only selected extracts from the opinion are here inserted.]

MR. JUSTICE MATTHEWS. . . . The decree of the circuit court was relied upon in the state court as a complete defense to the action for malicious prosecution, on the ground that it was conclusive proof of probable cause. The supreme court of Louisiana, affirming the judgment of the inferior state court, denied to it, not only the effect claimed, but any effect whatever. It is conceded that, according to the law of Louisiana, the action for a malicious

prosecution is founded on the same principles, and subject to the same defenses, as have been established by the common law prevailing in the other states. . . . In the opinion in the present case, the supreme court of Louisiana say that to sustain the charge of malicious prosecution it is necessary to show "(1) that the suit had terminated unfavorably to the prosecutor; (2) that in bringing it the prosecutor had acted without probable cause; (3) that he was actuated by legal malice, i. e., by improper or sinister motives. The above three elements must concur."

And, when there is no dispute of fact, the question of probable cause is a question of law, for the determination of the court. *Stewart v. Somnborn*, 98 U. S. 187, 194. Want of probable cause, and the existence of malice, either express or implied, must both concur to entitle the plaintiff in an action for a malicious prosecution to recover. So that, if probable cause is shown, the defense is perfect, notwithstanding the defendant in instituting and carrying on the action may have been actuated solely by a motive and intent of malice. If he had probable cause to institute his action, the motives by which he was actuated, and the purposes he had in view, are not material.

How much weight, as proof of probable cause, shall be attributed to the judgment of the court in the original action, when subsequently reversed for error, may admit of some question. It does not appear to have been judicially determined in Louisiana. In the case of *Griffis v. Sellars*, 4 Dev. & B. 177, *Ruffin, C. J.*, said "that probable cause is judicially ascertained by the verdict of the jury, and judgment of the court thereon, although upon an appeal a contrary verdict and judgment be given in a higher court." In *Whitney v. Peckham*, 15 Mass. 243, such a judgment was held to be conclusive in favor of the existence of probable cause. To the same effect is *Herman v. Brookerhoff*, 8 Watts, 240, in an opinion of Chief Justice Gibson. The decision in the case of *Whitney v. Peckham*, *ubi supra*, however, was questioned by the supreme court of New York in the case of *Burt v. Place*, 4 Wend. 591, 598, where *Marcy, J.*, delivering the opinion of the court, said that the Massachusetts decision rested entirely upon *Reynolds v. Kennedy*, 1 Wils. 232, which had been qualified by the decision of *EYRE*, baron of the exchequer, in *Sutton v. Johnstone*, 1 Term R. 505, and by what was said by Lord MANSFIELD and Lord LOUGHBOROUGH in the same case, which came before them on a writ of error. 1 Term R. 512.

The effect of these English authorities, as stated by *Marcy, J.*, in *Burt v. Place*, *ubi supra*, is as follows: "That if it appears by the plaintiff's own declaration that the prosecution, which he charges to have been malicious, was before a tribunal having jurisdiction, and was there decided in favor of the plaintiff in that court, nothing appearing to fix on him any unfair means in conducting the suit, the court will regard the judgment in favor of the prosecution satisfactory evidence of probable cause." In that case the judgment relied upon by the defendant was held not to be

conclusive. The reason is stated to be as follows: "Though the plaintiff admits in his declaration that the suits instituted before the magistrate by the defendant were decided against him, he sufficiently countervails the effect of that admission by alleging that the defendant, well knowing that he had no cause of action, and that the plaintiff had a full defense, prevented the plaintiff from procuring the necessary evidence to make out that defense by causing him to be detained a prisoner until the judgments were obtained, and by alleging that the imprisonment was for the very purpose of preventing a defense to the actions."

Commenting on this case, the court of appeals of Kentucky in *Spring v. Besore*, 12 B. Mon. 551, 555, say: "The principle settled in the case last cited we understand to be that such a judgment will not, in every possible state of case, be deemed to be conclusive of the question of probable cause; but that, like judgments in other cases, its effect may be destroyed by showing that it was procured by fraud or other undue means." That court proceeds to state the rule as follows: "The correct doctrine on the subject is, in our opinion, that the decree or judgment in favor of the plaintiff, although it be afterwards reversed, is, in cases where the parties have appeared, and proof has been heard on both sides, conclusive evidence of probable cause, unless other matters be relied upon to impeach the judgment or decree, and show that it was obtained by fraud, and, in that case, it is indispensable that such matter should be alleged in the plaintiff's declaration, for unless it be done, as the other facts which have to be stated establish the existence of probable cause, the declaration is suicidal. The plaintiff's declaration will itself always furnish evidence of probable cause when it states, as it must do, the proceedings that have taken place in the suit alleged to be malicious, and shows that a judgment or decree has been rendered against the plaintiff. To counteract the effect of the judgment or decree, and the legal deduction of probable cause, it is incumbent upon him to make it appear in his declaration that such judgment or decree was unfairly obtained, and was the result of acts of malice, fraud, and oppression on the part of the defendant, designed and having the effect to deprive him of the opportunity and necessary means to have defeated the suit, and obtained a judgment in his favor."

The limitations upon the general principle declared in *Burt v. Place*, *ubi supra*, were followed by the supreme court of Maine in *Witham v. Gowen*, 14 Me. 362, and both decisions were referred to in the subsequent case of *Payson v. Caswell*, 22 Me. 212, 226, where the court said: "In these two cases we have instances of exceptions to the general rule, indicative of the general nature of the characteristics which might be expected to attend them; but the rule itself remains unimpaired. If there be a conviction before a magistrate having jurisdiction of the subject-matter, not obtained by undue means, it will be conclusive evidence of probable cause."

The propriety of this limitation of the rule seems to have been admitted by the supreme judicial court of Massachusetts in *Bacon*

v. Towne, 4 Cush. 217, 236, though in later cases it reiterated the broader rule, as originally stated in *Whitney v. Peckham*, *ubi supra*. *Parker v. Huntington*, 7 Gray, 36.

This seems to reconcile the apparent contradiction in the authorities, and states the rule, which we think to be well grounded in reason, fair and just to both parties, and consistent with the principle on which the action for malicious prosecution is founded.

It is, perhaps, not material in this case to define the rule with precision, and to attempt to state with accuracy the precise effect to be given to a judgment or decree of the court as proof of probable cause under all circumstances, because in the present case the decree of the circuit court of the United States was adjudged to be entitled to no effect whatever as evidence in support of the defense of the plaintiff in error. . . .

But the rule in question, which declares that the judgment or decree of a court having jurisdiction of the parties and of the subject-matter, in favor of the plaintiff, is sufficient evidence of probable cause for its institution, although subsequently reversed by an appellate tribunal, was not established out of any special regard to the person of the party. As we have already seen, it will avail him as a complete defense in an action for a malicious prosecution, although it may appear that he brought his suit maliciously, for the mere purpose of vexing, harassing, and injuring his adversary. The rule is founded on deeper grounds of public policy, in vindication of the dignity and authority of judicial tribunals constituted for the purpose of administering justice according to law, and in order that their judgments and decrees may be invested with that force and sanctity which shall be a shield and protection to all parties and persons in privity with them. The rule, therefore, has respect to the court and to its judgment, and not to the parties, and no misconduct or demerit on their part, except fraud in procuring the judgment itself, can be permitted to detract from its force. It is equally true and equally well settled in the foundations of the law that neither misconduct nor demerit can be imputed to the court itself. It is an invincible presumption of the law that the judicial tribunal, acting within its jurisdiction, has acted impartially and honestly. The record of its proceedings imports verity; its judgments cannot be impugned except by direct process from superior authority. The integrity and value of the judicial system, as an institution for the administration of public and private justice, rests largely upon this wholesome principle. That principle has been disregarded in the present case by the supreme court of Louisiana in failing to give due effect to the decree of the circuit court of the United States as sufficient evidence in support of the defense of the plaintiff in error in this action, so far as it is an action for the recovery of damages for a malicious prosecution.

The judgment of the supreme court of Louisiana on the bond it self, for damages occasioned by its breach, against the principal and surety, is not attacked in this proceeding. It is so far affirmed

But that part which constitutes a judgment against the Crescent City Live-stock Landing & Slaughterhouse Company solely, for damages for the malicious prosecution, is reversed, and the cause is remanded for further proceedings therein not inconsistent with this opinion; and it is so ordered.

That probable cause is a question of law for the court, see *Plummer v. Gheen*, 10 N. C. 66, inserted ante in this sub-section, and the note to that case. Particular, as distinguished from general, malice must be shown. Particular malice is malice against a certain person. General malice is malice against mankind in general. Particular malice may be shown by threats and expressions of ill will; or it may be inferred from want of probable cause. *Brooks v. Jones*, 33 N. C. 260; see also *Savage v. Davis*, 131 N. C. 159, 42 S. E. 571, affirming this and stating that particular malice is not essential in libel, though it is in malicious prosecution. If there be want of probable cause, etc., the advice of counsel is not an absolute defense, but it may be shown to rebut the presumption of malice. *Smith v. B. & L. Association*, 116 N. C. 73, 75, 20 S. E. 963; *Railroad v. Hardware Co.*, 143 N. C. 54, 58, 55 S. E. 422. In some states the advice of counsel makes out a case of probable cause, if the defendant shows that he acted in good faith. *Black v. Buckingham*, 174 Mass. 102, 54 N. E. 494; *Pawlowski v. Jenks*, 115 Mich. at p. 276, 73 N. W. 238. See also as to advice of counsel, 26 Cyc. 31; 19 Am. & Eng. Enc. L. 685. See also, on the question of probable cause, 18 L. R. A. (N. S.) 49-74, and elaborate note (advice of counsel); 6 Ib. 701, and note, 149 N. C. 100 (effect of reversal of conviction, on appeal); 6 L. R. A. (N. S.) 701, and note (effect of nol. pros.); 20 Ib. 295, and note, 149 N. C. 100 (effect of plea of guilty); 15 L. R. A. (N. S.) 1143, and note (conviction secured by fraud and perjury); 2 Ib. 1100, and note (effect of want of jurisdiction of the court in which the prosecution was begun); 12 Ib. 717, and note (effect of release after arrest, without further prosecution); 3 Ib. 928, and note (effect of discharge by magistrate). See "Malicious Prosecution," Century Dig. § 58; Decennial and Am. Dig. Key No. Series § 25.

WOOD v. GRAVES, 144 Mass. 365, 11 N. E. 567. 1887.

Abuse of Legal Process.

[Tort against Graves and others. Verdict against defendants, who alleged exceptions. The complaint contained three counts: (1) For malicious prosecution; (2) For false imprisonment; (3) For abuse of legal process. No facts are stated and none are necessary. The judgment below was reversed, but upon a point immaterial to the subject under consideration. After showing that the first two counts were not sustained by the proof, the opinion proceeds:]

C. ALLEN, J. . . . There is no doubt that an action lies for the malicious abuse of lawful process, civil or criminal. It is to be assumed, in such a case, that the process was lawfully issued for a just cause, and is valid in form, and that the arrest or other proceeding upon the process was justifiable and proper in its inception. But the grievance to be redressed arises in consequence of subsequent proceedings. For example, if, after an arrest upon civil or criminal process, the party arrested is subjected to unwarrantable insult and indignities, is treated with cruelty, is deprived of proper food, or is otherwise treated with oppression and undue

hardship, he has a remedy by an action against the officer, and against others who may unite with the officer in doing the wrong.

It is sometimes said that the protection afforded by the process is lost, and that the officer becomes a trespasser *ab initio*. *Esty v. Wilmot*, 15 Gray, 168; *Malcom v. Spoor*, 12 Mete. 279. This rule, however, is somewhat technical, and is hardly applicable to others than the officer himself. But the principle is general, and is applicable to all kinds of abuses outside of the proper service of lawful process, whether civil or criminal, that for every such wrong there is a remedy, not only against the officer whose duty it is to protect the person under arrest, but also against all others who may unite with him in inflicting the injury. Perhaps the most frequent form of such abuse is by working upon the fears of the person under arrest, for the purpose of extorting money or other property, or of compelling him to sign some paper, to give up some claim, or to do some other act, in accordance with the wishes of those who have control of the prosecution. The leading case upon this subject is *Grainger v. Hill*, 4 Bing. (N. C.) 212, where the owner of a vessel was arrested on civil process, and the officer, acting under the directions of the plaintiffs in the suit, used the process to compel the defendant therein to give up his ship's register, to which they had no right. He was held entitled to recover damages, not for maliciously putting the process in force, but for maliciously abusing it, to effect an object not within its proper scope. In *Page v. Cushing*, 38 Me. 523, the same doctrine was held applicable to the abuse of criminal process. *Holley v. Mix*, 3 Wend. 350, is to the same effect, and it was held that an action for false imprisonment will lie against an officer and a complainant in a criminal prosecution where they combine and extort money from a party accused by operating upon his fears, though the party was in the custody of the officer under a valid warrant, issued upon a charge of felony.

The case of *Baldwin v. Weed*, 17 Wend. 224, was an action for false imprisonment. The plaintiff had been indicted in New York. He was arrested in Vermont, and carried to New York for trial. The defendant, Weed, procured the requisition, was present at the arrest, and caused the plaintiff to be put into irons, with the purpose to secure two small debts. The plaintiff executed to Weed a bond for the delivery of property much in excess of the debts. The action for malicious prosecution failed, but the court [NELSON, J.] declared that an action of trespass, assault, and false imprisonment should have been brought, and was the appropriate remedy for the excess of authority and abuse of the process, and intimated to the plaintiff to amend his pleadings accordingly. See, also, *Carleton v. Taylor*, 50 Vt. 220; *Mayer v. Walter*, 64 Pa. St. 283.

On similar grounds, an officer becomes responsible in damages, for abuse of process, or as trespasser *ab initio*, by reason of such abuse, who omits to give an impounded beast reasonable food and water while under his care (*Adams v. Adams*, 13 Pick. 384); or who stays too long in a store where he has attached goods (*Rowley*

v. Rice, 11 Mete. 337; Williams v. Powell, 101 Mass. 467; Davis v. Stone, 120 Mass. 228; or who keeps a keeper too long in possession of attached property (Cutler v. Howe, 122 Mass. 541); or who places in a dwelling house an unfit person as keeper, against the owner's remonstrance (Malcom v. Spoor, 12 Mete. 279).

In various other cases, where it has been said that the only remedy was by an action for malicious prosecution, the whole grievance complained of consisted in the original institution of the process, and no abuse in the mere manner of serving it was alleged. Such cases are Mullen v. Brown, 138 Mass. 114; Hamillburgh v. Shepard, 119 Mass. 30; Coupal v. Ward, 106 Mass. 289; O'Brien v. Barry, *Id.* 300. The case of Hackett v. King, 6 Allen, 58, was trover for the conversion of property which the plaintiff conveyed to the defendant under alleged duress. In Taylor v. Jaques, 106 Mass. 291, the question arose in another form, the action being on a promissory note, in defense to which the defendant alleged that his signature was procured by duress.

See 12 L. R. A. (N. S.) 1019, and note (insult, etc., after arrest). See "Malicious Prosecution," Century Dig. § 7; Decennial and Am. Dig. Key No. Series § 7.

ADAMS v. LISHER, 3 Blackford, 241, 244. 1833.

Malice and Probable Cause. Prosecutions for Wrongs Affecting the Public Distinguished from Those for Private Benefit. Effect of Acquittal on the Question of Probable Cause.

[Lisher sued Adams for Malicious Prosecution. Verdict and judgment against Adams, who carried the case to the supreme court by writ of error. Reversed. Adams had "prosecuted Lisher in an action of trespass for cutting timber on the land of the United States," and caused him to be imprisoned by the United States marshal. Lisher was acquitted of this charge, and then brought this action against Adams. The judge charged that although Lisher was guilty of cutting certain poplar trees on the land of the United States, yet, if that fact was *unknown to Adams* at the time he caused the action to be commenced against Lisher, the prosecution was malicious and Lisher could recover.]

STEVENS, J. . . . The last error complained of is the instruction of the court to the jury, that although the plaintiff was guilty of cutting some of the poplar trees on the land in question, as charged in the declaration, yet, if that fact was unknown to the defendant at the time he caused the action of trespass to be commenced, the prosecution was malicious, and the defendant was liable to the plaintiff for a malicious prosecution. The grounds of this action are malice, either express or implied, and the want of probable cause; both must exist, or the action cannot be maintained. From the want of probable cause, malice may be implied; but the want of probable cause can never be implied from the proof of malice. The direct proof of the most intense malice is not sufficient; there must be proof also of the want of probable cause, or the suit must fail. The want of probable cause is never

implied. There is a distinction between malicious arrests in civil suits between individuals prosecuted for the private benefit of the plaintiff and a malicious prosecution of an offense, misdemeanor or wrong, which affects the public. In the latter case, the prosecutor is much more favored than in the other. It is a rule of law which seems to be founded on principles of policy, convenience, justice, and necessity, that the prosecutor of a wrong that affects the public shall be protected, provided he has probable cause, however malicious his private motives may have been; for although he may have intended ill, still good may arise to the public. 1 T. R. 493; *White v. Dingley*, 4 Mass. 433; *Lindsay v. Larned*, 17 Mass. 190; *Vanduzor v. Linderman*, 10 Johns. 106; 2 Stark. Ev. 911; 2 Wils. 302; 2 Saund. Pl. & Ev. 195; 1 Sw. Dig. 491.

This suit is founded on a prosecution set on foot by the defendant against the plaintiff, for a wrong that affects the public, and, therefore, the defendant stands on the footing of the most favored class of prosecutors. It was an action of trespass for cutting and carrying away from lands belonging to the public, timber, that is to say, two poplar trees, and one hickory tree, etc. The gist of that action was the trespass, and proof of cutting and carrying away any one of those trees, would be sufficient to sustain the action; and if he were guilty of the trespass, he cannot maintain this action, although he may have been acquitted in the district court, where he was prosecuted; and it is immaterial whether the defendant knew him guilty or not, if he can now prove the fact that he was guilty, or if he can even prove that there was probable cause to suspect him of being guilty, it is sufficient for him. Judgment reversed.

See "Malicious Prosecution," Century Dig. §§ 49-55; Decennial and Am. Dig. Key No. Series § 24.

RAILROAD v. HARDWARE CO., 143 N. C. 54, 57-59, 55 S. E. 422. 1906.
Abuse of Legal Process and Malicious Prosecution Distinguished. Advice of Counsel.

[Action for abuse of legal process in attaching plaintiff's cars and keeping them tied up for two years. What judgment was rendered, is not disclosed in the reported case, but both parties appealed. Affirmed.]

CLARK, C. J. . . . The court below erred in instructing the jury that "if they believed the evidence to answer the first issue 'Yes.' That issue was, 'did the defendant wrongfully, and without probable cause, cause to be issued and levied a warrant of attachment upon the property of the plaintiff?'" There was ample evidence to submit to the jury upon the question of probable cause. There was the testimony of the general manager of the defendant that the party who bought the goods told him they were for the use of, and bought for the account of, the plaintiff; that he had no reason whatsoever to disbelieve this statement; that the action was

instituted by the defendant in the utmost good faith, believing that the plaintiff verily owed the debt for which the property was attached; that, notwithstanding this belief, out of the abundance of caution, he submitted honestly all the facts to his counsel, who advised him that he had a cause of action against the plaintiff; that no steps were taken except such as were advised by his attorney; that, as for attaching more property than the amount of his claim would warrant, he had no idea what property the sheriff had attached under, and by virtue of, the writ, and that his only cause for taking a nonsuit at the time of the trial of the action was his inability to secure the attendance, as a witness, of the party who bought the goods." The defendant had laid all the facts before counsel of high standing in the profession, and had sued out the attachment under his advice. This is evidence to rebut the allegation of malice. *Smith v. B. & L. Assn.*, 116 N. C. 73, 20 S. E. 963, and there are many authorities holding that it is evidence, also, of probable cause. See cases collected in note 93 Am. St. Rep. 461. This action furthermore cannot be maintained for malicious prosecution, if as the jury have found, there was no malice. *Railroad v. Hardware Co.*, 138 N. C. 174, 50 S. E. 571.

The only ground for an action for abuse of process is the levy on an excessive number of cars for the alleged purpose of forcing payment of an alleged debt, preferably to submitting to loss and inconvenience by the attachment. There was certainly evidence, above set out, in denial of this, and it was error in any aspect of the case to instruct the jury to answer the first issue "Yes." If the officer levied, as it seems that he did, on an excessive quantity of property, the plaintiff in the attachment was not liable for the abuse unless it had in some way directed, advised or encouraged such act. 19 Am. & Eng. Enc. (2d ed.) 630. This being denied, raised an issue for the jury.

It may be as well to note here the distinction between an action for malicious prosecution and an action for abuse of process. In an action for malicious prosecution there must be shown (1) malice, and (2) want of probable cause, and (3) that the former proceeding has terminated. *Railroad v. Hardware Co.*, 138 N. C. 174, 50 S. E. 571. In an action for abuse of process it is not necessary to show either of these three things. By an inadvertence it was said in the case last cited that want of probable cause must be shown. "If process either civil or criminal is wilfully made use of for a purpose not justified by the law, this is an abuse for which an action will lie." 1 Cooley, Torts (3d ed.), 354. "Two elements are necessary: First, an ulterior purpose; second, an act in the use of the process not proper in the regular prosecution of the proceeding." *Id.* 355; 1 Jaggard, Torts, § 203; Hale on Torts, § 185. "An abuse of legal process is where it is employed for some unlawful object not the purpose intended by law. It is not necessary to show either malice or want of probable cause, nor that the proceeding had terminated, and it is immaterial whether such proceeding was baseless or not." *Mayer v. Walter*, 64 Pa.

283. The distinction has been clearly stated. *Jackson v. Tel. Co.*, 139 N. C. 356, 51 S. E. 1015, 70 L. R. A. 738. Error.

An action lies for the malicious abuse of lawful process—whether civil or criminal—issued for a just cause, valid in form, and proceeded on in a manner justified and proper in its inception, but subsequently abused. *Jackson v. Telegraph Co.*, 139 N. C. 347, headnote 9, 51 S. E. 1015, inserted post, in this section. See "Process," *Century Dig.* § 257; *Decennial and Am. Dig. Key No. Series* § 168.

DOCTOR et al. v. RIEDEL et al., 96 Wis. 158, 71 N. W. 119. 1897.

Lawful Exercise of Legal Process with a Malicious Motive and Ulterior Vindictive Object. Executing Lawful Process in an Offensive Manner.

[Action for abuse of legal process. General demurrer. Demurrer overruled. Judgment against defendants, and they appealed. Reversed. The facts appear in the beginning of the opinion.]

WINSLOW, J. The complaint charges, in brief, that the defendants, without previous demand, entered judgment upon a judgment note at 10 o'clock at night, and immediately issued execution thereon, and broke into the plaintiffs' store, and levied upon their stock of goods, with the malicious intent thereby to injure and destroy the plaintiffs' business credit and reputation, and that the plaintiffs, on being informed of the seizure, immediately paid the judgment and procured release of the levy. Plainly, the complaint does not state a case of malicious prosecution of a civil action, because the action ended favorably to the present defendants; thus demonstrating that there was not only probable, but perfect, cause for bringing it. *O'Brien v. Barry*, 106 Mass. 300. It is claimed, however, that a cause of action is stated for abuse of process. The authorities upon the question of what will constitute a cause of action for abuse of process are certainly in a state of some confusion, and frequently this action seems to have been confounded with actions for malicious prosecution, although they are essentially different actions. The leading case on the subject, perhaps, is the case of *Grainger v. Hill*, 4 Bing. N. C. 212. Here the plaintiff was arrested at a time when he could not procure bail, and kept under arrest until he surrendered a ship's register. The capias was a valid writ, regularly issued upon a good cause of action, but it was used to effect an ulterior and illegitimate purpose; and for that use there was held to be a remedy in tort, regardless of the question whether the original action was determined or whether it was founded on probable cause. So, where an execution is issued upon a judgment already paid or for an excessive amount, and goods are levied upon, a remedy is given. In these and similar cases, as said by an eminent text writer, "it is enough that the process was wilfully abused to accomplish some unlawful purpose." *Cooley, Torts* (2d ed.), pp. 220, 221. This is probably the test, namely, whether the process has been used to accomplish some unlawful end, or to compel the defendant to do

some collateral thing which he could not legally be compelled to do. *Johnson v. Reed*, 136 Mass. 421. Applying this test to the case before us, we do not discover any cause of action stated. The process of the court has been used to collect a valid debt, and in precisely the manner that the plaintiffs here consented to its use by the judgment note. By this instrument the plaintiffs authorized its holder to enter judgment and issue execution at any time, and this is all that has been done. The defendants seem to have acted strictly within their right. The general rule is that, where one exercises a legal right, his undisclosed motives are immaterial. *Phelps v. Nowlen*, 72 N. Y. 39; *Rayeroff v. Tayntor*, 68 Vt. 219, 35 Atl. 53. We see no reason why the rule should not apply here. The defendants having collected their debt in a way which they were authorized to use, we cannot punish them for their secret motives. The plaintiffs had an open account at the bank, upon which there stood \$850 to their credit, and they claim that this should have been applied upon the note. Whether the bank had a right to make such an application without consent may be doubtful, but, whether it could do so or not, we see no reason for holding that it was obliged to do so. Order reversed and action remanded, with directions to sustain the demurrer.

MARSHALL, J. (dissenting). I understand the decision of the court to be to the effect that if a person is in the mercantile business and unquestionably solvent, to the knowledge of another to whom he is indebted on a judgment note, the circumstances being that such other knows he can obtain payment of such note on demand, he may, notwithstanding, with the malicious purpose to destroy the credit of his debtor and break up his business, enter judgment on such note at 10 o'clock at night, immediately issue an execution thereon, and, in the absence of such debtor (his place of business being closed for the night), cause an officer to break into such place and take possession of such debtor's stock in trade, without having made any demand for payment of the debt, or demanding entrance to the store, or giving the debtor any notice whatever that immediate payment of the debt is required, thereby maliciously causing unnecessary and serious pecuniary injury to such debtor, and that such conduct constitutes no wrong, or, if it does, it is without legal redress. If there is no remedy for such an official outrage, it must stand as a striking example of the insufficiency of our system of jurisprudence to deal with a class of serious malicious injuries that may break down a prosperous business, involve its owner in utter ruin, turn his condition of solvency to one of insolvency, and make him a beggar in a day. I must respectfully dissent from that doctrine, and protest that no such imperfection exists in the remedies afforded by our laws. That the reasoning upon which the decision of my brethren rests leaves such a wrong without a remedy is of itself an infallible test of its fallacy. Actionable injuries, growing out of what is commonly called "abuse of process," consists of two

classes: One where the process of the court is not used for its legitimate purpose, but to accomplish by coercion some outside object not within the proper use of the process, as in *Grainger v. Hill*, 4 Bing. N. C. 212, cited in the opinion of the court, where the injured party was arrested on a valid writ in order to coerce him into delivering a ship's register, which was entirely outside of the legitimate purposes of the writ. My brethren test the complaint here solely by *Grainger v. Hill* and similar cases, and the elementary principle that abuse of process, strictly so called, is the use of process regularly issued, to accomplish an unlawful end, or to compel the defendant to do some collateral thing. Thereby the conclusion is easily reached that the complaint does not state a cause of action. But there is another class of malicious injuries growing out of abuse of process, sometimes designated as "malicious misuse of process," that has been, to my mind, entirely overlooked, to which class the case made by the complaint belongs, and within the rules of which a good cause of action is clearly stated. Such class includes the use of process to accomplish its legitimate object, but in a reckless, unnecessarily oppressive way, with wrong intent to injure the person against whom the process runs. Such misuse is actionable, because of the unnecessary injury inflicted, and the motive of it. The two classes of injuries referred to are recognized in *Mayer v. Walter*, 64 Pa. St. 283, which is a very instructive case on the subject. The court there held, in effect, that malicious abuse of process is where it is used for some unlawful object not within its scope, but that malicious misuse of process may take place where no object but its proper and legitimate execution is contemplated. Here the object intended was the execution of the judgment. Defendant had a legal right to collect it, but the proceedings to that end were unnecessarily harsh and oppressive, and with bad intent; hence the actionable injury. *Rogers v. Brewster*, 5 Johns. 125, which will be found cited by all standard text writers, touches this case at every essential point. The officer had ample opportunity to execute his writ by taking property that would not interfere seriously with the debtor's business. Instead of doing so, he took a horse from the team with which such debtor was at work, with intent to embarrass and injure him. In deciding the case the court said: "The constable appears to have executed the warrant in an unreasonable and oppressive manner, and with the avowed and malicious design to harass and oppress the plaintiff. The oppression of an officer in the execution of process is indictable, and a great abuse of the powers of a sheriff on execution has been held sufficient to make him a trespasser. If he be charged with a malicious and oppressive proceeding, a proper remedy for this abuse of power is a special action on the case, in which the malice and oppression must be made manifest. The seizing and selling of the horse in the case before us was without any just cause, so long as other property was shown which would have raised the money with equal facility. It was therefore a cause-

less and malicious proceeding. Where a ministerial officer does anything against the duty of his office, and damage thereby accrues to the party, an action lies." To the same effect are *Juchter v. Boehm*, 67 Ga. 534; *Snydacker v. Brosse*, 51 Ill. 357. In *Bulger v. Buchanan* (Tex. Sup.), 6 S. W. 408, the officer and the execution plaintiff, who ratified the officer's act, were held liable for the malicious conduct of the latter in executing the writ in a hasty and oppressive manner at a time when it subjected defendant and his family to unnecessary hardship. Many cases of the same kind exist in the books, but time will not permit calling attention to them further than is necessary to show clearly my reasons for holding that the complaint in the instant case states a cause of action. The whole subject might well rest on *Smith v. Weeks*, 60 Wis. 94, 18 N. W. 778. There the officer had a warrant to arrest Weeks in contempt proceedings. The latter was a locomotive engineer. He was at home all day, to the knowledge of the officer, and might have been arrested, and the object of the writ satisfied, without seriously embarrassing him. It was his duty to go out with his engine at night, which the officer knew, yet, for the purpose of embarrassing and unnecessarily oppressing Weeks, the officer waited till he was about to go out on his night run, and then arrested him. The court held that such conduct constituted an official outrage, and a clear abuse of process. There were many aggravating circumstances which occurred after the arrest, but the court held clearly that the arrest itself, under the circumstances, and the motive of it, constituted abuse of process. From the foregoing, the principle governing this subject may be stated thus: If process to collect a judgment be executed in an unnecessarily harsh and oppressive manner, with a malicious purpose to injure the judgment debtor, such conduct constitutes an actionable wrong. In executing such a process the officer must not be guilty of oppression, or make use of greater force or violence than the thing requires. If he does, he is guilty of an abuse of process and liable for damages. *Alder, Jud. Writs*, 514, § 179. Applying the above-stated principle to the complaint before us, the order overruling the demurrer to the complaint was obviously right, and should be sustained.

See "Process," *Century Dig.* § 257; *Decennial and Am. Dig.* Key No. Series § 168.

JACKSON v. TELEGRAPH CO., 139 N. C. 347, 355, 51 S. E. 1015. 1905.
False Imprisonment, etc. Measure of Damages.

[Action for False Imprisonment. Judgment against defendant. Defendant appealed. Affirmed. Only that portion of the opinion which decides upon the measure of damages, is here inserted.]

WALKER, J. . . . The court charged correctly when it permitted the jury to award punitive damages. If McManus, as the jury found, arrested the plaintiff, not because the latter had as-

saulted him, but to put him out of the way and thereby prevent his resistance to an entry upon the land, it was a case where vindictive damages might well be allowed by the jury in addition to compensation for the wrong. The court in its charge made the question of probable cause turn upon whether the plaintiff had or had not assaulted McManus, and, they having decided that there was no probable cause, it follows that they found there was no assault, and that the arrest was wholly unjustifiable, and a wanton, highhanded, and oppressive act, for which punitive damages may be allowed. *Remington v. Kirby*, 120 N. C. 320, 26 S. E. 917. The verdict was moderate in view of the circumstances, and the jury do not seem to have allowed much, if anything, in the way of exemplary damages. "The doctrine is well settled that the jury, in addition to compensatory damages, may award exemplary, punitive, or vindictive damages, sometimes called 'smart money,' if the defendant has acted wantonly or with criminal indifference to civil obligations" (*Railroad v. Prentice*, 147 U. S. 106, 13 Sup. Ct. 261, 37 L. Ed. 97), or the defendant has been guilty of an intentional and wilful violation of the plaintiff's rights (*Railroad v. Arms*, 91 U. S. 489, 23 L. Ed. 374; *Hansley v. Railroad*, 117 N. C. 565, 23 S. E. 443, 32 L. R. A. 543, 53 Am. St. Rep. 600). . . . No error.

See "False Imprisonment," *Century Dig.* §§ 109-115; *Decennial and Am. Dig.* Key No. Series §§ 32-36.

(d) *Liability of Officers in Actions for False Imprisonment, Malicious Prosecution, and Abuse of Legal Process.*

STEWART v. COOLEY, 23 Minn. 347, 23 Am. Rep. 690. 1877.

Liability of Judicial Officers.

[Action for Conspiracy to institute a Malicious Prosecution against the plaintiff. The acts of Cooley which are made the subject of this action, were done in his capacity as judge of the municipal court of Minneapolis. Demurrer. Demurrer sustained. Judgment against plaintiff, and he appealed. Reversed. The facts appear in the beginning of the opinion.]

(CORNELL, J. Eliminating from the complaint the averments "that defendants, on etc., at, etc., wilfully and maliciously conspired together to cause said plaintiff to be charged with, complained of, and arrested and imprisoned for the crime of perjury, as hereinafter set forth, and that, in pursuance of the said conspiracy," the thereafter recited acts were done, we find no difficulty whatever in agreeing with the court below that no cause of action is stated against the defendant Cooley.

The reception of the complaint, the issue of a warrant thereon, the decision upon its sufficiency, and refusal to discharge the prisoner from arrest, his subsequent omission to take any steps to pro-

cure the attendance of the prosecuting witness, and dismissal of the action for want of prosecution, were all acts and omissions done and admitted in his capacity of judge, in the performance and discharge of his judicial duties, in a matter and proceeding clearly within the criminal jurisdiction of the municipal court, of which he was judge. No private action could be maintained upon any of these acts, decisions, or omissions, however erroneous they may have been, or by whatever motives prompted. An independent judiciary is justly regarded as essential to the public welfare and the best interests of society. Hence, the doctrine has become settled that, for acts done in the exercise of judicial authority, clearly conferred, an officer or judge shall not be held liable to any one in a civil action, so that he may feel free to act upon his own convictions, uninfluenced by any fear or apprehension of consequences personal to himself. *Yates v. Lansing*, 5 Johns. 282; *S. C.*, 9 Johns. 394; *Rochester White Lead Co. v. City of Rochester*, 3 N. Y. 463; *Stewart v. Hawley*, 21 Wend. 552; *Weaver v. Devendorf*, 3 Denio, 117; *Harman v. Brotherson*, 1 Denio, 537; *Wilson v. Mayor of New York*, 1 Denio, 595; *Randall v. Brigham*, 7 Wall. 523; *Bradley v. Fisher*, 13 Wall. 335.

While we are thus clear that none of the specific acts charged in the complaint, taken singly or together, furnished any ground for a civil action, or even any evidence sufficient to support the allegations of conspiracy in the complaint, we cannot concur with the court below in holding the conspiracy averments hereinbefore quoted as merely formal and immaterial allegations. Under them it would have been competent, on the trial, to prove that, prior to the institution of the criminal proceedings, the defendant Cooley and the other defendants met together, and maliciously and without probable cause actually entered into an agreement and conspiracy with each other to prosecute plaintiff for perjury, for the sole purpose of bringing him into disgrace, and subjecting him to arrest and imprisonment; and that each and all the acts charged to have been done by the defendants, respectively, were done solely in pursuance of this agreement, and to carry out this common purpose, and not otherwise. It cannot be doubted that such a conspiracy, previously formed, and carried out by such a gross perversion and abuse of legal process and proceedings, would subject all the parties engaged in it to liability to the party injured and aggrieved. The act of entering into such an agreement was not done in the course of any judicial proceeding, or in the discharge of any judicial function or duty. . . . Reversed.

See the valuable note to the principal case in 23 Am. Rep. at pp. 692-694. Judges of courts of *record of superior or general jurisdiction* are not liable to civil actions for their judicial acts, even when such acts are in excess of their jurisdiction and alleged to have been done maliciously or corruptly. Judges of *inferior and limited jurisdiction* are protected only when the act is within their jurisdiction. If judges of superior and general jurisdiction act corruptly or maliciously in matters over which there is a clear absence of all jurisdiction, as distin-

guished from a mere exceeding of their jurisdiction, they may be liable. *Bradley v. Fisher*, 13 Wall. at pp. 351-354. See "Judges," Century Dig. § 165; Decennial and Am. Dig. Key No. Series § 36.

WALL v. TRUMBULL, 16 Mich. 228, 234-236. 1867.

Judicial and Ministerial Officers and Duties Distinguished. Respective Liabilities of Such Officers. Superior and Inferior Courts. Jurisdiction.

[Action of Trespass for issuing a warrant, as supervisor, to collect an alleged illegal tax, under which warrant Wall's property was sold. Defendant pleaded that what he did was done in his official capacity as supervisor. Judgment against Wall, who carried the case to the supreme court by writ of error. Affirmed. Only part of the opinion is inserted here.]

COOLEY, J. . . . It will now become necessary to consider whether the supervisor can be held liable as a member of the township board which allowed the claims. It is objected on his behalf that it does not appear that he voted in favor of their allowance, and it is urged that, for aught that appears, he may have opposed them. But I am of opinion that this objection is not well taken. The supervisor's presence was necessary to a quorum when they were allowed, and nothing appears from which his dissent can be inferred. He signed the record of the allowance, embodying therein an order to himself, as supervisor, to levy the amount by taxation—an order without any purpose, so far as I can perceive, except to formally connect the persons signing it with the allowance of the claims, and the levy of the taxes to meet them.

In determining whether the members of the township board voting for the allowance are liable, the first question which arises is, whether the nature of their duties is judicial, or ministerial only; for the rule of liability is altogether different in the two cases. A ministerial officer has a line of conduct marked out for him, and has nothing to do but to follow it; and he must be held liable for any failure to do so which results in the injury of another. A judicial officer, on the other hand, has certain powers confided to him to be exercised according to his judgment or discretion; and the law would be oppressive which should compel him in every case to decide correctly at his peril. It is accordingly a rule of very great antiquity that no action will lie against a judicial officer for any act done by him in the exercise of his judicial functions, provided the act, though done mistakenly, were within the scope of his jurisdiction. *Broom's Max.* 82; *Smith v. Boucher*, Cas. Temp. Hardw. 69; *Mostyn v. Fabrigas*, Cowp. 161; *Mills v. Collett*, 6 Bing. 85; *Garnett v. Farrant* 6 B. & C. 625; *Houlden v. Smith* 11 Q. B. 841; *Yates v. Lansing*, 5 Johns 291; 9 *Ibid.* 396; *Dims v. Lord Brougham*, 6 C. & P. 249; *Holroyd v. Beare*, 2 B. & Ald. 473; *Pike v. Carter*, 3 Bing. 78; *Lowther v. Earl of Radnor*, 8 East. 113; *Basten v. Carew*, 3 B. & C. 652;

Stewart v. Hawley, 21 Wend. 552; Weaver v. Devendorf, 3 Denio, 117; Vail v. Owen, 19 Barb. 22; Hill v. Sellick, 21 Barb. 207; Gordon v. Farrar, 2 Doug. (Mich.) 411; Wilkes v. Dinsman, 7 How. 89. This principle of protection is not confined to courts of record, but it applies as well to inferior jurisdictions; the only difference being that authority in a court of general jurisdiction is to be presumed, while the jurisdiction of inferior tribunals must affirmatively appear on the face of their proceedings. Wight v. Warner, 1 Doug. (Mich.) 384; Clark v. Holmes, Ibid. 390; Chandler v. Nash, 5 Mich. 401. *Nor does the rule depend upon whether the tribunal is a court or not; it is the nature of the duties to be performed that determines its application.* Thus, in Harrington v. Commissioners, etc., 2 McCord, 400, a decision by road commissioners that one was not exempt from a road assessment was held a protection notwithstanding the party was exempt in fact. In Freeman v. Cornwall, 10 Johns. 470, an overseer of highways who had adjudged one in default for not working, and obtained a warrant of distress from a magistrate, was held not liable, although in fact there was no default. In Easton v. Calendar, 11 Wend. 90, the trustees of a school district included in their apportionment of taxes the collector's percentage, though otherwise directed by statute, but were held not liable. In Weaver v. Devendorf, 3 Denio, 117, it was held that the duty of assessors in determining the value of taxable property was in its nature judicial, and that, however erroneous their decision, they were not liable to a suit on behalf of the party aggrieved. The court say the act "is emphatically a judicial act," and "the principle of irresponsibility, so far as respects a civil remedy, is as old as the common law itself." The same rule was applied to assessors in Dillingham v. Snow, 5 Mass. 547. In Brown v. Smith, 24 Barb. 419, it was held that assessors act judicially in determining upon the residence of a person owning real estate subject to taxation, and that they were not liable to an action for an erroneous decision. And on the same ground they were held not liable in Vail v. Owen, 19 Barb. 22, for assessing property which by law was exempt from taxation. See the same principle applied in a tax case, in Hill v. Sellick, 21 Barb. 207. The rule was applied in Van Steenberg v. Bigelow, 3 Wend. 42, to appraisers appointed to assess damages under a turnpike act, and in Gordon v. Farrar, 2 Doug. (Mich.) 511, to inspectors of election in passing upon the qualification of voters. See also Stewart v. Hawley, 21 Wend. 552; Macon v. Cook, 2 Nott & McCord, 379; Moor v. Ames, 3 Caines, 170. There can be no question, I think, in the light of these decisions, that the duties performed by this board are within the principle of protection which they affirm.

None of these cases conflict with those where officers, judicial as well as ministerial, have been held liable when acting without jurisdiction. Assessors have frequently been held liable for levying a personal tax upon a person not resident within their township, because their jurisdiction over personal assessments was

confined to residents (*Freeman v. Kenney*, 15 Pick. 44; *Gage v. Currier*, 4 Id. 399; *Snydam v. Keys*, 13 Johns. 444; *Mygatt v. Washburn*, 15 N. Y. 316); and all classes of officers have been subjected to similar responsibility. The rule of official exemption depends in these cases upon jurisdiction; but wherever that appears and is not exceeded, the protection is complete. . . . Judgment affirmed.

No action will lie against a justice of the peace for his judicial acts as distinguished from his ministerial acts, provided he act within his jurisdiction. It is not always easy, however, to distinguish between judicial and ministerial acts. See *Furr v. Moss*, 52 N. C. 525. If the act be judicial—as a commitment for a contempt committed in the presence of the court—no action will lie even against the mayor of a town who acted both maliciously and erroneously. *Scott v. Fishblate*, 117 N. C. 265, 23 S. E. 436, 30 L. R. A. 696. For further discussion of this matter, see 80 N. W. 248, 46 L. R. A. 215, and note. See "Taxation," Century Dig. § 508; Decennial and Am. Dig. Key No. Series § 301.

TAYLOR v. ALEXANDER et al., 6 Ohio, 144. 1833.

Acting Under Void and Voidable Process.

[Action of Trespass for assault and battery, and for false imprisonment of plaintiff and his wife. Verdict and judgment against plaintiff. Plaintiff moved for a new trial, and upon this motion the opinion is written. Motion refused, and judgment against the plaintiff.

The acts complained of were done in the execution of a warrant issued by a justice of the peace. The judge charged that the warrant, though irregular, was not void, and afforded a justification to the defendant provided he acted in a reasonable manner and without excessive violence, etc.; and that if the process was legal, the motive which actuated the party who procured it was immaterial in this form of action, i. e. Trespass vi et armis.]

WRIGHT, J. The first question to be decided is, whether it is competent for the plaintiff in trespass to prove, in order to enhance the damages, that a legal prosecution was commenced with a malicious motive? If the prosecution complained of be malicious, and the forms of law have been used for malignant purposes, the party injured has his remedy by an action on the case for a malicious prosecution, in which the concurrence of a malicious motive with the want of probable cause will subject the aggressor to damages commensurate with the injury sustained and oftentimes to those exemplary or vindictive. In trespass, the rule is different. If the defendant in that action has acted under valid legal proceedings, they will justify him, and protect those acting under him. The true question in such case is, were the acts complained of legal? If they were, they are none the less so, because the party instituting the legal proceedings was actuated by motives of revenge or malignity. The evidence offered by the plaintiff, and ruled out at the trial of the case, was offered upon the avowed ground that proceedings had been commenced under the criminal laws. The proceedings themselves had not been

shown, and could not be considered by the court either as legal, or as illegal and void; and it was therefore properly rejected. It is no answer to this to say, that subsequently these proceedings were given in evidence, because after so given in evidence the proof was not offered.

2. Were the warrants of the justice of the peace a justification to the officer and his posse? The principle is well established that executive officers, being obliged to execute process, are protected in the rightful discharge of their duty, provided the process issued from a court or magistrate having jurisdiction of the subject matter. And if the magistrate proceed unlawfully in issuing the process, he, and not the executive officer, will be liable for the injury. 13 Mass. 286, 272; 14 Mass. 459. The executive officer is justified, even when the process under which he acts is voidable for irregularity or mistake in issuing it. 4 Mass. 232; 2 Stark. Ev. 818; 3 Stark. Ev. 1448, n. (e). The cases relied upon by the plaintiff's counsel are those of attempted justification where there appears an excess of jurisdiction. In such cases, the process being void, it, of course, could afford no protection. As if a justice of the peace were to issue a writ in slander, that process would not protect the officer, because the justice has no jurisdiction of the subject. It does not comport with law or correct policy to permit an executive officer, or those he commands as his posse, to examine into the regularity of the proceedings of the court whose process they execute, or to confer upon them authority to proceed or to forbear, as they may judge best. The rule that holds them to know the extent of the jurisdiction requires for its justification some legal subtlety, but rests on far different ground from that urged by the plaintiff. The papers in this case are irregular, but do they not show a proceeding under the laws of the state? We think they do. The affidavit might not stand a critical examination. The magistrate in drawing it has endeavored to pursue the statute form, and has omitted a sentence. If the affidavit was the authority under which Peterson and Boland justified, we should doubt; and we might also doubt, if the justice sought under that to protect himself. But it must be remembered that the justice was acquitted before this evidence was introduced. We think the other defendants need not look back of the warrants for their justification. The larceny is bunglingly enough charged in the warrant, yet it shows that there was a complaint under the laws for the punishment of crimes, for taking the property of another, and commanded the arrest, and the officer was legally bound to execute it. The search warrant describes the offense sufficiently clear. The objection that it sets forth the belief that the offense had been committed by Taylor or his wife, while it commands the search of the house of Taylor, the husband, and if the goods were found, to bring forth only his body, does not seem to us of much weight. The goods were found in his possession; his arrest is complained of; and, in our opinion, the law does not invoke the aid of courts to punish the officers of justice for trifling

errors in drawing up legal process. If they are substantially good they are sufficient. We do not inquire what right these parties have in any other form of action, and only decide that, in this case, the error of the court is not apparent; certainly not such as to require us to grant a new trial. Judgment for defendant.

See "False Imprisonment," Century Dig. § 16; Decennial and Am. Dig. Key No. Series § 4; "Justices of the Peace," Century Dig. § 46; Decennial and Am. Dig. Key No. Series, § 27; "Sheriffs and Constables," Century Dig. §§ 143-157; Decennial and Am. Dig. Key No. Series § 98.

SEC. 9. DEPRIVATION OF PRIVILEGES.

ASHBY v. WHITE et al., 2 Lord Raymond, 938, 941, 958. 1704.

Unlawful Interference with the Right to Vote.

[Action on the Case for damages for refusing to allow the plaintiff to vote. Verdict against the defendants, who moved in arrest of judgment on the ground that the action could not be maintained. The motion was sustained and judgment entered against the plaintiff. Holt, C. J., dissented. The plaintiff finally prevailed, as appears from the statement at the end of the opinion.]

GOULD, J. I am of opinion that judgment ought to be given in this case for the defendants, and I cannot by any means be reconciled to give my judgment for the plaintiff, for there are no footsteps to warrant such an opinion, but only a single case. I am of opinion that this action is not maintainable for these four reasons: First, because the defendants are judges of the thing, and act herein as judges; Secondly, because it is a parliamentary matter, with which we have nothing to do; Thirdly, the plaintiff's privilege of voting is not a matter of property or profit, so that the hindrance of it is merely *dammum absque injuria*; Fourthly, it relates to the public, and is a popular offense.

1. As to the first, the king's writ constitutes the defendant a judge in this case, and gives him power to allow or disallow the plaintiff's vote. For this reason it is, that no action lies against a sheriff for taking insufficient bail, because he is the judge of their sufficiency. So is the case of *Medcalf v. Hodgeson*, Hutt. 120; and their sufficiency is not traversable, 1 Lev. 86, *Bentley v. Hore*. Upon the same reason the resolution of the court is founded in the case of *Hammond v. Howell*, 2 Mod. 218, that no action lies against a man for what he does as a judge. 9 Hen. 6, 60, p. 9.

2. This is a parliamentary matter, and the parliament is to judge whether the plaintiff had a right of electing or not; for it may be a dispute, whether the right of election be in a select number, or in the populace; and this is proper for the parliament to determine, and not for us; and if we should take upon us to determine that he has a right to vote, and the parliament be of opinion that he has none, an inconvenience would follow from contrary judgments. So in 2 Ventr. 37, *Onslow's case*, it is ad-

judged, that no action lies for a double return of members to serve in parliament. The resolution of the king's bench in the case of *Barnardison v. Seame*, 2 Lev. 114, was given on this particular reason, that there had been a determination before in parliament in favor of the plaintiff. And Hale said, we pursue the judgment of the parliament; but the plaintiff would have been too early, if he had come before; and yet that judgment was reversed.

3. It is not any matter of profit, either in presenti or in futuro. To raise an action upon the case, both damage and injury must concur, as is the case of 19 Hen. 6, 44, cited in Hob. 267. If a man forge a bond in another's name, no action upon the case lies, till the bond be put in suit against the party: so here, it may be this refusal of the plaintiff's vote may be no injury to him, according as parliament shall decide the matter; for they may adjudge that he had no right to vote, whereby it will appear, the plaintiff was mistaken in his opinion as to his right of election, and consequently has sustained no injury by the defendant's denying to take his vote.

4. It is a matter which relates to the public, and is a kind of popular offense, and therefore no action is given to the party; for by the same reason if one man may bring an action, a hundred may, and so actions infinite for one default; which the law will not allow, as is agreed in *Williams's case*, 5 Co. 73, a, and 104, b, *Boulton's case*. Perhaps in this case after the parliament have adjudged the plaintiff has a right of voting, an information may lie against the sheriff for his refusal to receive it. So the case of *Ford v. Hoskins*, 2 Cro. 368; 2 Brown, 194. Such an action as this was never brought before, and therefore shall not be taken to lie, though that be not a conclusive reason. As to the case of *Sterling v. Turner*, 2 Lev. 50, 2 Ventr. 50, where an action was brought by the plaintiff, who was a candidate for the place of bridge master of London, for refusing him a poll, and adjudged maintainable, there is a loss of a profitable place. So the case of *Herring v. Finch*, 2 Lev. 250, where the plaintiff brought an action on the case against the defendant, for that the plaintiff being a freeman, who had a voice in the election of mayor, the defendant being the present mayor refused to admit his voice; in that case the defendant is guilty of a breach of his faith: and in both these cases the plaintiff has no other remedy, either in parliament or anywhere else, as the plaintiff in our case has. So that I am of opinion that the judgment ought to be given for the defendant upon the merits. But upon this declaration the plaintiff cannot maintain any action, for the plaintiff does not allege in his count, that the two burgesses elected were returned, and if they were never returned, there is no damage to the plaintiff. See 2 Bulstr. 265. But I do not rely upon this fault in the declaration.

[This judgment was reversed in the house of lords and judgment given for the plaintiff by a vote of 50 to 15. 2 Ld. Ray. at p. 958. See next case post for fuller account of the action of the house of lords.]

See "Elections," Century Dig. § 53; Decennial and Am. Dig. Key No. Series § 57.

JENKINS v. WALDRON, 11 Johnson, 114, 120. 1814.

Unlawful Interference with Right to Vote.

[Action on the Case by Waldron against Jenkins et al., inspectors of election, for refusing to receive his vote. Judgment against Jenkins et al., who carried the case to the supreme court by writ of error. Reversed.]

SPENCER, J. . . . It is not alleged or proved that the inspectors fraudulently or maliciously refused to receive Waldron's vote; and this we consider to be absolutely necessary to the maintenance of an action against the inspectors of an election. The case principally relied on by the counsel for the defendant in error is that of *Ashby v. White*, 2 Ld. Raym. 938. There the declaration alleged that the rejection of Ashby's vote was done fraudulently and maliciously, and, although the jury found the defendant guilty, the judgment was arrested by three judges, in opposition to the opinion of Chief Justice Holt. The judgment was afterwards reversed in the House of Lords. The reasons for the reversal do not appear in the report of the case; but the ground of the reversal is distinctly stated in the resolutions of the Lords, in answer to the resolutions of the Commons, reprehending the bringing of the action and the judgment thereon. The first resolution of the Lords states, "that by the known laws of this kingdom every freeholder, or other person having a right to give his vote at the election of members to serve in parliament, and being wilfully denied, or hindered so to do, by the officers who ought to receive the same, may maintain an action in the queen's court against such officer to assert his right, and to recover damages for the injury." 1 Bro. Par. Cas. 49, 1st ed. The case of *Harman v. Tappende et al.*, 1 East, 555, and *Drewy v. Coulton*, in a note to that case, clearly show that this action is not maintainable, without stating and proving malice express or implied on the part of the officers. In the case in the text, LAWRENCE, J., said: "There is no instance of an action of this sort maintained for an act arising merely from error of judgment;" and he cited Mr. Justice WILSON's opinion in *Drewy v. Coulton* with approbation. In that case the suit was for refusing the plaintiff's vote. Justice Wilson considered it as an action for misbehavior by a public officer in the discharge of his duty, and that the act must be malicious and wilful to render it a misbehavior; and he held that no action would lie for a mistake in law. In speaking of the case of *Ashby v. White*, he considered it as having been determined by the House of Lords on that ground, from the resolutions entered by them. The whole of Judge Wilson's reasoning is clear, perspicuous and irresistible, and is fully confirmed in *Harman v. Tappende*. It would, in our opinion, be opposed to all the principles of law, justice and sound policy, to hold that officers, called upon to exercise their deliberative judgments, are answer-

able for a mistake in law, either civilly or criminally, when their motives are pure, and untainted with fraud or malice. Judgment reversed.

An action for damages was sustained against the selectmen of a town, who wrongfully erased a voter's name from the registry of votes. "The removal of plaintiff's name was, if wrongful, a direct injury which deprived him of his right to vote. For this an action may be maintained, although there are also highly penal provisions in the statute, intending to provide for wilful violations of the rights of voters, under which the plaintiff does not seek to recover." *Larned v. Wheeler*, 140 Mass. 390, 5 N. E. 290. In *Carter v. Harrison*, 5 Blackford, 138, the principal cases *supra* are fully sustained, and it is said: "If persons when discharging the duties which devolved upon these defendants, wrongfully and maliciously deprive a man of his right to vote, they do him an intentional and serious injury, for which he may have an action against them. But if their refusal of a legal vote be merely in consequence of an error of judgment and no wilful wrong can be imputed to them, they ought not to be liable to a suit." See also *Peavey v. Robbins*, 48 N. C. 339. For the necessary allegations in the declaration or complaint in actions of this nature, see *Murphy v. Ramsey*, 114 U. S. 15, 5 Sup. Ct. 747. See "Elections," *Century Dig.* § 53; *Decennial and Am. Dig.* Key No. Series § 57.

The right to fish and shoot on navigable waters is a privilege possessed by the public. An action lies for damages against one who interferes with the exercise of such privileges by a private individual, and such interference will, in proper cases, be enjoined. *Perrin v. Chandler*, 69 Atl. 874, 17 L. R. A. (N. S.) 1239, and note.

GORDON v. FARRAR, 2 Douglas (Mich.), 411, 415. 1847.

Exemption of Election Officers from Civil Actions.

[Special action on the Case by Gordon against Farrar et al., inspectors of election, for refusing to let the plaintiff vote for a congressman, etc. The jury rendered a special verdict fixing plaintiff's damages at 12½ cents subject to the opinion of the court. The verdict found as facts that the plaintiff was of African descent though nearly white in color; and that he offered to vote and his vote was refused by the defendants, who were inspectors of election. The presiding judge reserved the question, as to what judgment should be rendered upon the verdict, for the supreme court, which court directed that judgment be entered against the plaintiff.]

MILES, J. . . . This brings us to the question of judicial responsibility. "The doctrine which holds a judge exempt from a civil suit or indictment for any act done or omitted to be done by him as a judge, has a deep root in the common law;" Per KENT, C. J., in 5 Johns. 291. "Courts of special and limited jurisdiction, while acting within the line of their authority, are protected as to error of judgment." *Cunningham v. Bucklin*, 8 Cow. 183. In the case of *Vanderheyden v. Young*, 11 Johns. 159, which was an action of trespass against the members of a court-martial for the imprisoning of the plaintiff, SPENCER, J., in concluding the opinion delivered, says, it would be most mischievous and pernicious to subject men acting in a judicial capacity to actions, when their

conduct is fair and impartial, when they are uninfluenced by any corrupt or improper motives, for a mere mistake in judgment. Authorities might be multiplied upon this subject, but it cannot be necessary to cite cases to sustain a proposition so well established. In this view of the case, it is unnecessary to examine the cases referred to by plaintiff's counsel, to show that an action could be maintained against the inspectors of an election, acting ministerially, and without malice, for rejecting a lawful vote, as we put the judgment of this court upon the distinct ground that the inspectors, in determining upon the plaintiff's qualification to vote as a white person, acted judicially, and are therefore not liable to this action. Judgment for the defendants.

See 10 Am. & Eng. Enc. Law, 673 et seq., and Bish. Non-Cont. Law, s 31. See "Elections," Century Dig. § 53; Decennial and Am. Dig. Key No Series, § 57.

CHAPTER VI.

INJURIES GROWING OUT OF RELATIVE RIGHTS.

SEC. 1. HUSBAND AND WIFE.

(a) Habeas Corpus.

LISTER'S CASE, 8 Modern, 22. 1721.

Right of Wife to Habeas Corpus When Restrained by Her Husband.

[Mr. Lister was married to Lady Rawlinson, a widow, who had, before her marriage with Lister, settled her estate in her own power, and out of his control. Afterwards, there being some disagreement between them, he, by a proper writing duly executed, covenanted to allow her so much every year for her maintenance, and that she might live separately from him; to which she agreed. They accordingly lived apart for some time. The husband, during this separation, pretended a desire to be reconciled to his wife, but in fact only wanting more money of her, she refused; whereupon he, with another person who assisted him, forced her into a coach as she was coming from church on a Sunday, and carried her into the mint, and kept her in custody under a strict confinement. And now she being brought into court by habeas corpus, her husband moved by his counsel, that the court would not interpose between husband and wife; that she could not deny herself to be his wife; and that by the law the husband has a coercive power over his wife.]

The COURT. An agreement between husband and wife to live separate, and that she shall have a separate maintenance, shall bind them both until they both agree to cohabit again; and if the wife be willing to return to her husband, no court will interpose to obstruct her. But as to the coercive power which the husband has over his wife, it is not a power to confine her; for by the law of England she is entitled to all reasonable liberty, if her behavior is not very bad: and therefore she shall now be set at liberty, if it is her pleasure to be. She answered, that she desired to be at liberty. And thereupon she was discharged out of the custody of her husband, and went out of court with her son.

But the court said, that the husband should have leave to write to her, and to use any lawful means in order to a reconciliation, provided she was willing to see him; and that her children or servants should not hinder him, unless by her order; but that whenever she permitted him to come to her, he should not offer any violence or uncivil behavior to her person.

DOMINUS REX v. LISTER, 1 Strange, 478. 1721.

Another Report of Lister's Case.

The defendant married the Lady Rawlinson, and they disagreeing, a deed of separation was executed, whereby some part of her fortune was made over to him, and the rest settled for her separate maintenance. In pursuance of this agreement they lived separately for some time, till Mr. Lister thought fit to seize on her, as she came out of church, and hurried her away to a remote place, where he kept her under a guard, till her relations found her out and brought a habeas corpus, by virtue of which she came before the court. And all this matter appearing, and that he declared he took her into his power in order to prevail with her to part with some of her separate maintenance; the chief justice declared, and all the rest agreed, that where the wife will make an undue use of her liberty, either by squandering away the husband's estate, or going into lewd company; it is lawful for the husband, in order to preserve his honor and estate, to lay such a wife under restraint: but where nothing of that appears, he cannot justify depriving her of her liberty. That there was no color for what he did in this case, there being a separation by consent. And therefore they discharged the lady from her confinement, and being desired to bind the husband from attempting the like in the future, they refused to do that; but, however, intimated to him that they should bear a heavy hand over him, if he acted contrary to the declared opinion of the court.

See Craton's case, 28 N. C. 164, inserted at ch. 1, § 2, ante.

REGINA v. JACKSON, L. R. 1 Q. B. 671, Smith's Cases L. P. 473. 1891.

Rights of Husband and Rights of Wife in Habeas Corpus for Custody of the Wife.

[Habeas corpus sued out on behalf of Mrs. Jackson, wife of the defendant, to secure her liberation from enforced confinement to her husband's house. The husband insisted that, under his marital rights, he could force his wife to live with him, and that the courts could not release her from his custody—it being admitted that the only ground of complaint on the part of the wife was, that she was confined to the husband's house, because otherwise she would not live with him. The court examined Mrs. Jackson as to her wishes, and, finding that her refusal voluntarily to live with her husband arose from her own free will, discharged her from the husband's restraint and permitted her to go where she pleased.]

LORD HALSBURY, Lord Chancellor. The court has satisfied itself that, in refusing to go to and continue in her husband's house, Mrs. Jackson was acting of her own free will, and that she is not compelled or indeed, so far as present circumstances are concerned, induced by any one to refuse to continue in his house, and was not compelled to remain where she was before he removed her.

I confess that some of the propositions which have been referred to during the argument are such as I should be reluctant to suppose ever to have been the law of England. More than a century ago it was boldly contended that slavery existed in England; but, if any one were to set up such a contention now, it would be regarded as ridiculous. In the same way, such quaint and absurd dicta as are to be found in the books as to the right of a husband over his wife in respect of personal chastisement are not, I think, now capable of being cited as authorities in a court of justice in this or any civilized country. It is important to bear this in mind, for many of the statements, which have been relied upon, of a more moderate character and less outrageous to common feelings of humanity, are bound up with these ancient dicta to which I refer. The only justification, as it appears to me, for such expressions as are found in some of the old books is that afforded by the free translation given to them by HALE, C. J., who suggests that "castigatio" may be taken to mean admonition merely. Whether the word will bear that translation in these passages I cannot say; but I am glad that some one even at that early period thought it inconsistent with the rights of free human creatures that such a power of personal chastisement of the wife should exist. I only mention the subject, because it appears to me that the authorities cited for the husband were all tainted with this sort of notion of the absolute dominion of the husband over the wife. The only case referred to in which it was decided, as a question of law in an abstract form, unaccompanied by circumstances which might import a qualification, that a husband had a right to the custody of his wife, was *Cochrane's Case*, 8 Dowl. 630. With regard to the proposition that the mere relation of husband and wife gives the husband complete dominion over the wife's person, apart from any circumstances of misconduct or any acts amounting to a proximate approach to misconduct on her part, which would give the husband a right to restrain her, none of the authorities cited appear to me to establish that proposition. I do not mean to lay it down as the law that there may not be some acts, acts of proximate approach to some misconduct, which might give the husband some right of physical interference with the wife's freedom,—for instance, if the wife were on the staircase about to join some person with whom she intended to elope, I could understand that there might be to some extent a right to restrain the wife. It is not necessary, however, on the present occasion to discuss that question any further than to say that I can understand that some authority on the part of the husband of such a nature and so limited might well be justified according to any system of reasonable law. We have to determine this case on the return to the writ, which states in substance that, because the wife refused to live with the husband, he took her and has since detained her in his house, using no more force or restraint than was necessary to take her or to prevent her returning to her relations. Such is the return by which he justifies the admitted

imprisonment of this lady. I do not know that I can express in sufficiently precise language the distinction which has been suggested between "imprisonment" and "confinement." If there be any such distinction, I should find that in this case there was imprisonment. I do not find any denial in the return that the lady is kept in imprisonment in the husband's house. The return seems to me to be based on the broad proposition that it is the right of the husband, where his wife has wilfully absented herself from him, to seize the person of his wife by force and detain her in his house until she shall be willing to restore to him his conjugal rights. I am not prepared to assent to such a proposition. The legislature has deprived the matrimonial causes court of the power to imprison for refusal to obey a decree for the restitution of conjugal rights. The husband's contention is that, whereas the court never had the power to seize and hand over the wife to the husband, but only the power to imprison her as for a contempt for disobedience of the decree for restitution of conjugal rights, and even that power has now been taken away, the husband may himself of his own motion, if she withdraws from the conjugal consortium, seize and imprison her person until she consents to restore conjugal rights. I am of opinion that no such right exists or ever did exist. Moreover, assuming that sufficient authority existed for such a proposition, it is subject in any case to the qualification which I observe is always imported, that, where the wife has a complaint of or reason to apprehend ill-usage of any sort, the court will never interfere to compel her to return to her husband. This brings me to the particular circumstances of this transaction. I am prepared to base my judgment on the ground that the husband has no such authority as he claims; that no English subject has such a right of his own motion to imprison another English subject, whether his wife or any one else—of course, I am speaking of persons of full age and *sui juris*; but, assuming that there were such authority, it would be subject to the qualification I have mentioned in the case of apprehended ill-usage, and I am of opinion that the facts in this case afford ample ground for refusing to allow the husband to retain the custody of his wife. It seems to have been thought that the question how far a lady may be dealt with in this way depends on the exact amount of force or violence used or pain inflicted. But is it nothing that a lady coming out of church on a Sunday afternoon is to be seized by a number of men and forcibly put into a carriage and carried off? Must not the element of insult involved in such a transaction be considered? Then, if the lady's statement to the medical man be true, the moment she got into the house the husband took off her bonnet and threw it into the fire. The affidavit of the medical man states that the wife told him so; that affidavit is one of the husband's affidavits, and there is no denial that this happened by the husband. I confess to regarding with something like indignation the statement of the facts of this case, and the absence of a due sense of the delicacy and respect due to

a wife whom the husband has sworn to cherish and protect. With regard to the statements as to the earlier part of the history of the case, contained in the husband's affidavits, I am unwilling to look at them for this reason: I do not deny that unqualified and uncontradicted they do make out a case in his favor, so far as showing that this alliance was entered into under circumstances which do not reflect any discredit on him. But I am unwilling to discuss these statements of the affidavits, because I do not know how far they can be trusted, inasmuch as the wife has not been permitted to have any opportunity of communicating with any legal adviser as to any matters on which she might have contradicted those affidavits. Therefore, it seems to me that, though one has no right to say that one disbelieves those statements, it is impossible to rely upon them under the circumstances. The result is, in my opinion, that there is no power by law such as the husband claims to exercise, and, if there were, the facts give ample ground to the lady to apprehend violence in the future. Either of these grounds is sufficient to show that the return to this writ is bad, and that this lady must be restored to her liberty.

LORD ESHER, M. R. . . . One proposition that has been referred to is that a husband has a right to beat his wife. I do not believe this ever was the law. Then it was said that, if the wife was extravagant, the husband might confine her, though he could not imprison her. The confinement there spoken of was clearly the deprivation of her liberty to go where she pleases. The counsel for the husband was obliged to admit that, if she was kept to one room, that would be imprisonment; but he argued that, if she was only kept in the house, that was confinement only. That is a refinement too great for my intellect. I should say that confining a person to one house was imprisonment, just as much as confining such person to one room. I do not believe that this contention is the law or ever was. It was said that by the law of England the husband has the custody of his wife. What must be meant by "custody" in that proposition so used to us? It must mean the same sort of custody as a gaoler has of a prisoner. I protest that there is no such law in England. *Cochrane's Case*, 8 Dowl. 630, was cited as deciding that the husband has a right to the custody, such custody, of his wife. I have read it carefully, and I think that it does so decide. The judgment, if I may respectfully say so, is not very exactly worded, and uses different expressions in many places where it means the same thing; but that seems to me to be the result of it. It appears to me, if I am right in attributing to it the meaning I have mentioned, that the decision in that case was wrong as to the law enunciated in it, and that it ought to be overruled. Sitting here, in the court of appeal, we are entitled to overrule it. I do not believe that an English husband has by law any such rights over his wife's person, as have been suggested. I do not say that there may not be occasions on which he would have a right of restraint, though not of imprisonment.

For instance, if a wife were about immediately to do something which would be to the dishonor of her husband—as if the husband saw his wife in the act of going to meet a paramour—I think that he might seize her and pull her back. That is not the right that is contended for in this case. The right really now contended for is that he may imprison his wife by way of punishment, or if he thinks that she is going to absent herself from him, for any purpose, however innocent of moral offense, he may imprison her, and it must go the full length that he may perpetually imprison her. I do not think that this is the law of England. . . .

The principal case is generally known and referred to as “The Clitheroe Case,” because the incidents upon which it is based arose at a little place named Clitheroe. The case is referred to in *State v. Jones*, 132 N. C. at p. 1052, 43 S. E. 939, and in *Powell v. Benthall*, 136 N. C. at p. 154, 48 S. E. 598. See “A Century of Law Reform,” 347, for valuable and interesting comments upon the principal case. It is hardly supposable that the principles laid down in the case will be disputed, in this day and generation, in any jurisdiction deriving its laws from the common law. That a husband may protect his honor, is a right still accorded to him by the Clitheroe case. As to this right see *State v. Craton*, 28 N. C. 164, inserted at ch. 1, § 2, (1), ante and note.

Where the guardian of an infant husband took the husband, his ward, from the society of the wife, the wife was held entitled to have her husband released upon habeas corpus proceedings, to the end that he might resume his relations as her husband if he should choose to do so. *Ex parte Chace*, 58 Atl. 978, 69 L. R. A. 493. See “Husband and Wife,” Century Dig. § 5-8; Decennial and Am. Dig. Key No. Series § 3.

(b) *Seduction.*

BIGAOUETTE v. PAULET, 134 Mass. 123. 1883.

Husband's Recovery for Seduction of Wife. Basis of the Action. Consortium.

[Action of tort with four counts: (1) Seduction of wife; (2) Assault on wife; (3) Rape of wife; (4) Assault on wife. Verdict directed against the plaintiff. Plaintiff alleged exceptions. The opinion is on these exceptions. Exceptions sustained. The proof was that the defendant forcibly had connection with the plaintiff's wife—“violently and forcibly ravished her;” that she continued to perform her usual household duties so that her husband suffered no pecuniary loss from the defendant's act. The judge ruled that as there was no seduction proven nor any loss of services, the action could not be maintained.]

W. ALLEN, J. The plaintiff cannot maintain this action for an injury to the wife only; he must prove that some right of his own in the person or conduct of his wife has been violated. A husband is not the master of his wife, and can maintain no action for the loss of her services as his servant. His interest is expressed by the word *consortium*, the right to the conjugal fellowship of the wife, to her company, co-operation and aid in every conjugal relation. Some acts of a stranger to a wife are of themselves invasions of the husband's right, and necessarily injurious to him:

others may or may not injure him, according to their consequences, and, in such cases, the injurious consequences must be proved, and it must be shown that the husband actually lost the company and assistance of the wife. This is illustrated in the statement of injuries to a husband in 3 Bl. Com. 139, 140, where such injuries are said to be principally three: "Abduction, or taking away a man's wife; adultery, or criminal conversation with her; and beating or otherwise abusing her." The first two are of themselves wrongs to the husband, and his remedy is by action of trespass *vi et armis*. In regard to the others, the author's words are, "if it be a common assault, battery, or imprisonment, the law gives the usual remedy to recover damages, by action of trespass *vi et armis*, which must be brought in the names of the husband and wife jointly; but if the beating or other maltreatment be very enormous, so that thereby the husband is deprived for any time of the company and assistance of the wife, the law then gives him a separate remedy by an action of trespass, in the nature of an action upon the case, for this ill usage, *per quod consortium amisit*; in which he shall recover a satisfaction in damages." He states, as one of the circumstances affecting the damages in an action for adultery, "the seduction or otherwise of the wife, founded on her previous behavior and character."

It is usual in actions for criminal conversation to allege the seduction of the wife, and the consequent alienation of her affections, and loss of her company and assistance, and sometimes of her services; but these are matter of aggravation, except so far as they are the statement of a legal inference from the fact itself, and actual proof of them is not necessary to the husband's right of action. The loss of consortium is presumed, although the wife may have herself been the seducer, or may not have been living with the husband. A husband who is living apart from his wife, if he has not renounced his marital rights, can maintain the action, and it is not necessary for him to prove alienation of the wife's affection, or actual loss of her society and assistance. See *Chambers v. Caulfield*, 6 East, 244; *Wilton v. Webster*, 7 C. & P. 198; *Yundt v. Hartrunft*, 41 Ill. 9. The essential injury to the husband consists in the defilement of the marriage bed—in the invasion of his exclusive right to marital intercourse with his wife, and to beget his own children. This presumes the loss of the consortium with his wife—of comfort in her society in that respect in which his right is peculiarly exclusive. Although actions of this nature have generally been brought where the alienation of the wife's affections, and actual deprivation of her society and assistance, have been the prominent injury to the husband, yet it is plain that the seduction of the wife, inducing her to violate her conjugal duties, and the injuries arising from that, are not the foundation of the action. The original and approved form of action is trespass *vi et armis*, and, though this form was adopted when the act was with the consent of the wife, it was for the reason, as given by Chief Justice Holt, that "the law indulges the

husband with an action of assault and battery for the injury done to him, though it be with the consent of his wife, because the law will not allow her a consent in such case to the prejudice of her husband, because of the interest he has in her." *Rigaut v. Gallisard*, 7 Mod. 78; 2 Ld. Raym. 809; Holt, 501. See also Bac. Abr. Trespass, C. 1; and Marriage, F. 2; 2 Chit. Pl. (13th Am. ed.) 855; Reeves' Dom. Rel. 63. The fact that trespass, and not case, was the form of action, even when the wrong was accomplished by the seduction of the wife, for the reason that the wife was deemed incapable of consent, and "force and violence were supposed in law to accompany this atrocious injury," indicates that *the cause of action arose from acts committed upon the person of the wife, and not from influences exerted upon her mind. That the corrupting of the body rather than the mind of the wife was the original essential wrong to the husband.*

We think that this action may be maintained upon the evidence offered, not for the actual loss of comfort, assistance, society and benefit, alleged in the second and fourth counts as consequences of the assaults set forth in them, but for the loss of the consortium with the wife which is implied from criminal conversation with her, whether with or against her will. Exceptions sustained.

That the action lies though the intercourse with the wife is had by violence, see *Egbert v. Greenwalt*, 44 Mich. 245, 6 N. W. 654, 38 Am. Rep. 260; 21 Cyc. 1626; 8 Am. & Eng. Enc. Law, 262; and see 18 L. R. A. (N. S.) 587. The fact that the husband ill-treated his wife, was ill-tempered, and lived unhappily with her, cannot be shown in mitigation of damages, *Van Vector v. McKillip*, 7 Blackford, 578, which case also holds that either trespass vi et armis or trespass on the case will lie for seduction. That a man cannot maintain an action for the seduction of his fiancée, see *Case v. Smith*, 107 Mich. 416, 65 N. W. 279, 31 L. R. A. 282. See 14 L. R. A. (N. S.) at pp. 749, 750 (previous bad character or conduct of the wife, as a defense); 16 Ib. 742, and note (effect of wife's being the aggressor); 16 Ib. 674, and note (mental anguish). For the opposite rulings of Lords Kenyon and Eldon on the measure of damages,—Lord Kenyon allowing punitive damages, and Lord Eldon allowing compensatory damages—see 4 Camp. Lives C. J's, 118, 119. See "Husband and Wife," Century Dig. § 1128; Decennial and Am. Dig. Key No. Series § 341.

MORRIS v. MILLER, 4 Burrows, 2057, 2059. 1767.

"Crim. Con." Proof Requisite in.

[Action for Criminal Conversation with plaintiff's wife. Verdict for plaintiff subject to the opinion of the court upon this question: "Whether, to support an action of crim. con., there must not be proof of an actual marriage?" Judgment of nonsuit against the plaintiff.]

LORD MANSFIELD. I do not, at present, remember any action for criminal conversation, where an actual marriage was not proved. Proof of actual marriage is always used and understood in opposition to proof by cohabitation, reputation, and other circumstances.

from which a marriage may be inferred. We will tell you our opinion to-morrow. Cur' advisare vult.

Lord Mansfield now delivered the opinion of the court. We are all clearly of opinion, that in this kind of action, an action for criminal conversation with the plaintiff's wife, there must be evidence of a marriage in fact: acknowledgement, cohabitation, and reputation, are not sufficient to maintain this action.

But we do not at present define what may or may not be evidence of a marriage in fact. This is a sort of criminal action. There is no other way of punishing this crime at common law. It shall not depend upon the mere reputation of a marriage, which arises from the conduct, or declarations, of the plaintiff himself. In prosecutions for bigamy, a marriage in fact must be proved.

No inconvenience can happen by this determination; but inconvenience might arise from a contrary determination, which might render persons liable to actions founded upon evidence made by the persons themselves who should bring the action. Judgment of nonsuit.

See also *Brinegar v. Chaffin*, 14 N. C. at p. 111; 21 Cyc. 1630. See "Husband and Wife," Century Dig. § 1133; Decennial and Am. Dig. No Series § 348.

KROESSIN v. KELLER, 60 Minn. 372, 27 L. R. A. 372, 62 N. W. 438.
1895.

Wife's Right of Action for Seduction, etc., of Her Husband.

[The plaintiff and the defendant were both women. The plaintiff sues in Crim. Con. for seduction of her husband by the defendant. Demurrer. Demurrer overruled. Judgment against defendant, and she appealed. Reversed.]

COLLINS, J. This is an action brought by a married woman against one of her own sex to recover damages, following, in a general way, the common-law form of declarations in crim. con. A general demurrer to the complaint was overruled in the court below, and by this appeal we are required to determine whether such an action can be maintained: the right to recover being based solely on alleged adulterous acts between plaintiff's husband and the defendant. It is to be noticed here that it is not alleged that the defendant was the seducer of the husband, or that plaintiff has been deprived of his support: nor is it an action for enticing the husband away, or for inducing him to abandon or desert his wife. We are quite safe in saying that at common law no such action could have been maintained. The injured husband alone brought crim. con., and he could sustain the action by simply showing adulterous intercourse. The grounds on which the right to recover was based are well stated in *Cooley on Torts*, 224, and the principal elements were the disgrace which attached to the plaintiff as the husband of the unfaithful wife,—and no such disgrace has ever rested upon the wife, if there was one, of the guilty defend-

ant,—and, of more importance, the danger that a wife's infidelity might not only impose on her husband the support of children not his own, but still worse, cast discredit upon the legitimacy of those really begotten by him. Because of these elements, the man was always conclusively presumed to be the guilty party. In the eye of the law, the female could not even give her consent to the adulterous acts, and, as a result, it was no defense in this form of action that the defendant had been enticed into criminal conversation through the acts and practices of the woman. From this statement as to the grounds or elements constituting this action, it will be seen that the principal ones cannot possibly exist or be involved in a similar action brought by a wife. And what has been said about the unavailability of the defense that the defendant himself was the victim, and not the seducer, is suggestive of what the courts might have to hold to be the rule of pleading, and what they might have to inquire into, upon the trial of an action of this kind. Would it be held, following the old rule we have mentioned, and for which the reason seems well founded, that it was no defense for the female sued to allege and prove that she was the party seduced, and that the greater wrong and injury had been inflicted upon her, not upon the plaintiff wife? or would the contrary rule prevail? But we need not consider the subject further, for a moment's reflection will suggest the remarkable results flowing from the adoption of either rule.

We have been cited to quite a number of cases, determined in the courts of last resort in this country, in which it has been held, without much stress being laid on statutes concerning the rights of married women, that an action may be maintained by a wife against one who wrongfully induces and procures her husband to abandon or send her away. *Westlake v. Westlake*, 34 Ohio St. 621, the court being divided in opinion, is a leading case on this view of the subject. A later one, announcing the same doctrine, but made to rest much more on the married woman's acts in the state of Michigan and similar to our own, is *Warren v. Warren*, 89 Mich. 123, 50 N. W. 842. The plaintiff's counsel has been industrious in collecting this class of cases in his brief, and to them we add *Price v. Price* (Iowa), 60 N. W. 202. But even on this proposition, and despite broad statutory enactments affecting the rights of married women, the courts are not entirely agreed, for in Maine and Wisconsin it has been held that such an action cannot be maintained. *Doe v. Roe*, 82 Me. 503, 20 Atl. 83; *Duffies v. Duffies*, 76 Wis. 374, 45 N. W. 522. But we need not decide, as between these cases, for the exact question raised by the demurrer here was not the one under consideration in any we have cited. They were brought for enticing away the husband; causing him to withdraw his support from the wife; to abandon or desert her,—an entirely distinct and separate cause of action from that set out in the plaintiff's complaint. At common law this form of action was wholly different in pleadings and proof, as well as parties, from crim. con. It proceeded, and still proceeds, upon different grounds, and we do not

regard cases of that nature as authority in this. We are not unmindful of the fact that plaintiff's counsel has presented two cases—*Seaver v. Adams* (N. H.), 19 Atl. 776, and *Haynes v. Nowlin*, 129 Ind. 581, 29 N. E. 389—in which it is held that an action by a wife against another woman, based on a complaint very much like this, will lie. But in these cases the authorities before referred to are cited and relied on as directly in point. The courts rendering these decisions do not seem to have considered that there is, and inevitably must be, a marked distinction between an action charging a defendant with having induced and enticed a husband to withdraw his support from his wife and to abandon and desert her and one similar to crim. con. We think the difference noticeable and material, although we do not wish to be understood as holding that the one first mentioned will lie. That question is not before us, and we simply express our conviction that a wife cannot maintain an action in the nature of crim. con. Such actions would “seem to be better calculated to inflict pain upon innocent members of the families of the parties than to secure redress to the persons injured.” The power to bring such actions would furnish wives “with the means of inflicting untold misery upon others, with little hope of redress for themselves.” We find nothing in our statutes in respect to the rights of married women which indicates that the power to proceed in this form of action was intended to be conferred. Attention has been called to Gen. Laws 1887, c. 207, § 1. We have heretofore had occasion to comment upon that act, and have not changed our views as then expressed. *Althen v. Tarbox*, 48 Minn. 18, 50 N. W. 1018. Order reversed.

The principal case is not one for seduction, enticing away, or inducing the husband to abandon or desert his wife, but for crim. con. with the husband, and for that alone. It is not to be confounded with the cases of seduction, enticing, etc. See *Haynes v. Nowlin*, 129 Ind. 581, 29 N. E. 389, and read it in the light of the criticism upon it in the principal case. See also *Gernerdt v. Gernerdt*, 185 Pa. 233, 39 Atl. 884, 40 L. R. A. 549 (inserted in ch. 6, § 1, (c), post) and notes. It will be observed that the reason assigned for the rule of the common law does not come within the spirit of modern statutes conferring upon a feme covert the right to sue alone, etc. The reason referred to is: “The man was always conclusively presumed to be the guilty party. In the eye of the law, the female could not even give her consent to the adulterous acts, and, as a result, it was no defense in this form of action [crim. con. by the husband against the seducer of his wife] that the defendant had been enticed into criminal conversation through the acts and practices of the woman.” “The legal inability of a wife to consent to the act” is announced in *Barbee v. Armstead*, 32 N. C. at p. 535, inserted in the next section. See “Husband and Wife,” Century Dig. § 1128; Decennial and Am. Dig. Key No. Series § 341.

(c) Enticing and Harboring.

BARBEE v. ARMSTEAD et al., 32 N. C. 530, 535. 1849.

What is the Proper Form of Action for Enticing and Harboring a Wife?

[Action of Trespass on the Case to recover damages for enticing the plaintiff's wife to leave him and for detaining her. Verdict and judgment against the plaintiff, and he appealed. Reversed.]

One of the defendants was the mother-in-law of the plaintiff, and lived with the defendant Armstead. She assigned as a reason for enticing her daughter to leave the plaintiff, that the plaintiff was lazy and failed to provide for his wife, and that she, the defendant, "did not wish her daughter to perish." Some time after the enticing away of his wife, the plaintiff entered into a written agreement with Armstead to the effect that Armstead might retain the custody of the wife with the right of the plaintiff to visit her. After deciding that this contract was invalid, the opinion proceeds:]

NASH, J. . . . Lord Brougham declares, in *Warrender v. Warrender*, 2 Cl. & Fin. 561. that, notwithstanding a deed of separation had been executed, the husband had a right to reclaim his wife; his language is "no pledge can bind the party not to reclaim his or her conjugal rights, for such pledge is against the inherent condition of the married state, and against public policy." The plaintiff in this case, his license being by parol, had a right to reclaim his wife. His demand was a revocation of his license to the defendant to harbor her, and he was a wrong-doer in continuing to do so.

Finally, the defendant insists, that the plaintiff has misconceived his action, and ought to have sued in trespass. Mr. Chitty in the 1st vol. of his treatise on pleadings, page 91, says that trespass is the appropriate remedy for seducing away a wife, or seducing a daughter; but he does not say that it is, in either case, the only remedy; and on the same page he states, that for the latter offense, it has been usual to declare in case. The same principles govern the action for each injury—the legal inability of the wife or child to assent to the act. Where the injury is both immediate and consequential, either action can be supported, page 147. If there be a doubt as to the form of the action in this case, it is whether the plaintiff could have maintained trespass for a detention, even after a demand. . . . Judgment reversed.

See *Powell v. Benthall*, 136 N. C. 145, 48 S. E. 598, inserted post in this subsection. See "Husband and Wife," *Century Dig.* § 1118; *Decennial and Am. Dig. Key No. Series* § 324.

RINEHART v. BILLS, 82 Mo. 534, 52 Am. Rep. 385. 1884.

Alienation of Wife's Affections Without Enticing Her Away or Seducing Her.

[Bill in equity to enjoin the collection of a note given the defendant by the plaintiff, on the ground that it was procured by fraud and threats. Answer. Demurrer to answer. Demurrer overruled. Judgment against

the plaintiff for the balance due the defendant on the note. Plaintiff appealed. Affirmed.

The answer set up that plaintiff made love to defendant's wife and obtained her consent to an elopement, although she repented and made a full confession to the defendant and abandoned her idea of eloping; that defendant threatened to sue the plaintiff for his conduct and, in compromise, the plaintiff executed the note in controversy. The balance due on the note was set up by the defendant as a counterclaim.]

MARTIN, C. . . . Only one question is presented to us in the record for determination. That question involves the sufficiency of the defense, and is raised on the demurrer and in the motions made after judgment. The plaintiff contends that as the answer fails to show that defendant's wife had been actually debauched or seduced away from him, no wrong had been inflicted upon him for which an action lies, and that the note taken in settlement of the supposed wrong was void as being without consideration. This position cannot be maintained upon either principle or authority. The injury to the defendant consists in the alienation of his wife's affections with malice or improper motives. Debauchery and elopement when they occur are only the immediate and legitimate consequences of the wrong. That the injury in this instance did not culminate in adultery and elopement is a fact not due to the plaintiff's forbearance, but to the wife's prudent reflection and laudable repentance. The alienation of the wife's affections for which the law gives redress may be accomplished notwithstanding her continued residence under her husband's roof. Indeed it has been not infrequently remarked by authors and jurists that such continued residence after the alienation has been effected, so far from leaving the husband without a good cause of action, contributes an aggravation to his injury from which an elopement might well be accepted in the nature of an alleviation. *Schouler, Dom. Rel.* 57; *Cooley, Torts*, 224; *Hoard v. Peek*, 56 Barb. 202; *Heermance v. James*, 47 Barb. 120. I think it would be difficult to regard it in any other light in the absence of contrition or change of heart. The demurrer admits the salacious and seductive solicitations of the plaintiff, extending over a period of eighteen months. It also admits the fact of actual estrangement and alienation which constitutes the essence of the offense. Every thing which follows afterward can be only in the nature of aggravation, mitigation or reparation of the wrong inflicted upon the sanctity of the defendant's home.

I may add here, by way of allusion to the consideration of the note, that the compromise of a doubtful claim asserted in good faith furnishes a valuable consideration to support a promise. 1 Pars. Cont. 438, § 4, 6 Ed. The judgment is affirmed.

See 3 L. R. A. (N. S.) 470 (conspiracy to alienate affections); 16 Ib. 742, and note (the wife being the aggressive party to the alienation). See "Husband and Wife," *Century Dig.* § 1118; *Decennial and Am. Dig. Key No. Series* § 324.

BERTHON v. CARTWRIGHT, 2 Espinasse, 480. 1796.

Harboring a Wife Who Leaves the Husband for Good Cause.

Case for seducing the plaintiff's wife, detaining her, and thereby depriving him of her society. Plea of not guilty. The plaintiff proved the elopement of his wife from his home, and her reception and entertainment by the defendant.

The defense was, that the plaintiff's wife had been compelled to leave his house in consequence of ill treatment, and had been received by the defendant out of motives of humanity.

It was ruled by Lord Kenyon, that if a husband ill treats his wife so that she is forced to leave his house through fear of bodily injury, a person may safely, nay honorably, receive and protect her; and that of course in such case no action was maintainable. The plaintiff was nonsuited.

See "Husband and Wife," Century Dig. § 1118; Decennial and Am. Dig. Key No. Series § 324.

HOLTZ v. DICK, 42 Ohio St. 23, 51 Am. Rep. 791. 1884.

Enticing and Harboring Minor Wife by Her Parents. General Rules Governing Enticing and Harboring in All Cases.

[Dick sued Holtz and his wife, the parents of Dick's wife, for the alleged malicious enticing away of his wife. The defense was that Dick's wife left him of her own uninfluenced will. Verdict and judgment against Holtz and wife. The case comes before the supreme court on a petition in error filed by Holtz and wife in the lower court, from which the cause was transferred to the supreme court for decision of the question raised by the petition. Affirmed.

The wife was only sixteen years of age. She and her husband got along well enough together; but Mrs. Holtz hated her son-in-law and persuaded his wife to leave him out of malice towards him, and not for the good of her daughter. Mrs. Holtz' husband simply submitted to her acts because of her dominion over him. After disposing of minor points of evidence, etc., the opinion proceeds:]

OKEY, J. . . . The remaining question relates to the law applicable to the case. A man properly demeaning himself is entitled to the society and assistance of his wife against all the world. Whoever unlawfully deprives him of such society or assistance is liable to an action. In estimating damages, however, each case must be determined by the circumstances attending it, and the motive of the intervening person must ever be kept in view. The cases may be properly divided into two classes. One where a villain interferes for the purpose of seduction, or the sole ground of interference is malice; the other where friends, usually parents, interfere for the protection of the wife and the offspring, if any. In the first class the husband, if without fault, is always entitled to damages; in the latter, if the motive of the intervening

person was pure, and the appearance seemed to indicate necessity for interference, there can be no recovery, though no occasion for interference really existed. Much will be forgiven the parents of a wife who honestly interfere in her behalf, though the interference was wholly unnecessary, and may have been detrimental to her interest and happiness, as well as that of her husband; still, where the motive is not protection of the wife, but hatred and ill will of the husband, it is no answer to his action for such interference that the offenders were his wife's parents. *Friend v. Thompson, Wright*, 636, 639; *Rabe v. Hanna*, 5 Ohio, 530; *Preston v. Bowers*, 13 Ohio St. 1; *Schouler's Bus. & W.* § 64; *Cooley's Torts*, 224.

As James Dick was living happily with his wife, and it was the interest and desire of both that they should continue so to live, we deny that the parents had authority to cause them to separate on the mere ground that she had not arrived at the age of sixteen years and the marriage was without such parents' consent; and the motive having been malice toward Dick and not protection to Irena, we hold that the action was maintainable, even if her age was as her parents claimed it to be.

I confess to some reluctance to the entry of judgment against Frederick Holtz. But if the law as to the liability of the husband for the tort of his wife is wrong, the evil must be remedied by the legislature and not this court. Judgment affirmed.

See *Brown v. Brown*, 124 N. C. 19, 32 S. E. 320, which sustains the principal case, and goes on to show that while parents are liable for maliciously enticing their infant children to abandon their spouses, still the bona fide acts of parents—not wanton or malicious—in bringing about such separations, are treated with much greater leniency than are the officious intermeddlings of strangers. See "*Husband and Wife*," *Century Dig.* § 1118; *Decennial and Am. Dig. Key No. Series* § 324.

POWELL v. BENTHALL, 136 N. C. 145, 153, 48 S. E. 598. 1904.

Enticing and Harboring. Acts of Strangers and of Parents and Other Relatives.

[Action by a husband against his sister-in-law and her husband, (1) For enticing away his wife and alienating her affections; (2) For harboring his wife after being forbidden to do so. Verdict against the plaintiff on the first cause of action, and against the defendants on the second cause of action. Judgment against defendants, and they appealed. Reversed.]

The defense set up was that the plaintiff's wife left him of her own accord and with his consent, to seek for work; that she refused to return to him; that defendants acted without malice and because of their relationship to the wife of the plaintiff and to "assist a neglected relative in her unhappy condition." The defendants asked the court to charge the jury: "The defendants had the right to permit their sister to live in their house, and to give her such countenance, comfort, and support as her condition seemed to require, although she had separated from her husband without just cause, and although the plaintiff, after said separation, forbade the defendants to give shelter, comfort, and support and protection to his wife; and the jury should answer the second issue 'No,'

unless they find that the defendants wrongfully induced the plaintiff's wife to leave her husband—alienate her affections from him—notwithstanding the defendants did give to the plaintiff's wife, after she left her husband, such shelter, comfort, and support." The court refused the prayer, and defendants excepted.]

CONNOR, J. . . . We should be reluctant to excuse or justify the conduct of either husband or wife, or of third persons, encouraging separation or withdrawal of marital rights or refusal to recognize or discharge marital duties. We should adhere strictly to the wise and salutary principles announced and enforced by the great judges who have preceded us as essential to the sanctity of this relation which forms the basis of our social and domestic life. On the other hand, we should be equally reluctant to adhere to the conceptions of a past age regarding the status of the wife and the power of the husband over her person and conduct. We fully sympathize with the statement made in "A Century of Law Reform" that there is no branch or department of the law in which the change has been greater or the contrast more violent. It is not necessary to cite decisions of this court to show that our predecessors have recognized, and given expression to the change of public conscience and policy in this respect. Thirty years ago this court, speaking by SETTLE, J., said: "We may assume that the old doctrine that a husband has a right to whip his wife, provided he used a switch no larger than his thumb, is not law in North Carolina. Indeed, the courts have advanced from that barbarism until they have reached the position that the husband has no right to chastise his wife under any circumstances." *State v. Oliver*, 70 N. C. 60. In 1891 Lord Chancellor Halsbury, in *Regina v. Jackson*, 1 L. R. R. B. D. 671, said: "The court has satisfied itself that in refusing to go and continue in her husband's house [the petitioner] was acting of her own free will, and that she is not compelled or . . . induced by any one to refuse to continue to remain where she was before he removed her. I confess that some of the propositions which have been referred to during the argument are such as I should be reluctant to suppose ever to have been the law of England. . . . In the same way such quaint and absurd dicta as are to be found in the books as to the right of the husband over his wife in respect of personal chastisement are not, I think, capable of being cited as authorities in a court of justice in this or any civilized country." He says: "The return seems to me to be based on the broad proposition that it is the right of the husband, when his wife has wilfully absented herself from him, to seize the person of his wife by force, and detain her in his house until she shall be willing to restore him to his conjugal rights. I am not prepared to assent to such a proposition." In this case opinions were written by the Master of the Rolls, and Fry, L. J., concurring with the Chancellor. The case is regarded as the latest and best judicial expression of the law conforming to the sentiment of the most enlightened statesmen and jurists of the age. So far back as 1791, Lord Kenyon, who certainly was not a radical judicial re-

former, said in *Phillips v. Squire, Peake*, Rep. 82: "The ground of this action is that the defendant retains the plaintiff's wife against the inclination of her husband, whose behavior he knows to be proper; or from selfish or criminal motives. But where she is received from principles of humanity the action cannot be supported. If it could, the most dangerous consequences would ensue, for no one would venture to protect a married woman. It is of no consequence whether the wife's representation was true or false. This kind of action materially differs from that of harboring an apprentice, the ground of that action being the loss of apprentice's services." The plaintiff was nonsuited. In *Turner v. Estes*, 3 Mass. 317, the court said: "The defendant is charged with enticing the plaintiff's wife. No evidence was given at the trial of any enticing. As to the charge of harboring, the sum of the evidence is that the defendant permitted his wife's mother to remain in his house, without using force to expel her. He was not obliged to use force." These authorities fully sustain the defendants' exception to the charge.

We think that his honor was also in error in placing upon the defendants the burden of showing justification. *Barnes v. Allen*, *40 N. Y. 390. The learned justice says: "The gist of the action, as all the authorities agree, is the loss, without justifiable cause, of the comfort, society, and services of the wife. In maintaining the action two questions principally arise: Was the loss occasioned by the voluntary action of the wife upon justifiable cause, or was it occasioned by the acts or persuasion of the defendant without any real cause, and in bad faith towards the plaintiff? On both these questions the plaintiff must give evidence tending to establish his case, or his action must fail." The error in the instruction in this particular is that it overlooks entirely the motives, and casts the burden of proving the truth of the wife's statement upon the defendant.

We are further of the opinion that his honor erred in telling the jury that they could not consider the relation of the defendants to the plaintiff's wife. Upon the question of good faith the relationship was most material. It cannot be that a sister and her husband are to be treated as officious intermeddlers and wrongdoers for giving food and shelter to plaintiff's wife and permitting her to remain in their home. We do not intend to say that, if it appeared that they actively procured the separation, or counseled and advised its continuance, they would not be liable; but where the question of motive is essential to be shown the relationship is not only relevant, but most material.

After a careful examination of the testimony, we fail to see any evidence fit to be submitted to the jury to sustain the affirmative of the issue. In view of all the evidence, we think his honor should have given the instruction asked upon the second issue. He could not have dismissed the action pending the trial upon the first issue. The finding upon that issue practically put an end to the case. The plaintiff relied upon the case of *Johnson v. Allen*, 100 N. C.

131, 5 S. E. 666. That was a case in which the plaintiff sued for "enticing, harboring, and debauching" his wife. The testimony was ample to sustain the allegation. The language of the court must be taken in the light of the testimony. There is a vast difference between the case of a man who entices another man's wife away from him and debauches her and the facts in this case.

The conclusion to which we have arrived renders it unnecessary to pass upon the exceptions of the defendants' counsel in regard to the form of the issue and the verdict. It is not improper to say, however, that in the light of what is said in *Pearce v. Fisher*, 133 N. C. 333, 45 S. E. 638, the exception should be sustained. For the error pointed out, there must be a new trial.

That the marriage of an infant daughter works her emancipation from parental control, see *Wilkinson v. Dellinger*, 126 N. C. 462, 35 S. E. 819; 80 N. W. 877, 46 L. R. A. 440, and notes; and the notes to *State v. Stigall*, 22 N. J. L. 286, inserted at sec. 2 of this chapter. Whether or not a husband can recover for the harboring of his wife when they are living apart under articles of separation—which articles he undertakes to repudiate—presents a question of some interest. See *Barbee v. Armstead*, 22 N. C. 530, inserted ante in this subsection; *A Century of Law Reform*, 348; *Smith v. King*, 107 N. C. 273, 12 S. E. 57; *Eversley's Dom. Rel.* 434 et seq.; 25 Am. & Eng. Enc. L. 476; *Metcalf v. Tiffany*, 106 Mich. 504, 64 N. W. 479.

That damages may be recovered for an unlawful entry upon land with intent to debauch the owner's wife, see *Brame v. Clark*, 148 N. C. 364, 62 S. E. 418, inserted at ch. 3, sec. 12, ante. It is a felony in North Carolina to elope with or abduct the wife of another, see *Revisal*, sec. 3360. See "Husband and Wife," *Century Dig.* § 1118; *Decennial and Am. Dig. Key No. Series* § 324.

GERNERD v. GERBERD, 185 Penn. 233, 39 Atl. 884, 40 L. R. A. 549, 1898.
*When the Wife Can and Cannot Sue for Enticing Her Husband from Her,
 or Tortiously Inducing or Causing Him to Abandon Her.*

[Action by the wife against her father-in-law for inducing her husband to abandon her, by means of injurious words spoken of and concerning her. Judgment against defendant, and he appealed. Affirmed.]

FELL, J. The right of a husband to maintain an action against one who has wrongfully induced his wife to separate from him seems not to have been doubted since the case of *Winsmore v. Greenbank* (decided in 1745), *Willes*, 577. The right of a wife to maintain an action for the same cause has been denied, because of the common-law unity of husband and wife, and of her want of property in his society and assistance. There was certainly an inconsistency in permitting a recovery when her husband was a necessary party to the action, and she had no separate legal existence or interest, and the damages recovered would belong to him, but the gist of the action is the same in either case. There is no substantial difference in the right which each has to the society, companionship, and aid of the other, and the injury is the same whether it affects the husband or the wife. Where the wife has

been freed from her common-law disabilities, and may sue in her own name and right for torts done her, we see no reason to doubt her right to maintain an action against one who has wrongfully induced her husband to leave her. Generally, this right has been recognized and sustained in jurisdictions where she has the capacity to sue, notably in the cases of *Bennett v. Bennett*, 116 N. Y. 584, 23 N. E. 17; *Foot v. Card*, 58 Conn. 4, 18 Atl. 1027; *Seaver v. Adams*, N. H. C. 19 Atl. 776; *Westlake v. Westlake*, 34 Ohio St. 621; *Haynes v. Nowlin*, 129 Ind. 581, 29 N. E. 389; *Warren v. Warren*, 89 Mich. 123, 50 N. W. 842; *Bassett v. Bassett*, 20 Ill. App. 543; *Price v. Price*, 91 Iowa, 693, 60 N. W. 202; *Clow v. Chapman*, 125 Mo. 101, 28 S. W. 328; *Mehrhoff v. Mehrhoff* (C. C.), 26 Fed. 13. The New York and Indiana cases cited overrule the earlier cases in those states in which a different conclusion had been reached. The only decisions in which we find the right denied are *Duffies v. Duffies*, 76 Wis. 374, 45 N. W. 522, and *Doe v. Roe*, 82 Me. 503, 20 Atl. 83. Of late years, the right of the wife to sue has generally been maintained by text writers. It is said in *Bigelow*, *Torts*, 153: "To entice away or corrupt the mind and affection of one's consort is a civil wrong, for which the offender is liable to the injured husband or wife." And in *Cooley*, *Torts*, 228: "We see no reason why such an action should not be supported, where, by statute, the wife is allowed for her own benefit, to sue for personal wrongs suffered by her." In 1 *Jag. Torts*, p. 467, many of the cases on the subject are referred to, and the conclusion is thus stated: "On the other hand, it has been insisted that in natural justice no reason exists why the right of the wife to maintain an action against the seducer of her husband should not be coextensive with the right of action against her seducer. The weight of authorities and the tendency of the legislation strongly incline to the latter opinion." The same proposition is stated in 1 *Am. & Eng. Enc. Law* (2d ed.) p. 166, and in 1 *Bish. Mar. & Div.* § 1358. The defendant in this action was the father of the plaintiff's husband, and the case was one to be carefully guarded at the trial. The intent with which he acted was material in determining his liability. It was his right to advise his son, and in so doing in good faith, and with a proper motive, he should not be regarded in the same light as a mere intermeddler. A clear case of want of justification on the part of the parents should be shown before they should be held responsible. *Cooley*, *Torts*, 265; *Hutcherson v. Peck*, 5 Johns. 196; *Bennett v. Smith*, 21 Barb. 439; *Huling v. Huling*, 32 Ill. App. 519; *Tasker v. Stanley*, 153 Mass. 148, 26 N. E. 417; *Fratini v. Caslini* (Vt.), 44 Am. Rep. 850, note (S. C., 29 Atl. 252). On the trial the plaintiff was held to distinct and clear proof that the defendant wrongfully and maliciously caused her husband to abandon her. Every right which the defendant could properly claim in this regard was carefully stated in a very clear and adequate charge. The claim that the action was, in effect, an action for words spoken, and consequently barred by the statute of limitations, cannot be sustained. It was not either in

form or in substance an action of slander, and the words proven were only one of the many means employed by the defendant to effect his purpose. The judgment is affirmed.

See *Kroessin v. Keller*, 60 Minn. 372, inserted at sec. 1 (b), ante, and note, for the right of the wife to sue for seduction of her husband. For other authorities on enticing a husband from his wife, see *Brown v. Brown*, 121 N. C. 8, 27 S. E. 998, which holds that a wife who is abandoned may maintain such an action in North Carolina, because, being abandoned, she becomes a free trader under the statute; 1 Am. & Eng. Enc. L. 166; 15 Ib. 864-866. See 4 L. R. A. (N. S.) 643, 3 Ib. 470, and notes; and note to *Rinehart v. Bills*, inserted ante in this section. See "Husband and Wife," Century Dig. § 1119; Decennial and Am. Dig. Key No. Series § 325.

(d) *Injuries to the Wife by Her Husband and by Third Persons.*

HOLLEMAN v. HARWARD, 119 N. C. 150, 152-155, 25 S. E. 972. 1896.

Selling Deleterious Drugs to the Wife. Husband's Right of Action.

[Action for damages resulting from sale of laudanum to plaintiff's wife. Demurrer by defendant. Demurrer sustained. Judgment against the plaintiff, from which he appealed. Reversed.]

The complaint alleged that defendant was a druggist and knew that plaintiff's wife was using large quantities of laudanum to the injury of her health; that plaintiff notified the defendant not to sell to her; that defendant nevertheless sold laudanum to her; and that plaintiff sustained injuries in consequence.]

MONTGOMERY, J. . . . The question, then, is, can the plaintiff, upon the facts set out in the complaint, maintain an action? The action is a novel one. With the exception of the case of *Hoard v. Peck*, 56 Barb. 202, which, in its most important aspects, resembles the one before us, we have been able to find no precedent in the English common-law courts or in the courts of any of our states. It does not follow, however, that because the case is new the action cannot be maintained. If a principle upon which to base an action exists, it can be no good objection that the case is a new one. It is contended for the defendants, though, that there is no principle of the common law upon which this action can be sustained, and that our own statutory law gives no such remedy as the plaintiff seeks in this action for the wrong done to him by the defendants, and that the novelty of the action, together with the silence of the elementary books on the subject-matter of the complaint, while not conclusive, furnishes strong countenance to their contention. It is claimed for the defendants that while, in the abstract, such facts as are stated in the complaint would make the parties charged guilty of a great moral wrong, there would be no legal liability incurred therefor. It was argued for the defendants that there was no legal obligation resting upon themselves not to sell the drug, as is alleged, to the plaintiff's wife, or upon the wife not to use it; that many of the ancient restrictions upon the rights of married women had been repealed by recent legislation, or modified by a more liberal judicial construction; that a married

woman was ordinarily free to go where she would, and that the husband could not arbitrarily deprive her of her liberty, nor use violence against her under any circumstances, except in self-defense, and that, if he could not restrain her locomotion and her will, he could not prevent her from buying the drug and using it; that the wife's duty to honor and obey her husband, to give to their children motherly care, to render all proper service in the household, and to give him her companionship and love, was a moral duty, but that they could not be enforced by any power of the law, if the wife refused to discharge them. But, notwithstanding the claim of the plaintiff, we think this action rests upon a principle,—a principle not new, but one sound and consistent. The principle is this: "Whoever does an injury to another is liable in damages to the extent of that injury. It matters not whether the injury is to the property, or the rights, or the reputation of another." Story, J., in *Dexter v. Spear*, 4 Mason, 115, Fed. Cas. No. 3,867. And also in the third book of Blackstone's Commentaries (ch. 8, p. 123) it is written: "Wherever the common law gives a right, or prohibits an injury, it also gives a remedy by action." A married woman still owes to her husband, notwithstanding her greatly improved legal status, the duty of companionship, and of rendering all such services in his home as her relations of wife and mother require of her. The husband, as a matter of law, is entitled to her time, her wages, her earnings, and the product of her labor, skill, and industry. He may contract to furnish her services to others, and may sue for them, as for their loss, in his own name. And it seems to be a most reasonable proposition of law that whoever wilfully joins with a married woman in doing an act which deprives her husband of her services and of her companionship is liable to the husband in damages for his conduct. And the defendants owed the plaintiff the legal duty not to sell to his wife opium in the form of large quantities of laudanum as a beverage, knowing that she was, by using them, destroying her mind and body, and thereby causing loss to the husband. The defendants and the wife joined in doing acts injurious to the rights of the husband. From the facts stated in the complaint, the defendants were just as responsible as if they had forced her to take the drug, for they had their part in forming the habit in her, and continued the sale of it to her after she had no power to control herself and resist the thirst; and that, too, after the repeated warnings and protests of the husband. There is no difference between the principle involved in this action and the principle upon which a husband can recover from a third person damages for assault and battery upon his wife. That assaults and batteries are made criminal offenses makes no difference, the foundation of the husband's suit being, not for the public offense, but for damages,—compensation for the injury which he has sustained on account of the loss of his wife's services. The sale of the laudanum by the defendants to the plaintiff's wife, under the circumstances set out in the complaint, was wilful and unlawful, and the husband's in-

jury is just as great as if his wife had been disabled from a battery committed on her, although the unlawful act is not indictable.
 . . . Error.

In a "Note by the Reporter" to *Rinehart v. Bills*, 52 Am. Rep. 385, at p. 388, it is said: "The case of *Hoard v. Peck*, 56 Barb. 202, cited in the opinion above, is sui generis, and probably will always remain so. It was there held that a husband may maintain an action against an apothecary, who, without the husband's knowledge, habitually sells laudanum to the wife, knowing that she uses it to the impairment of her mind and body. It would seem that if this were law there would be no need of the civil damage acts which grant a similar redress to the wife against those who sell intoxicating liquors to the husband." See "*Husband and Wife*," 2 Stat. Dig. §§ 767, 768; Decennial and Am. Dig. Key No. Series § 269.

SMITH v. CITY OF ST. JOSEPH, 55 Mo. 456, 17 Am. Rep. 660. 1874.
Injury to the Wife. Remedies of the Husband and Wife Respectively.

[Action by the husband for damages incident to loss of services of his wife and to necessary expenses incurred in her cure, in consequence of injuries suffered by the wife through the alleged negligence of the defendant. Judgment against the defendant. Defendant appealed. Affirmed.]

In an action brought against the defendant by the plaintiff and his wife, the wife had recovered for the injuries she had sustained and for the physical suffering she endured. This recovery by the wife—her husband having been joined with her as co-plaintiff for conformity only—was relied upon as a defense to this action by the husband. The facts appear in the latter part of the opinion.]

WAGNER, J. . . . The main questions relied on for a reversal of this judgment are, (1) that the former judgment was a bar to the maintenance of this action, and (2) that the court erred in its instructions in reference to damages. The judgment rendered in favor of plaintiff and wife in the former action was solely for the damages resulting to the wife in consequence of the injuries received by her. She was the meritorious cause of the action, and the husband was merely joined under the provisions of the statute to enable her to sue. But the damages there were strictly confined to her personal injuries, and the expenses incurred by the husband, and loss of service, which constitute the foundation of this action, were not in that case. In some of the New England states, under the provisions of statutes regulating the subject, it is held that but one action can be maintained. Those statutes permit all the damages incident to and growing out of the injury to be recovered in the same suit. They provide for but one action. But in the other states, where no such statutory regulations exist, a contrary doctrine is held. In the case of *McKinney v. Western Stage Co.*, 4 Iowa, 420, the court says: "We suppose that at common law the rule is well settled that for an injury to the person of the wife during coverture, by battery, or to her character by slander or any such injury the wife must join with the husband in the

suit. When, however, the injury is such that the husband receives a separate loss or damage, as, if in consequence of the battery, he has been deprived of her society, or has been put to expense, he may bring a separate action in his own name. *Barnes v. Hurd*, 11 Mass. 59; *Lewis v. Babcock*, 18 Johns. 443; 2 Saund. Pl. & Ev. 568; and this rule we do not understand to be changed by the Code."

The Indiana court holds, also, that the established doctrine is, that for a tort committed upon a wife two actions will lie, one by the husband alone for the loss of service, expenses, etc., and the other by the husband and wife for the injury to her person. *Rogers v. Smith*, 17 Ind. 323; *Long v. Morrison*, 14 Ind. 595; *Ohio & M. R. R. Co. v. Tindall*, 13 Ind. 366; *Boyd v. Blaisdell*, 15 Ind. 73.

In the case of *Fuller v. Naugatuck R. R. Co.*, 21 Conn. 557, it was said that it was clear that the plaintiffs could not recover for the wife's personal injury and also for the expenses of her cure in the same action. On the former ground of damages, the husband would have no interest, while the latter would accrue to him alone, and so the two claims would be incompatible with each other. The same principle has often been adjudged in different cases and laid down in elementary treatises. *Reeves' Dom. Rel.* 291; *Whitney v. Hitchcock*, 4 Denio, 461; *Cowden v. Wright*, 24 Wend. 429; *Bartley v. Ritchmyer*, 4 N. Y. 38; *Klingman v. Holmes*, 54 Mo. 304. We think there can be no doubt respecting the maintenance of the action, and that there is no bar in consequence of the previous recovery.

On the question of damages the court instructed the jury that if they found for the plaintiff they should assess his damage at such sum as was shown by the evidence would compensate him for the expenses he had necessarily incurred, in nursing and taking care of his wife for the time she was diseased and disabled on account of the injury she had sustained in falling over the embankment, including compensation for his services in waiting upon her, doctors' bills, and cost of medicine, and also for the loss of her services directly resulting from the injury. The only serious objection made to this instruction is that it allows the plaintiff to recover compensation for his services in waiting upon his wife during her illness. Under all the circumstances surrounding this case I think the instruction was right. [FACTS.] The evidence shows that the wife's thigh was broken by the fall; that for two months she was so utterly helpless that her husband had to be constantly at her bedside and assist her even to move. During all this time he did not take off his clothes, as his attentions were required to be unceasing and unremitting. The husband then had to neglect all his business to perform this painful duty, and if he had not done it in person he would have been under the necessity of hiring some one to do it in his stead. In this aspect of the case, therefore, I think the instruction was justified.

There is no reason for interference on the ground that the damages were excessive. The verdict was for \$3,500, and the wife was

confined to her bed for a year before she could even get around the room on crutches: she was constantly using medicine all that time, and under the attendance of physicians, and extra servants had to be employed. Before the accident, she was a healthy young woman about thirty-one years old and a good housekeeper, superintended the domestic affairs of the family, and did all the sewing for them. She had a family of six small children, and they and her husband have lost the benefit of her services. Seven years had elapsed from the occurrence of the injury up to the time of the trial, and the husband for that length of time had been deprived of her services, and will be as long as she lives, for it is conceded that the accident had rendered her a cripple for life. Taking all these things together, and the estimate placed upon the loss of services by the witnesses, and the actual expenses laid out and incurred by the plaintiff, we are not prepared to say that the jury placed the compensation too high. Judgment affirmed.

"If one slanders a married woman or commits an assault and battery upon her, the action for injuring her must be in the name of husband and wife, although, in the latter instance, if there be any damage besides the pain suffered by the wife—as a loss of service, or an injury to her clothes, or medical bills—the husband may sue alone and allege special damage. So, if one drive a carriage so negligently as to run against a married woman, in an action for the personal injury to her, she is a necessary party as the husband cannot sue alone without alleging special damage." Pearson, C. J., in *Crump v. McKay*, 53 N. C. 32, decided in 1860, before the adoption of the Code practice. In 1893, it was held that a husband could not recover for the slander of his wife unless he showed special damage to himself. This was under the Code practice. *Harper v. Pinkston*, 112 N. C. 293, 17 S. E. 161. In *Strother v. R. R.*, 123 N. C. 197, 31 S. E. 386, it is held that the wife can sue alone for insults offered her, and that the husband is not required to be a party to the action and has no interest or share in the recovery. See 17 L. R. A. (N. S.) 570, and note (does the husband's action abate at his death?); 20 Ib. 215, and note (right of wife to sue for injury to herself); 9 Ib. 1193, 19 Ib. 633, and notes (right of husband to recover for injuries resulting in wife's death). See "Husband and Wife," Century Dig. §§ 767, 768; Decennial and Am. Dig. Key No. Series § 209.

BANDFIELD v. BANDFIELD, 117 Mich. 80, 75 N. W. 287, 40 L. R. A. 757. 1898.

Injuries to the Person of the Wife by the Husband. Remedy of the Wife.

[Mrs. Bandfield sued her husband for damages sustained by his communicating to her a loathsome and incurable disease. The plaintiff had been abandoned by her husband and she had obtained a divorce from him before bringing this action. Defendant demurred. Demurrer sustained. Judgment against plaintiff, and she appealed. Affirmed.]

GRANT, C. J. The sole question is: Can a wife maintain suit against her husband for a personal tort, committed upon her while they were living together as husband and wife? We answered this question in the negative in the case of *Wagner v. Carpenter*, cir-

circuit judge, decided November 17, 1897. In that case the husband had uttered a gross libel against his wife. She brought suit by *capias ad respondendum*, and the proceedings were quashed by the circuit judge, for the reason that the wife could not maintain the suit against her husband. The wife applied to this court for the writ of mandamus to compel the circuit judge to vacate that order. The writ was denied, and the order of the circuit judge sustained. No opinion was written. But the sole and identical question there involved is the same as is involved in this suit. The briefs there filed pursued the same line of argument and cited the same authorities as are now cited. Counsel cite the married woman's act of this state as conferring this right. This act is found in 2 How. Ann. St. §§ 6295, 6297, which read as follows: "The real and personal estate of every female, acquired before marriage, and all property, real and personal, to which she may afterwards become entitled by gift, grant, inheritance, devise, or in any other manner, shall be and remain the estate and property of such female.

Actions may be brought by and against a married woman in relation to her sole property, in the same manner as if she were unmarried." In many decisions the courts of many of the states, notwithstanding the statutes conferring rights upon a married woman over her separate property not conferred by the common law, have thus far, without exception, denied the right of a wife to sue her husband for personal wrongs committed during coverture. No such right is conferred by our statute unless it be by implication. The legislature should speak in no uncertain manner when it seeks to abrogate the plain and long-established rules of the common law. Courts should not be left to construction to sustain such bold innovations. The rule is thus stated in 9 Bac. Abr. tit. "Statutes," I, p. 245: "In all doubtful matters, and when the expression is in general terms, statutes are to receive such a construction as may be agreeable to the rules of the common law in cases of that nature; for statutes are not presumed to make any alteration of the common law, further or otherwise than the act expressly declares. Therefore in all general matters the law presumes the act did not intend to make any alteration; for, if the parliament had that design, they should have expressed it in the act."

The result of plaintiff's contention would be another step to destroy the sacred relation of man and wife, and to open the door to law suits between them for every real and fancied wrong,—suits which the common law has refused on the ground of public policy. This court has gone no further than to support the wife, under the married woman's act, in protecting her in the management and control of her property. It has sustained her right to an action for assault and battery, for slander, and for alienation of her husband's affections against others than her husband. *Berger v. Jacobs*, 21 Mich. 215; *Leonard v. Pope*, 27 Mich. 145; *Rice v. Rice*, 104 Mich. 371, 62 N. W. 833. At the same time, it has held that the wife could not enter into a partnership or other business with

her husband, and thus become responsible for the contracts and debts of her husband. *Artman v. Ferguson*, 73 Mich. 146, 40 N. W. 907; *Edwards v. McEnhill*, 51 Mich. 160, 16 N. W. 322. Personal wrongs inflicted upon her give her the right to a decree of separation or divorce from her husband, and our statutes have given the court of chancery exclusive jurisdiction over that subject. This court, clothed with the broad powers of equity, can do justice to her for the wrongs of her husband, so far as courts can do justice, and, in providing for her, will give her such amount of her husband's property as the circumstances of both will justify, and, in so doing, may take into account the cruel and outrageous conduct inflicted upon her by him, and its effect upon her health and ability to labor. 2 Am. & Eng. Enc. Law (2d ed.), 120; 2 How. Ann. St. § 6245. In the absence of an express statute, there is no right to maintain an action at law for such wrong. We are cited to no authority holding the contrary. We cite a few sustaining the rule: *Abbott v. Abbott*, 67 Me. 304; *Freethy v. Freethy*, 42 Barb. 641; *Peters v. Peters*, 42 Iowa, 182; *Schultz v. Schultz*, 89 N. Y. 644; *Cooley*, Torts (2d ed.), p. 268; *Schouler*, Dom. Rel. § 252; *Newell*, Defam. p. 366; *Townsh. Sland. & L.* (3d ed.), p. 548. Judgment affirmed. The other justices concurred.

For the rights of husband and wife to sue each other, before and after divorce, for personal injuries and other torts, at common law and under modern statutes, see note to the principal case in 40 L. R. A. 757, 6 Ib. (N. S.) 191, 23 Ib. (N. S.) 699, and notes. See also *Abbott v. Abbott*, 24 Am. Rep. 27; Rev. sec. 408; 21 Cyc. 1519; *Phillips v. Barnet*, Smith's Cases L. P. 385. For changes effected by modern statutes, see 6 L. R. A. 506, and note. See "Divorce," "Husband and Wife," Century Dig. §§ 812-816, 748-755; Decennial and Am. Dig. Key No. Series, "Divorce," § 316; Ib., "Husband and Wife," § 205.

FISCHLI v. FISCHLI, 1 Blackford, 360, 364. 1825.

Remedy of Wife for Support.

[The plaintiff, a divorced wife to whom alimony had been allowed, sued her husband in equity, praying that one-third of his land be set apart to her for life and for general relief. Defendant demurred. Demurrer sustained, and decree against the plaintiff, dismissing her bill. Plaintiff carried the case to the supreme court. Affirmed.]

HOLMAN, J. . . . Taking the matter as it stood in England, we find no precedent, except in a few extreme cases, where any court has interfered in granting a maintenance to the wife, other than the court that granted the divorce. Most of the cases turn on the agreement of the parties, which will be carried into effect whether there has been a divorce or not. Vide, 1 Fonb. 97; 1 Mad. dock, 307; *Head v. Head*, 3 Atkyns. 517; *Seeling v. Crawley*, 2 Vernon. 386. It seems to be a general rule, that the granting of a maintenance to the wife out of the husband's property, is not an

original, but an incidental matter. Such was the conclusion of Fonblanque, after reviewing most of the cases on the subject. See 1 Fonb. 97. Such was also the determination of Lord Chancellor Thurlow, in *Ball v. Montgomery*, 2 Ves. Jr. 195. His language is: "I take it now to be the established law, that no court, not even the ecclesiastical court, has any original jurisdiction to give a wife separate maintenance. It is always as incidental to some other matter that she becomes entitled to a separate provision. If she applies in this court upon a supplicavit for security of the peace against her husband, and it is necessary that she should live apart, as incidental to that the chancellor will allow her separate maintenance; so in the ecclesiastical court, if it is necessary for a divorce a mensa et thoro propter saevitiam." Similar to this is the authority given by our act of assembly. The making of a provision for the wife, by the division of the property, is incidental to the divorce. The court that decrees the divorce, is to make the provision. And if that court fails to provide for the wife, by a division of the property, or makes an inequitable division, we know of no authority, either from the act of assembly, or the English books, for any other court to remedy the evil, or extend the provision. The decree is affirmed, with costs.

It is now held in many states that a wife may be allowed a maintenance by a court of equity in a suit brought by her against her husband, although she is not seeking a divorce. That to grant her relief where the husband wrongfully fails to support her, is within the powers of a court of equity independently of any statute, see *Galland v. Galland*, 38 Cal. 265, *Smith's Cases* L. P. 431; *Graves v. Graves*, 14 Am. Rep. 525; *Cram v. Cram*, 116 N. C. at p. 293, 21 S. E. 197; 14 Cyc. 744. See *Cram v. Cram*, 116 N. C. 288, 21 S. E. 197, for similar relief in North Carolina upon construction of the statutes of that state, *Revisal*, sec. 1567. In *Graves v. Graves*, 36 Iowa, 310, 14 Am. Rep. 525, it is said: "The main question involved in this controversy is, whether a court of equity has the authority or jurisdiction to entertain an action brought for alimony alone, and to grant such alimony *where no divorce or other relief is sought*? It is true, beyond controversy, that the great weight and number of the English authorities deny such jurisdiction. And it is, perhaps, also true that the number and possibly the preponderance of the American authorities are in accord with the English. But there are well-considered cases and authorities of great weight which affirm the jurisdiction. Judge Story says of these latter, that there is so much good sense and reason in the doctrine that it might be wished it were generally adopted. . . . That a husband is bound, both in law and equity, for the support and maintenance of his wife is a proposition hitherto and now undisputed. If by his conduct he makes it unsafe, or by entertaining others there he makes it immoral for her to remain at his home, she may leave it and him and carry with her his credit for her maintenance elsewhere. So that, in such case, a victualler, a merchant, a dressmaker, a milliner, a shoemaker, a laundress, a physician, a lawyer, or any dealer in the necessities of life may severally supply the wife with the articles needful and proper in her situation, and may respectively maintain their actions against the husband for their value. This remedy the law affords. But this involves multiplicity of suits; and, besides, the remedy is by no means adequate. The wife may find it difficult, if not impossible, to obtain a continuous support in this way, since such dealers and professional men would be unwilling to supply

their articles or services, if thus compelled to resort to litigation in order to secure their pay. Here then is a plain legal duty of the husband for the violation of which no adequate remedy, even with a multiplicity of suits, can be had, except in a court of equity. Upon the ground of avoiding a multiplicity of suits, or on the ground that no adequate remedy can be had at law, a court of equity may properly base its jurisdiction in such cases. . . . It seems to us, that upon well-settled equity principles, as well as upon considerations of public policy, the action may be maintained without asking a divorce or other relief." For alimony in divorce proceedings—when allowed, how enforced, when it ceases, effect of death of husband, remarriage of the parties, etc., see 2 L. R. A. (N. S.) 232; 3 Ib. 192, 923; 4 Ib. 909; 7 Ib. 179; 9 Ib. 593, 1070, 1168; 17 Ib. 1140. See "Divorce," Century Dig. § 585; Decennial and Am. Dig. Key No. Series § 199.

KYLES v. RAILROAD, 147 N. C. 394, 398-403, 61 S. E. 278. 1908.

Wife's Remedy for Mutilation of Husband's Corpse.

[Mrs. Kyles sued the defendant for damages claimed as the result of the careless and negligent conduct of the defendant whereby the corpse of her husband was mutilated; also for wantonly, wilfully, and recklessly mutilating, etc. Defendant demurred to the evidence. Demurrer sustained. Judgment against the plaintiff, and she appealed. Reversed.

"The evidence indicated that the body was struck after death by different trains going east and west, and that it and parts thereof were thrown hither and thither, backwards and forwards, by the passing trains going in opposite directions." There was also evidence of negligence on the part of the defendant's employees, none of whom were discharged in consequence, and this the court holds was, per se, "a ratification and it [the defendant] cannot be heard to say that the act was unauthorized. 12 A. & E. (2nd Ed.) 36 et seq.]"

CLARK, C. J. . . . The nonsuit, it seems, was granted, not on the ground of lack of evidence to support the allegations of fact in the complaint, but on the ground that they did not constitute a cause of action. As this is the first time that such cause of action has been presented in the history of this court, it is proper to review somewhat the authorities elsewhere which sustain the propositions that mutilation of a dead body entitles the surviving husband or wife (and, if none, the next of kin) to recover compensatory damages for the mental anguish caused thereby, and, in addition, punitive damages if such conduct was wilful and wanton, or in recklessness of the rights of others. The right to the possession of a dead body for the purpose of preservation and burial belongs, in the absence of any testamentary disposition, to the surviving husband or wife, or next of kin, and, when the widow was living with her husband at the time of his death, her right to the possession of the husband's body for such purpose is paramount to the next of kin. *Larson v. Chase*, 47 Minn. 307, 50 N. W. 238, 14 L. R. A. 85, 28 Am. St. Rep. 370. A widow has a right of action for the unlawful mutilation of the remains of her deceased husband. *Larson v. Chase*, 47 Minn. 307, 50 N. W. 238, 14 L. R. A. 85, 28 Am. St. Rep. 370; *Foley v. Phelps* (Sup.), 37 N. Y. Supp.

471. While a dead body is not property in the strict sense of the common law, yet the right to bury a corpse and preserve its remains is a legal right, which the courts will recognize and protect, and any violation of it will give rise to an action for damages. 8 S. A. & E. (2d ed.) 834, and cases cited; 13 Cyc. 280 and cases cited. While the common law does not recognize dead bodies as property, the courts of America and other Christian and civilized countries hold that they are quasi property, and that any mutilation thereof is actionable. *Larson v. Chase*, supra. This is not an action for the negligent killing of the deceased, but an action by the widow (8 S. A. & E. [2d ed.] 838, and cases cited) for the wilful, unlawful, wanton, and negligent mutilation of his dead body. She was entitled to his remains in the condition found when life became extinct; and for any mutilation incident to the killing the defendant would not be liable, but is liable, in law, for any further mutilation thereof after death, if done either wilfully, recklessly, wantonly, unlawfully, or negligently. *Larson v. Chase*, supra; *Foley v. Phelps*, supra; *Railroad v. Wilson*, 123 Ga. 62, 51 S. E. 24; *Lindh v. Railroad*, 99 Minn. 408, 109 N. W. 823, 7 L. R. A. (N. S.) 1018. Where the rights of one legally entitled to the custody of a dead body are violated by mutilation of the body or otherwise, the party injured may in an action for damages recover for the mental suffering caused by the injury. *Perley*, *Mortuary Law*, 20; *Renihan v. Wright*, 125 Ind. 536, 25 N. E. 822, 9 L. R. A. 514, 21 Am. St. Rep. 249; *Larson v. Chase*, supra; *Hale v. Bonner*, 82 Tex. 33, 17 S. W. 605, 14 L. R. A. 336, 27 Am. St. Rep. 850. In *Larson v. Chase*, 47 Minn. 311, 50 N. W. 239, 14 L. R. A. 85, 28 Am. St. Rep. 370, it is said, discussing this cause of action: "Where the wrongful act constitutes an infringement of a legal right, mental suffering may be recovered for, if it is the direct, proximate, and natural result of the wrongful act. It was early settled that substantial damages might be recovered in a class of torts where the only injury suffered is mental—as, for example, an assault without physical contact. So, too, in actions for false imprisonment, where the plaintiff was not touched by the defendant, substantial damages have been recovered, though physically the plaintiff did not suffer any actual detriment. In an action for seduction, substantial damages are allowed for mental sufferings, although there be no proof of actual pecuniary damages other than the nominal damages which the law presumes. The same is true in actions for breach of promise of marriage. Wherever the act complained of constitutes a violation of some legal right of the plaintiff, which always, in contemplation of law, causes injury, he is entitled to recover all damages which are the proximate and natural consequence of the wrongful act. That mental suffering and injury to the feelings would be the ordinary and proximate result of knowledge that the remains of a deceased husband had been mutilated is too plain to admit of argument." This case cites *Meagher v. Driscoll*, 99 Mass. 281, 96 Am. Dec. 759, where a father recovered damages for mental anguish in digging up and remov-

ing the body of his child. *Chase v. Larson*, *supra*, is quoted and followed by many cases, among them *Foley v. Phelps* (Sup.), 37 N. Y. Supp. 471. "Where the injury inflicted upon the plaintiff's was an unlawful and unwarranted interference with the right of decent burial, and such conduct was wanton or malicious, or the result of gross negligence, or reckless disregard of the rights of others, exemplary damages may be awarded." *Wright v. Hollywood*, 112 Ga. 884, 38 S. E. 94, 52 L. R. A. 621. This whole subject is fully reviewed with full citation of authorities sustaining the right of action for compensatory damages for reckless indifference to the rights of others by Judge Dodge in the late case of *Koerber v. Patek* (1905), 123 Wis. 462-467, 102 N. W. 40, 68 L. R. A. 956. In *Lombard v. Lennox*, 155 Mass. 70, 28 N. E. 1125, 31 Am. St. Rep. 528, it is said: "If the ordinary and natural consequence of the tort is to cause an injury to the feelings of the plaintiff, and if the acts are done wilfully or with gross carelessness of the rights of the plaintiff, damages may be recovered for mental sufferings." To same purport, 1 Sedg. Dam. (8th ed.) §§ 43-47; 1 Suth. Dam. § 95 et seq.

The defendant also owed the plaintiff the duty to gather the body, and its fragments, and prepare the same for burial, and a negligent failure to do so was an infringement upon her legal rights, and therefore actionable. *Commonwealth v. Susquehanna Coal Co.*, 5 Kulp, 195 (Pa. case, 1889); *Scott v. Riley*, 40 Leg. Int. 382 (Pa. case). Parts of the body were left along the track and gathered up by the father on the Monday following. Respect for the dead is an instinct that none may violate. The democracy of death is superior to the edicts of kings. Rizpah became forever famous among her kind when she defied the king of Israel who would treat the bodies of her dead with contempt, and Sophocles has immortalized Antigone, who vindicated the like sentiment of human nature as a higher law than that of her sovereign. [The court then discussed the facts which constituted negligence.]

The above facts, if sustained on the trial, will entitle the plaintiff to recover damages for mental anguish for such indignities to the body of her husband, and punitive damages, also, if the jury find that such conduct was wilful and wanton, or in reckless indifference to the rights and feelings of the plaintiff and to their own duties. The jury should, however, be cautioned (as in actions for delay in delivery of telegrams concerning sickness and death) to carefully dissociate this from the plaintiff's grief at learning of the death of her husband, for this action does not concern that phase of the case. Nor is the plaintiff entitled to recover anything for grief at seeing the condition of the body in the coffin. She knew, or her friends should have told her of the condition of the remains, and she herself is to blame that she chose to look in upon them. It may have been a natural impulse, but the defendant is not responsible for the mental anguish resulting therefrom. The deceased may have moved in the humbler walks of life; but to the plaintiff he was husband and the father of her children. It was

her right, old as time, as broad as humanity, and as deep as the heart of man, that his mortal remains should be treated with due respect. So far as the defendant through its agents recklessly, wilfully, or negligently failed to do this, it has violated her rights under the law. What damages will compensate her for the mental anguish the defendant's conduct has caused her and what would be proper punitive damages for the recklessness, negligence, or indifference of its agents (if proven) is a matter for a jury of her countrymen to determine, subject to the supervision of a just judge, that an excessive sum be not assessed. The nonsuit is set aside, and a new trial ordered. Error.

For the right to recover for the mutilation of the corpse of a child, wife, etc., see 6 L. R. A. (N. S.) 883; 16 Ib. 405, and notes, As to the measure of damages in such cases—when mental anguish is allowed and when not—see 114 N. W. 353, 19 L. R. A. (N. S.) 564, and 112 S. W. 897, 19 L. R. A. (N. S.) 575, which two cases are opposed on the mental anguish question. The opinion here inserted is copied from 61 S. E. and differs a little, in the order of statement but not otherwise, from the opinion in the original report. See "Dead Bodies," Century Dig. § 13; Decennial and Am. Dig. Key No. Series § 9.

SEC. 2. PARENT AND CHILD.

(a) *Habeas Corpus.*

STATE V. STIGALL AND TURNLEY, 22 N. J. L. 286, 287-291. 1849.

Rules governing Courts as to Custody, etc., when Child brought before them on Habeas Corpus.

[The plaintiff, the father of certain children, prosecutes habeas corpus to obtain the custody of his children from his wife and her father. Two of the children, aged 3 years and 13 months, respectively, were left by the court with the defendant. The other child, aged 5 years, was delivered to the father. The case was commenced in the supreme court. The parents were separated but not divorced. Each laid the blame for the separation on the other. The wife's father merely permitted his daughter and her children to live with him at his daughter's request.]

RANDOLPH, J. . . . The custody of children, as a general principle, belongs to one or both of the parents, yet, for their protection and education, or for the preservation of their property, courts of equity, in the exercise of a sound discretion, will deprive both parents of the custody, and place them with third persons. 2 Story's Eq. § 1341, and the cases there referred to.

When a child is brought up on habeas corpus, if of sufficient age and discretion, the court will only ascertain whether the child is under restraint, and if so will merely make an order setting him at liberty, to go where he chooses; and if it be necessary to give effect to that order, will send an officer to see that it is respected and observed. And the same rule applies when a wife, apprentice, or any other person who has arrived at years of discretion, is brought up on habeas corpus, the court usually refusing to make

other order, unless it is absolutely necessary. *Rex v. Deleval*, 3 Burr. 1434; *Rex v. Clarksen*, 1 Strange, 444; *Rex v. Smith*, 2 Stra. 982; *Case of Woolstoncroft*, 4 J. C. R. 80.

But where the child is of tender years, and the father and mother have separated, or the wife has left the abode of her husband, it often becomes necessary for the court or judge, on the return of the habeas corpus, to determine as to the custody of the child, without waiting for the slower action of the chancellor, or referring the matter to him, as the *parens patriae*, in the place of the sovereign. There are two classes of cases in the books, very distinctly marked in character and principle, especially in the English decisions; the one is when the writ is brought up by the mother to remove the custody of the child from the father, or from his control, and the other is when the father sues out the writ to deprive the mother of the custody, and give it to the father. The general principle operating in both cases is, that the father, as head of the family, is entitled to the custody and control of his legitimate child, and may by will delegate that custody to a guardian. *Case of Nickerson*, 19 Wend. 16; *Case of Chegay*, 18 Wend. 637; 25 Wend. 72; 3 Hill. 400; 9 J. B. Moore, 279; 5 East. 221; 4 Ad. & El. 624; *Story Eq. § 1341, a*; 1 Blk. Com. 453. But in the case of illegitimate children, the mother, and not the putative father, is entitled to the custody; and if deprived of it, the court will restore them to her. *Rex v. Mosely*, 10 Ves. 52, note a; *Rex v. Soper*, 5 T. R. 278; 7 East, 579; 2 Inst. 375; 2 Mass. 109.

Under the general rule of the common law, courts have not felt authorized to take the child from the father, and give it to the mother, although some very strong cases have arisen which seem to demand the interference of the court. Thus, in the case of *De Manneville*, 5 East, 221, the court refused to take a child eight months old from the father, and give it to the mother, on the allegation that he intended to take it out of the kingdom; and even the chancellor, on application in the same case (10 Ves. 52), merely made an order restraining the father from removing the child from the kingdom, but refused to order it to be delivered to the mother, living separate from the husband. And in the case of *Skinner*, 9 Moore, 279, wherein the mother applied to have the child removed from the father, who was living in jail and cohabiting with a mistress, the court refused to make the order, referring the matter to chancery as the proper tribunal. To the same effect is *Ball v. Ball*, 2 Sim. 35, and *Wellesley v. The Duke of Beaufort*, 2 Russ. 9. This rule seemed so harsh and unsatisfactory that parliament was constrained to mitigate its rigor, and now, by 2 & 3 Viet. c. 54, s. 1, the chancellor or master of the rolls, upon petition of the mother of any infant in the custody of the father, or other person under his authority, may make order for the access of the petitioner, or, if the infant be within the age of seven years, for the delivery of such infant to the mother, until he attains such age under convenient regulations. *Barr Dig* 3379. *Tit. Infant*, 4. But when the father had asked a court of law or a judge to grant an order to reinvest him with the actual custody of

his child, the court, before making such order, would look into the case, and notwithstanding the presumed right of the father, would exercise a discretion in the matter: such ever was and still is the law, with much less change in the rule than in the mode of exercising the discretion, or the extent of its exercise. The principle of the action of the court, or refusal to act, is this: the power and right of the father is allowed for the benefit of the child, and not to enable him to govern with arbitrary caprice or tyrannical control, so as to subvert the very object of the law in giving him the authority. Thus, when the children would be exposed to cruelty or gross corruption, immoral principles or habits, or the father is not of ability to provide for the support, education, and future prospects of the child, and the mother or person with whom the child resides is able, the court will make no order granting the custody of the child to the father. And, too, if the child is of tender years, and especially if a female or of sickly constitution, in the custody of the mother, against whom there is no charge but inability to live with her husband, the court would make no order of removal. The discretion is pretty broad, and perhaps extending with the improvements and refinements of the age, yet it is not arbitrary, but based on sound principles, and, like all other discretionary proceedings, will take its hue from the officer exercising it. In *Rex v. Greenhill*, 4 Ad. & El. 624, the father left his home and family, and was cohabiting with a mistress; then the mother left and took with her her three young children. The husband was otherwise of good character, and had large property, the mother none. He offered to abandon his mistress and be reconciled to his wife, or to take the children to his mansion, to be educated under the supervision of his mother, and away from any immoral influence. The wife refused, and the court made the order of removal, on the ground that it would be for the benefit of the children, and there being nothing of cruelty or corruption about the father or his home, the law gave him the custody. But in *Rex v. Dobbins*, and in *Rex v. Wilson*, in the same book, pp. 664, 665, note, where the conduct of the father at his home came within the discretionary exceptions, the court refused to take the child from the mother. In the matter of *Waldron*, 13 Johns. 149, where the father was poor, and his wife went home to her father, who was of large estate, when she was delivered of a child and died, leaving the child the heir apparent to his grandfather, and when it was still of tender age, the father applied for his custody; but the court refused it, on account of the inability of the father and the great benefit of the child, and that the special powers of the court of chancery in the case invoked would be sufficient to correct any evil. In the case of *Nickerson*, 19 Johns. 16, the court say the father is the natural guardian, and entitled to the custody of the child, if there be no danger of ill usage or he be not of grossly immoral principles or habits, or unable to provide for him. In the *De Hautville* case, the child was but twenty-one months old, very sickly, and, in the opinion of physicians, not of an age to be separated from his

mother; and, on these grounds the court rightfully refused to remove the child from the mother and place him with the father. The case derives interest from the station of the parties, the extended and exciting evidence in relation to the history of the marriage and separation of the parents, as well as from the great ability and learned investigation of both counsel and court, yet in its simple details is of no extraordinary character, and though differing in result from *Rex v. Greenhill*, yet it comes within the principles and scope of the exceptions stated by the court in that case; the real difference is in the mode and extent of the discretion. In the English case the court, in a very strong case, exercised their discretion, and removed the child because they considered the exercise within the rule and for the benefit of the child: in the American case the court, in not a very strong case, refused its exercise, for pretty much the same reasons. In the case of *Barry v. Mercein*, to be found in 25 Wend. 72, 3 Hill, 401, and 8 Paige, 47, the same difficulty occurs as to the mode of exercising the discretion, but upon the general principles of law there is no great diversity among the several jurists who examined the matter, and these principles will generally be found to accord with what has been before stated. In *Grey's case*, 6 Law Jour. 529, the child was of tender years and feeble health, and was left with the mother, though living apart from the husband. So in the present case, the two younger children, one of thirteen months and the other of about three years, are too young to be removed, for any practical or useful purpose to themselves at least, and as nothing is proved against the mother but her inability to live with her husband, they should for the present remain with her; but an order may be entered to deliver the eldest child to his father.

In *Tillman v. Tillman*, — S. C. —, 66 S. E. 1049, where the mother asked for the custody of her children, who, without her consent, had been committed to their grandparents by the father, by a deed executed according to the provisions of a statute, Woods, J., gives a very clear exposition of the law in regard to the respective rights of the father and the mother to the control and custody of their children; the effect of the disposition of such custody by the deed of the father; and the constitutionality of such statutes, as affecting the rights of the mother, the liberty of the children, and the power of the courts to control the custody of the children. Upon reading this opinion one is impressed with the idea that "while much else may be said on the subject, nothing more can be said."

That a father may regain the custody of his infant children by habeas corpus, notwithstanding the fact that the respondent holds them under the deed of the father, see *Musgrove v. Komegay*, 52 N. C. 71; so it is with the mother of a bastard — she may retake the child though she has made a deed transferring it to another, *In re Lewis*, 88 N. C. 31; a bastard cannot be taken from the mother by the putative father, *Wright v. Wright*, 2 Mass. 109. While 12 Car. 2, permits a father to appoint a guardian for his infant children, yet such appointment, whether by deed or will, takes effect only after the father's death. *Tillman v. Tillman*, *supra*. See further as to the custody of infants, *Harris v. Harris*, 115 N. C. 587, 20 S. E. 187; *Latham v. Ellis*, 116 N. C. 30, 20 S. E. 1012; 15 Am. & Eng. Enc. Law, 182, 183, 185, 187; 21 *Ib.* 1036, 1037; 29 Cyc. 1586 et seq. The federal courts do not issue writs of habeas corpus in con-

controversies over the custody of children. In *re Burrus*, 136 U. S. 586, 10 Sup. Ct. 850. For appeals in habeas corpus proceedings for the custody of children, see ch. 5, sec. 8, (a), note. For the effect of the marriage of an infant upon parental control, see *Wilkinson v. Dellinger*, 126 N. C. 462, 35 S. E. 842; *State v. Lowell*, 80 N. W. 877, 16 L. R. A. 440; *White v. Henry*, 24 Me. 531, *Smith's Cases on L. P.*, 69; *Aldrecht v. Bennett*, 63 N. H. 415, *Smith's Cases*, 71; *Com. v. Graham*, 157 Mass. 73, 31 N. E. 706, *Smith's Cases*, 72, 16 L. R. A. 578, inserted at ch. 6, sec. 2, (c), post; *Schouler*, Dom. Rel. 370. The law seems to be settled, that marriage emancipates an infant daughter. Some authorities hold that it does not emancipate an infant son; some hold that it does; and still others hold that, while it does not completely emancipate him, still the infant must be allowed to support his wife and children from his earnings before the parent can appropriate such earnings. For the rights of a testamentary guardian to the custody of his wards, see *In re Young*, 120 N. C. 151, 26 S. E. 693. Death of the respondent abates the proceedings in habeas corpus for the custody of children. *Brown v. Rainor*, 108 N. C. 204, 12 S. E. 1028. For the jurisdiction of the courts of a state in which the child is temporarily sojourning, see 10 L. R. A. (N. S.) 690, and note. For who may sue out habeas corpus for the custody of an infant or on its behalf, see 9 L. R. A. (N. S.) 1173. For the constitutionality of statutes regulating the custody of infants for their well-being—committing them to training schools, etc.; and for the effect of such statutes on the child's constitutional liberty and the parent's right of custody, control, etc., see 18 L. R. A. (N. S.) 886, and note. See "Habeas Corpus," Century Dig. § 84; Decennial and Am. Dig. Key No. Series § 99; "Parent and Child," Century Dig. §§ 4-32.

(b) Enticing and Harboring Children.

BUTTERFIELD v. ASHLEY et al., 6 Cushing (Mass.), 249. 1850.
What Constitutes Enticing, etc. Remedy. Form of Action. Gist of the Action.

[Trespass on the case for enticing plaintiff's son from his employment. Judgment against defendant, and he appealed. Reversed.]

The plaintiff sues for the alleged enticing of his son, who was a minor and the servant of the plaintiff. The proof was that there was no enticing but that the son left his father and applied to defendants for employment. The defendants at first refused to employ him but afterwards did so upon his statement that his father was anxious that they should do so. This statement was untrue. The judge charged that plaintiff could recover upon these facts, notwithstanding the bona fides of the defendants in their belief that the son's statement was true.]

METCALF, J. . . . A master may maintain an action on the case against one who, knowing that another is his servant, entices him away from his service, or retains and employs him after he has left that service without being enticed away; and also against one who continues to employ his servant, after notice that he is such, though the defendant, at the time of retaining or employing him, did not know him to be a servant; and a father is the master of his minor child, within these rules of law. The books of entries contain forms of declarations adapted to these three distinct causes of action. And a plaintiff generally inserts at least two counts

in his declaration; one for enticing, and another for employing or harboring; so that he may succeed on the latter, though he may fail to support the former. But in either form of declaring, it is a material and necessary allegation, that the defendant knew, at the time of the enticing, employing, or harboring, that the party enticed away, employed, or harbored, was the servant of the plaintiff; or that he afterwards had notice thereof, and continued to employ or harbor the servant after such notice. *And such knowledge or notice must be proved in order to sustain the action.* See 8 Wentw. Pl. 438; 2 Chit. Pl. (6 Am. ed.) 645, 646; 1 Blk. Com. 429; 3 Ib. 142; *Fawcett v. Beavres*, 2 Lev. 63; *Blake v. Lanyon*, 6 T. R. 221; *Reeves Dom. Rel.* 291; *Sherwood v. Hall*, 3 Sumner. 127, Fed. Cas. No. 12,777; *Ferguson v. Tucker*, 2 Har. & Gil. 182; *Conant v. Raymond*, 2 Aik. 243; *Fores v. Wilson*, Peake's Cas. 55.

The gist of an action like that now before us is, says Lord Mansfield, "that the defendant has enticed away a man who stood in the relation of servant to the plaintiff." *Hart v. Aldridge*, Cowp. 54, 56. And the enticing must be proved. 3 Stark. Ev. 1310; *Stuart v. Simpson*, 1 Wend. 376. Now what is meant by "enticing away from the service" of another? So far as we know, the word "entice" has no technical meaning. But, in a declaration like that in this case, it must mean something quite different from a reluctant employment of another's servant, under a belief that the master has consented to that employment. The word is often joined, in the precedents of forms, with the words "solicit, seduce, persuade, and procure;" and it evidently imports an *active and wrongful effort* to detach a servant from his master's service, by offering inducements adapted to that end. In *Keane v. Boycott*, 2 H. Bl. 511, Eyre, C. J., describes enticement and its effects as a dissolution of the relation of master and servant "officiously." We see no evidence of enticement in the present case. The son had wrongfully left his father's service, before he was employed by the defendants; so that the plaintiff's declaration is not sustained by the proof. If evidence of the mere employment of another's servant, knowing him to be such, would support a declaration for enticing him from his master, there would be no necessity for a count which omits the allegation of enticement, and charges only a retaining, employing or harboring. Besides, if, in the opinion of the jury, the defendants believed that the plaintiff had fully consented to their employing his son, then the material averment in the declaration, that they well knew that he was in plaintiff's service, was not proved, but was disproved. For it is impossible that they should know him to be in the service of one whom they believed to have dispensed with his services. New trial ordered.

See notes to next case, post. See "Parent and Child," Century Dig. §§ 182-188; Decennial and Am. Dig. Key No. Series § 18.

MAGEE v. HOLLAND, 27 N. J. L. 86, 93, 95, 1858.

Abduction. History, etc., of the Remedy for. Essentials to Recovery

[Action on the case for the forcible, malicious, and wrongful seizing and carrying away the three infant children and servants of the plaintiff. Verdict against the defendant. Motion by defendant for a new trial, which motion was transferred to the supreme court for its advisory opinion. Motion refused. Only a part of the opinion is here inserted. The defendant was the brother-in-law of the plaintiff. The plaintiff's wife left him and the children; and afterwards she and the defendant forcibly seized the children and carried them out of the state.]

FLAHER, J. Before the abolition of the tenure in chivalry, it was held, as a doctrine of the common law, that the abduction of his heir, was an injury for which the father might maintain an action and recover, by way of damages, the value of his right of marriage. Reeves, in his work on Domestic Relations, 293, suggests that, inasmuch as all the children are heirs in this country, the action may be sustained for taking away any of them. But the damages for the abduction of the heir were restricted to the value of the marriage; and the father being no longer entitled to any such value, the taking away and marrying his heir does him no injury for which a civil action will lie upon that principle. 5 Coke, 108; 9 Coke, 113; 10 Coke, 130; Cro. Eliz. 55, 849. In the case of Barham v. Dennis, Cro. Eliz. 770, the declaration was in trespass, by a father for taking and imprisoning his daughter, without alleging her to be his heir or any loss of service, and damages were assessed for the taking and imprisoning separately. Three of the judges were of the opinion that the action could not be sustained. Glanville held that "the father hath an interest in every one of his children, to educate them and provide for them, and he hath his comfort by them; wherefore it is not reasonable that any should take them from him, and to do him such an injury, but that he should have his remedy to punish it." The case was thereupon adjourned, and was afterwards settled by arbitrament. 3 Blk. Com. 141, gives the weight of his authority to the opinion of Glanville, and I think it is to be regretted that this reasonable doctrine did not prevail. There does not seem, however, to have been any case in England or America, where a father has recovered damages for the abduction of his children, the uniform language of the cases being that he can only sustain his action where there has been actually or constructively a loss of service. In the case of Hall v. Hollander, 4 Bar. & Cress. 660, the court of king's bench, in England, sustained the ruling of the majority of the judges in Barham v. Dennis as clearly law. And subsequently, in the case of Grinnell v. Wells, 7 Man. & G. 1033, the court of common pleas held the same doctrine. The case of Hall v. Hollander has been somewhat questioned in some of the American cases, but the general doctrine has been substantially adhered to. . . .

Much stress has been laid, by the counsel for the defendant, on the fact that he acted in aid of and in conjunction with his sister.

the mother of the children. This circumstance was submitted to the jury, as entitled to be considered in mitigation of damages. Further than this it could not go. The right of the father was clearly paramount to that of the mother; and there was no reason to doubt that the defendant purposely aided in taking the children against the father's consent. Although in cases where a child is before the court by virtue of a habeas corpus they will exercise a discretion, and permit the child, if of tender years, to remain under the care of the mother; yet, if it is actually in the custody of the father, so absolute is his right considered, that they will not interfere to remove it, and it is strongly doubted whether they have the power to do it. *State v. Stigall*, 2 Zab. 286; *Hackwell's case*, 22 E. L. & E. R. 395. . . . New trial refused.

In the principal case it is held that punitive damages were properly allowed. It is also held that loss of services must be proven, though such loss may be inferred when the children are minors and residing with the father. For the measure of actual damages, as distinguished from punitive damages, in such cases, see the principal case and also *Clark v. Bayer*, 32 Ohio St. 299, 30 Am. Rep. 593; which last case holds also that one who stands in loco parentis may maintain an action for abduction, and that the action rests upon the *right* of the plaintiff to the services of the child *and not upon actual services*.

To entice a child from its parents was not a crime at common law; but to abduct or entice a child under fourteen years of age is made a crime in North Carolina. Revisal, sec. 3358; *State v. Rice*, 76 N. C. 194. To *abduct* is to take and carry away a child, either by fraud, persuasion, or open violence. *State v. George*, 93 N. C. 567. To *kidnap* a child is also made criminal in North Carolina, Revisal, sec. 3634. To *kidnap* is to forcibly abduct or steal away a man, woman, or child *from their own country and send them into another*, according to Blackstone; though, under modern statutes, the term is used very much in the same sense as to abduct—and the taking from *one country or state to another* is not always an essential ingredient. 2 Bouv. L. D. 91; 24 Cyc. 797. The mere *employment* of a minor is neither enticing nor kidnapping; and where there is no enticing there is no wrong to be remedied. *State v. Chisenhall*, 106 N. C. 676, 11 S. E. 518; *Williams v. Railroad*, 121 N. C. 512, 28 S. E. 367, 1 L. R. A. (N. S.) 205, and note (what constitutes enticing), 2 Ib. 362, and note (right of mother to sue while the father is living). See "Parent and Child," Century Dig. §§ 182-186; Decennial and Am. Dig. Key No. Series § 18.

(c) Seduction.

BRIGGS v. EVANS, 27 N. C. 16. 1844.

Form of Action. Father's Right to Recover. Basis of the Action. Fugement of the Law. Basis of Damages. Adult and Minor Daughter.

[Action on the case for seduction of plaintiff's daughter. Verdict and judgment against the defendant, and he appealed. Affirmed.]

The defendant seduced the plaintiff's daughter two months before she was of age and while she was living with her father as a member of his family. The daughter was delivered of a child in due course of gestation. She went to live with her grandmother before the birth of the

child but after the birth she returned to her father's. She became of age in November, 1841, and this action was commenced in March, 1842. There was no contract or hiring between the father and daughter, but she lived as one of the family and performed various domestic duties for him.]

NASH, J. Three objections were urged before the superior court. The first, because the action ought to have been trespass and not case; the second, because the action could not be sustained before the birth of the child; and third, because the action could not be sustained without proof of an actual contract for services after the daughter came of age. These objections were overruled by the presiding judge, and we think very properly.

It is unnecessary to point out the distinguishing marks between the actions of trespass and case, and the necessity, in ordinary cases, of adopting the form of action appropriate to the cause of complaint. It is admitted by the text writers, and decided in many cases, that the plaintiff, in an action for seduction, may adopt either form at his option. He may either bring trespass for the direct injury, laying it with a *per quod servitium amisit*, or in case for the consequential damage. 3 Stephens, N. P. 2351, 2354. That trespass may be brought, is shown by the cases of *Woodward v. Walton*, 2 N. R. 476; *Tulledge v. Wade*, 3 Wilson, 18; and that case may, by *Dean v. Peel*, 3 East, 43; *Heavitt v. Prime*, 21 Wend. 79; *Martin v. Payne*, 9 Johns. 387; *Speight v. Olivera*, 3 Stark. 435, by ABBOTT, C. J.; *Holloway v. Abell* 32 E. C. L. R. 615, and by many other cases. In *Chamberlain v. Hazelwood*, 7 Dow. Prac. cases, cited in 3 vol. of Stephens, N. P. 2353, Mr. Baron Parker declares that, although there may have been no direct adjudication on the subject, it had been the constant practice with pleaders to declare in either way. These authorities abundantly show that the action was properly brought in case.

The second exception is equally as untenable as the first. It assumes that the only consequential injury to the father, of which he has a right to complain, consists in the loss of the services of his daughter and the expenses he may incur during her confinement. This certainly is not so. If it were so, and pregnancy did not result from the seduction, the father would have no action. All the authorities show that the relation of master and servant between the parent and the child is but a figment of the law, to open to him the door for the redress of his injury. It is the substratum on which the action is built. The actual damage which he has sustained, in many, if not in most cases, exists only in the humanity of the law, which seeks to vindicate his outraged feelings. *He comes into court as a master—he goes before the jury as a father.* He must, indeed, show that his child stood to him in the relation of a servant: but it matters not how trivial the services she rendered—though it may have consisted but in pouring out his tea—he is entitled to his action. *Carr v. Clark*, 2 Chit. 261; *Mann v. Barrett*, 6 Esp. 23. So it has been decided that the father need

not show any actual service rendered, if at the time of the seduction she lived with her father or was under his control. *Maunder v. Nun, M. & M. 323*, cited 3 Stephens, N. P.; *Mann v. Barrett*, and *Holloway v. Abell*. Upon this objection, however, there is an express authority, that the father can maintain the action before the confinement of his daughter, even though he has turned her out of doors, per Lord Denman in *Joseph v. Cowen*, cited 2 Step. N. P. 2354, and Roscoe on Ev. 483. Both upon authority and reason then, this objection cannot be sustained.

So neither can the third. In no case is an actual contract between the father and the daughter necessary to maintain the action. Before the child attains the age of twenty-one years, the law gives the father dominion over her, and, after, the law presumes the contract, when the daughter is so situated as to render services to the father, or is under his control; and this it does for the wisest and most benevolent of purposes, to preserve his domestic peace, by guarding from the spoiler the purity and innocence of his child. If this were not so, in those cases where the degradation would carry the largest portion of anguish and distress, the unfortunate parent would be without redress, if his daughter were over twenty-one years of age. That the law is not as the defendant contends, is shown by many of the cases cited upon the other points. To these may be added, *Bennett v. Aleot*, 2 T. R. 166; *Nicholson v. Stryker*, 10 Johns. 115; *Morgan v. Dawes*, 4 Cow. 417. In this case the daughter lived in her father's house at the time of the seduction, under his control and in the performance of actual services.

Here this opinion might be closed, but for another part of the charge. The presiding judge told the jury that, before the daughter became of age, the action might be sustained in his paternal character for the loss of her services, and after she came of age, it might be sustained by him as master, for services lost. The distinction is new to us. We have been able to find no case in which it is recognized. On the contrary, the whole history of the action clearly shows that it rests upon the assumed or actual relation of master and servant, and that, as well before the daughter has attained twenty-one as after. We notice this part of the charge, not because it at all enters into the decision of this case, as presented to us by the parties, but because we are not willing it should be supposed we acquiesce in its correctness. The defendant did not except to it, and in the case of *King v. Ring*, 20 N. C. 301, the court say, "the rule of this court is, to regard, as nearly as we can, the case made by the judge in the light of a bill of exception for specified errors," and none others are considered here, unless they appear upon the record strictly so called. The only way in which it could have been important in this case was, as it might have affected the damages; and the defendant's not excepting is strong evidence that it did not affect him injuriously. We see no error in the opinion of the presiding judge in the points excepted to. Judgment affirmed.

Whether the action should be trespass *vi et armis* or trespass on the case for seduction of a daughter or servant, was one on which there was great conflict of authority. See *McClure's Exrs. v. Miller*, 11 N. C. 133, and note at p. 138. For a very full discussion of this question, see also 25 Am. & Eng. Enc. L. 291. That punitive damages may be recovered by the father, see *Scarlett v. Norwood*, 115 N. C. 284, 20 S. E. 459; *Snider v. Newell*, 132 N. C. at p. 624—that either trespass or case will lie, is approved in this case at p. 615, 44 S. E. 354. See “Seduction,” *Century Dig.* §§ 9-16, 25, *Decennial and Am. Dig. Key No. Series* §§ 7, 8, 12.

IRWIN v. DEARMAN, 11 East, 23. 1809.

Action by One in Loco Parentis. Damages.

[Action on the case for seduction of plaintiff's adopted daughter. Verdict against defendant, who moved for a new trial. Motion denied.]

The girl seduced was a daughter of a deceased fellow-soldier of the plaintiff. Plaintiff adopted her as his own child, and at the time of the seduction she lived with him and performed household services for him. The only damage proven was the loss of the girl's services for five weeks and the expenses of her confinement, which plaintiff paid. Verdict was for one hundred pounds.]

LORD ELLENBOROUGH, C. J. This has always been considered as an action *sui generis*, where a person standing in the relation of a parent, or in *loco parentis*, is permitted to recover damages for an injury of this nature ultra the mere loss of service. But even in the case of an actual parent, the loss of service is the legal foundation of the action. And however difficult it may be to reconcile to principle the giving of greater damages on the other ground, the practice is become inveterate and cannot now be shaken. And having been considered, in the case of *Edmondson v. Machell*, to extend to an aunt, as one standing in *loco parentis*, I think that this plaintiff, who had adopted and bred up the daughter of a friend and comrade from her infancy, seems to be equally entitled to maintain the action, on account of the loss of service to him, aggravated by the injury done to the object on whom he had thus placed his affection.

See also as to the action by one who stands in *loco parentis*, *Kinney v. Langhenour*, 89 N. C. 365, which holds that while a stepfather, or any other person who stands in *loco parentis*, may recover for seduction; still, the girl must be living in his family, or be absent temporarily with his consent, and under his control, or no recovery can be had. If the girl be seduced while in the service of a third person, the stepfather, etc., cannot maintain an action for seduction, although she returns to his house and is there delivered of a child as the result of the seduction, and is there cared for during her confinement. *Ibid.*, citing 5 Wait's Act. & Def. 660, 661; Wood's Mast. & Serv. sec. 245. The case also approves *Briggs v. Evans*, 27 N. C. 16, inserted *supra*. See “Seduction,” *Century Dig.* § 46; *Decennial and Am. Dig. Key No. Series* § 20.

SNIDER v. NEWELL, 132 N. C. 614, 44 S. E. 354. 1903.

Full Review of the Law of Seduction; Who Can Maintain an Action for; Necessary Allegations of the Complaint; Figment and Quaint Fictions of the Law; Services. Mental Anguish.

[Action by the father for the seduction of his infant daughter while she lived with him. Defendant demurred to the evidence. Demurrer sustained. Judgment of nonsuit against plaintiff, and he appealed. Reversed.

The judge held that, while plaintiff had proven the seduction and consequent mortification suffered by him, there was no proof that he had lost any portion of the services of his daughter by reason of the defendant's having seduced her. The facts appear in the beginning of the opinion.]

CONNOR, J. This is an action prosecuted by the plaintiff for the recovery of damages alleged to have been sustained by reason of the seduction by the defendant of his daughter, whereby he "lost the services of his said daughter, and the reputation of his family was thereby greatly injured, and he suffered great mental anguish and humiliation." The defendant admitted that he had illicit carnal intercourse with the daughter, but denied that the plaintiff lost her services thereby, or suffered otherwise. The plaintiff introduced evidence tending to show that his daughter, when about eighteen years of age, was seduced and debauched by the defendant; that he had repeated acts of sexual intercourse with her in the plaintiff's house, in which his daughter resided as one of his family; that such intercourse was had at night, the defendant going to the room of the daughter, entering through her bedroom window; that the plaintiff knew nothing of the defendant's conduct until it had continued about a year, when he charged the defendant with it, when he admitted the truth of the charge. The plaintiff testified that he was greatly shocked; that the matter greatly pressed on his mind, and he thought they were all disgraced; that the daughter was prior to the sexual intercourse with the defendant, chaste, pure, and virtuous; that defendant is a married man. The defendant introduced no testimony, but moved the court to dismiss the action as upon a nonsuit. The court allowed the motion, the plaintiff excepted and appealed.

The judgment of his honor is based upon the conclusion of law that the plaintiff had not shown any loss of service, or any diminution of the daughter's capacity to serve him, and could not, for the other injuries alleged, maintain the action. The demurrer to the evidence admits the truth of the plaintiff's testimony, together with every reasonable inference to be drawn therefrom most favorable to the plaintiff, but presents the question whether the plaintiff's testimony is sufficient to base a finding of such loss of service as is necessary to maintain the action. The plaintiff has alleged a loss of service, mental anguish, and mortification. We have been unable to find, after a very careful and diligent search, a case in England or America in which the declaration or com-

plaint has failed to allege loss of service. The action at common law was trespass *vi et armis*, or trespass on the case *per quod servitium amisit*. *Briggs v. Evans*, 27 N. C. 16. The gravamen of the action was that the daughter was the servant of the plaintiff, and that by her seduction he lost her services. *Taylor, C. J.*, in *McClure's Executors v. Miller*, 11 N. C. 133, says: "It is characterized by a sensible writer as one of the 'quaintest fictions' in the world that satisfaction can only be come at by the father's bringing the action against the seducer for the loss of his daughter's services during her pregnancy and nurturing." In *Kinney v. Laughenour*, 89 N. C. 365, it is said: "The action for seduction does not grow out of the relation of parent and child, but that of master and servant and the loss of services. It is true that this is a fiction of the law." In *Hood v. Sudderth*, 111 N. C. 215, 16 S. E. 397, *Clark, J.*, said *arguendo*: "It is true that at common law an action for seduction could technically only be brought by a father, master, or employer, and that damages were alleged *per quod servitium amisit* for value of services lost. This though in fact no services were lost, and even when a woman was of full age, and the father was not entitled to recover services of any one else. It was well understood that this was a mere fiction, and damages were awarded for wrong and injury done her." The question decided in that case does not arise upon this record. In *Searlett v. Norwood*, 115 N. C. 284, 20 S. E. 459, there was an allegation of loss of service, seduction, etc., "thereby damaging said plaintiff, and for medical care, nursing, tendance," etc. The action was brought by the father. In *Abbott v. Hancock*, 123 N. C. 99, 31 S. E. 268, the plaintiff alleged that her daughter was in her actual service, residing with her in New Berne, and being under twenty-one years old, and unmarried. In *Willeford v. Bailey* (at this term), 43 S. E. 928, there was an allegation of loss of service, abduction, etc., the action being brought by the father, the girl being under twenty-one years of age. *Nash, J.*, in *Briggs v. Evans*, *supra*, says: "It is but a figment of the law to open the door for the redress of his injury. It is the substratum on which the action is built. . . . He comes into court as a master; he goes before the jury as a father." The case of *Anthony v. Norton*, 60 Kan. 341, 56 Pac. 529, 44 L. R. A. 757, 72 Am. St. Rep. 360, unmistakably holds that "the action could be maintained on the bare relation of parent and child alone."

We are not called upon to say more than that courts should move forward, and yet cautiously, in dispensing with even "fictions." We must bear in mind that the law of procedure as well as substantive law is not a thing to be manufactured, but is the result of growth and careful conservative progress. While we find no difficulty in holding that "it is not necessary, in order for a parent to maintain an action for the seduction of his daughter, that he prove actual services or the loss thereof," it is sufficient that it be shown that the child is a daughter of the person suing.

and residing in his family as such, or is elsewhere with his consent and approval. Rogers on Domestic Relations, § 839. We carefully refrain from advancing further than is necessary in this case. It would not require any considerable foresight to see a large yielding of suits for seduction brought by collateral relations upon the suggestion of loss sustained in social position, business relations, mortified sensibilities, etc. We have a striking illustration of this in *Young v. Tel. Co.*, 107 N. C. 370, 11 S. E. 1044, 9 L. R. A. 669, 22 Am. St. Rep. 883, in which it was held that a husband, to whom a message had been sent notifying him of the sickness of his wife, could, in an action for failure to deliver promptly, recover, in addition to nominal damages, compensation for mental anguish. Since the decision of that case, we have suits for "compensation for mental anguish" brought by persons of almost every kind and degree of kinship, and we have good reason for thinking that "the end doth not yet appear." It is undoubtedly true that, as we come into a clearer view of social, domestic, and business relations, with their resulting rights and duties, the courts will guard these relations, and protect them by appropriate remedies, both preventive and remedial. In doing so, the principles underlying our jurisprudence must not be violated, or sentimental emotions be made cause of actions; nor must we permit the tenderest and most sacred relations of life to become sources of profit and speculation. In the view which we take of this case, the plaintiff was entitled to maintain his action upon his allegation and proof. We find abundant authority, both in and beyond this state, to sustain this conclusion. In *McDaniel v. Edwards*, 29 N. C. 408, 47 Am. Dec. 331, Ruffin, C. J., says: "When the daughter is living with the father, whether within age or of full age, she is deemed to be his servant, for the purposes of this action, in the former case absolutely, and in the latter if she render the smallest assistance in the family—as pouring out tea, milking, and the like." In *Kennedy v. Shea*, 110 Mass. 150, Ames, J., said: "According to numerous decisions of the courts of New York, Pennsylvania, and some other states of the Union, this relation is sufficiently proved by the evidence that the daughter was a minor, and that her father had the right to her services." In *Bartley v. Richtmyer*, 4 N. Y. 38, 53 Am. Dec. 338, Branson, C. J., says: "Since it has been settled that the value of the services actually lost does not constitute the measure of damages when the action is brought by the father, it has been held sufficient for him to show that the daughter was under age, and lived in his family, at the time of her seduction, without proving that she had been accustomed to render service. It has been thought enough that the father was entitled to her services, and might have required them if he had chosen to do so." See, also, notes to this case, 53 Am. Dec. 338. In *Martin v. Payne*, 9 Johns. 387, 6 Am. Dec. 288, Spencer, J., says: "She was his servant de jure, though not de facto, at the time of the injury; and, being his servant de jure,

the defendant has done an act which has deprived the father of his daughter's services, and which he might have exacted but for that injury." *Coon v. Moffet*, 3 N. J. Law, 583, 4 Am. Dec. 392.

The English cases are equally as clear upon this point. In *Fores v. Wilson, Peake*, N. P. Cases, 55, Lord Kenyon held "that there must subsist some relation of master and servant; yet a very slight relation was sufficient, as it had been determined when daughters of the highest and most opulent families have been seduced, the parent may maintain an action on the supposed relation of master and servant, though every one must know that such a child cannot be treated as a menial servant." In *Mauder v. Venn*, 1 Moody & M. 323 (22 Com. Law Rep.), it is held that it is not necessary to show any acts of service done by the daughter. It is enough that she lives in the father's family under such circumstances that he has a right to her services. This case is singularly like the case before us. It is said in the course of the plaintiff's proof, a difficulty occurred in making out any acts of service of the daughter. It being, however, proved that the seduction took place while she was residing with the plaintiff, and forming a part of his family, Littledale, J., interposed, and said that: "The proof of any acts of service was unnecessary. It was sufficient that she was living with her father, forming part of his family, and liable to his control and demand. The right to the service is sufficient." Judge Cooley thus sums up the law: "The father suing for this injury in the case of a daughter, actually at the time being a member of his household, is entitled to recover in his capacity of actual master for a loss of service consequent upon any diminished ability in the daughter to render service. That an actual loss is suffered under such circumstances the law will conclusively presume, and evidence that the daughter was accustomed to render no service will not be received." *Cooley on Torts*, p. 221; *Pollock on Torts*, p. 27.

We thus see that, while the courts have protested against the rule of law requiring the allegation of the fiction upon which the action is based, they have wisely wrought out the substantial remedy by recognition of the relation, with all of its incidents, rights, and duties, of parent and child. It is difficult to conceive how a daughter who has been seduced and debauched as the testimony in this case shows can be said not to have had her ability to serve her father diminished: hence we place our decision upon the allegation and testimony in the record. His honor was in error in sustaining the demurrer to the evidence, and the case should have been submitted to the jury under proper instructions. There must be a new trial.

See 25 Am. & Eng. Enc. Law, 193 et seq. For the English law on the subject, see Eversley's *Dom. Rel.* (2d ed.), pp. 559-562. Where plaintiff's daughter, fourteen years of age, was seduced by a master to whom she was apprenticed, it was held that the father could not recover. *Dain v. Wychoff*, 7 N. Y. 192, *Smith's Cases on L. P.* 98. A father may recover for the seduction of his married daughter if she be separated from her husband and living with the father as his servant. *Harper v.*

Luffkin, 7 Barn. & C. 387; Kirk v. Long, 7 U. C. C. P. 363; Anderson v. Rannie, 12 Ib. 536, cited in 21 L. R. A. (N. S.) at pp. 265, 266. See "Seduction," Century Dig. §§ 9-16; Decennial and Am. Dig. Key No. Series, §§ 7, 8.

BARTLETT v. KOCHER, 88 Ind. 425. 1882.

Action by Both the Father and the Child.

[Action by the father, Kocher, for the seduction of his infant daughter whereby he lost her services. Verdict and judgment against Bartlett and he appealed. Affirmed. By a statute of Indiana an unmarried female is permitted to recover for her own seduction. The girl, for whose seduction her father sues in this action, had brought an action in her own behalf against Bartlett and recovered damages for her seduction. Her father was her next friend in that action. The judgment in that action was relied upon by Bartlett as a defense to any further recovery in this action. Such defense was held to amount to nothing, and Kocher's demurrer to that portion of the answer in which it was pleaded, was sustained.]

HOWK, C. J. . . . It needs no argument, we think, to show that the court committed no error in sustaining the demurrer to these paragraphs of the answer. The next friend of an infant plaintiff is not a party to the action in such a sense as that the judgment therein rendered could be pleaded in bar of any cause of action he might have against the same defendant, growing out of the same transaction. Besides, the cause of action *in favor of an unmarried female, for her own seduction, is purely statutory*, and she "may recover therein such damages as may be assessed in her favor" (Civil Code of 1852, § 24; § 263, R. S. 1881); while the *cause of action in favor of the father of an infant daughter, for debauching and getting her with child, is of common law origin*, and he recovers in such action, in theory at least, for his loss of her services and the expenses incident to her lying-in or confinement, etc. *Pruitt v. Cox*, 21 Ind. 15; *Felkner v. Scarlet*, 29 Ind. 154; *Taylor v. Shelkett*, 66 Ind. 297.

It seems to us, therefore, that the cause of action in favor of the unmarried female and the cause of action in favor of the father, although founded on the same transaction, are widely different each from the other, and, certainly, the parties to the two actions are not the same. The paragraphs of the answer under consideration, therefore, were not good pleas of former adjudication, and the demurrer thereto was correctly sustained.

Under the error assigned upon the overruling of the motion for a new trial, the only point made by the appellant's counsel in argument is, that the court erred in instructing the jury, in substance, as follows: "In this case, if you find from a preponderance of the evidence, that the defendant begot plaintiff's daughter with child, under the circumstances substantially alleged in the complaint, and in consequence of which the plaintiff lost the services of his daughter, the plaintiff will, in this action, be entitled to recover damages for such services lost, if you find any such exist, in

this case, even though the said sexual intercourse, that produced said child, was occasioned as much by the misconduct of said daughter, or by the promptings of her own lascivious desires, as that of the defendant. In such a case, as against her father, she has no right to consent, and her act in consenting to, or even in producing, the criminal connection, was a nullity." The evidence is not in the record, and, therefore, the only question for decision is whether or not the instruction is erroneous in the abstract, or in any possible view of the case. All that the appellant's counsel have said in their brief in relation to the instruction is comprised in the statement that *they think* the court erred in so instructing the jury. We are of opinion, however, that the instruction is not erroneous. In *McAulhy v. Birkhead*, 35 N. C. 28, which was an action by a father for the seduction of his infant daughter, the court said: "Whatever bearing the forward and indelicate conduct of the plaintiff's daughter ought to have had, *on the question of damages, it certainly had none on the question of his right of action*. In respect to him, she had no right to consent, and her act in consenting to, or even procuring, the criminal connection was a nullity; so the defendant must stand as a wrongdoer, from whose act the plaintiff has suffered damage." *Shattuck v. Myers*, 13 Ind. 46; *Pruitt v. Cox*, supra. We find no error in the record of this cause. The judgment is affirmed, with costs.

That a woman may, in the teeth of the old law and the maxim *volenti non fit injuria*, recover for her own seduction, has been established by recent decisions in North Carolina, which decisions have been followed in some of the other states, and this doctrine seems destined to supplant the old law everywhere, see *Hood v. Sudderth*, 111 N. C. 215, 16 S. E. 397; *Scarlett v. Norwood*, 115 N. C. 285, 20 S. E. 459; *Willeford v. Bailey*, 132 N. C. 402, 43 S. E. 928. Whether or not both the female and her father may recover for her seduction while she is an infant, is discussed in *Scarlett v. Norwood*, 115 N. C. 285, 20 S. E. 459. The action for seduction sounding in tort, the defendant may be arrested under proceedings in arrest and bail. *Hoover v. Palmer*, 80 N. C. 313; *Kinney v. Laughenour*, 97 N. C. 325, 2 S. E. 43. If the father has been adjudged a lunatic, or if he be a nonresident, the mother may maintain an action for the seduction of her infant daughter. *Abbott v. Hancock*, 123 N. C. 99, 31 S. E. 268. The action by the woman, for her own seduction, abates at her death; but the parent's action does not abate upon the child's death. *Scarlett v. Norwood*, 115 N. C. 285, 20 S. E. 459. That under the old law a woman could not recover for her own seduction, see *Tiffany's Pers. & Dom. Rel.* 279; *Bish. Non-Cont. Law*, secs. 57, 386; *Schouler Dom. Rel.* (5th ed.), sec. 261; *Eversley's Dom. Rel.* 560. The old rule that the father could not recover as father but only as master, is styled an "outworn fiction" in *Willeford v. Bailey*, 132 N. C. p. 404, 43 S. E. 928, and a "feigned issue" in *Hood v. Sudderth*, 111 N. C. at p. 220, 16 S. E. 397. Effect of proof that intercourse was by force—rape—to defeat the action. 18 L. R. A. (N. S.) 587, and note. See "Judgment," *Century Dig.* § 1123; *Decennial and Am. Dig. Key No Series* § 584.

(d) Death or Injury of Child by Act of Another. Right of Parents to Recover for.

KILLIAN v. RAILROAD, 128 N. C. 261, 38 S. E. 873. 1901.

Death of Child Through Negligence of Another.

[Action by the father to recover damages for the death of his child through the alleged negligence of defendant. Judgment of nonsuit against plaintiff, from which he appealed. Affirmed.]

CLARK, J. This is an action by a father for the negligent killing of his son. Upon the evidence the plaintiff was nonsuited, and appealed; but in this court the defendant interposed a preliminary plea, *ore tenus*, to dismiss the action because the complaint does not state facts sufficient to constitute a cause of action. Rule 27 of this court (27 S. E. viii.); *Manning v. Railroad Co.*, 122 N. C. 825, 28 S. E. 963. The Code (§ 1498) provides that whenever "the death of a person is caused by a wrongful act, neglect, or default of another," an action therefor may be brought by "the executor, administrator or collector of the decedent." Section 1499 provides that "the plaintiff in such action may recover such damages as are a fair and just compensation for the pecuniary injury resulting from such death," and section 1500 provides for the application and distribution of such recovery. At common law, this action could not have been maintained. *Baker v. Bolton*, 1 Camp. 493, in which Lord Ellenborough tersely stated the doctrine of the common law to be, "In a civil suit, the death of a human being cannot be complained of as an injury." Where the injury subsequently resulted in death the action abated,—*"Actio personalis moritur cum persona."* Hence, though many courts doubted the soundness of the reasoning as applied to this class of cases, it was uniformly held in England and this country that the right of action ceased upon the death of the injured party. 8 Am. & Eng. Enc. Law (2d ed.), 855, and a page of authorities there cited,—especially *Carey v. Railroad Co.*, 55 Mass. 475, 48 Am. Dec. 616; *Eden v. Railroad Co.*, 53 Ky. 204; *Hyatt v. Adams*, 16 Mich. 180. In *Insurance Co. v. Brame*, 95 U. S., at page 756, 24 L. Ed. 582, it is said: "The authorities are so numerous and so uniform to the proposition that by the common law no civil action lies for an injury which results in death, that it is impossible to speak of it as a proposition open to question. It has been decided in many cases in the English courts and in many of the state courts, and no deliberate, well-considered decision to the contrary is to be found." It is true, the father was entitled to the services of his son, if he had lived, till his majority, but when the death of the son ensued the cause of action abated. It is said in *Hyatt v. Adams*, 16 Mich. 180, upon a review of the English authorities (Cooley, J., concurring), that one case and only one (*Baker v. Bolton*, *supra*), held that at common law the father could recover, after the death of the child, even for the value of

his services from the time of the injury up to the date of the death; but, as here the death was instantaneous, that case does not apply. In England this rule of the common law was changed by Lord Campbell's act (9 & 10 Vict.), which gave the right of action for injuries sustained by neglect or wrongful act of another, notwithstanding the death of the person injured. That act began by expressly reciting that at common law an action could not be maintained in such cases. This act has been copied, with many variations, in the states of the Union, but in nearly every instance such acts give the right of action to the personal representative. It has been, as a consequence of what has been said above, held that the statute confers a new right of action which did not exist before, and must be strictly followed. 8 Am. & Eng. Enc. Law (2d ed.), 858. Hence, where the right of action is given to the personal representative, "the parent cannot maintain it, even when the statute expressly provides that the recovery shall be for his or her benefit. In such cases only the executor or administrator can sue." 8 Am. & Eng. Enc. Law (2d ed.), 891, and cases cited upon that and two following pages. In this state the remedy was first given by St. 1854, c. 39 (Rev. Code, c. 1, §§ 8-10), which, with some modifications, are now §§ 1498-1500 of the Code. By these, as already said, the action must be brought by the personal representative. The plaintiff's counsel cited us to no case in this state, except *Russell v. Steamboat Co.*, 126 N. C. 961, 36 S. E. 191, in which the point does not arise and was not decided. The cases cited by them from other states are either recoveries for loss of service after the death of the child and up to the death (8 Am. & Eng. Enc. Law, 856), or where the statute confers the right of action upon the parent (8 Am. & Eng. Enc. Law, 895). In this state it has been held, as in all others, that the right of action did not exist at common law. *Collier v. Arrington's Ex'rs*, 61 N. C. 356; *Best v. Town of Kinston*, 106 N. C. 205, 10 S. E. 997; *Howell v. Board*, 121 N. C. 362, 28 S. E. 362. The right conferred by statute is plainly given to the personal representative only. Let it be entered: Action dismissed.

For a ruling to the effect that a parent may recover expenses incurred in consequence of the negligent killing of his minor child and also for the loss of time on the part of the parent incident to such an event, see *R. R. Co. v. Covenia*, 29 S. E. 219, 40 L. R. A. 253, citing *Dennis v. Clark*, 2 Cush. 347, 48 Am. Dec. 671. For a full discussion of the matter covered by the principal case, see *R. R. Co. v. Beall*, 42 S. W. 1054, 41 L. R. A. 807. See 19 L. R. A. (N. S.) 633; 9 Ib. 1193, and notes. See "Death," Century Dig. § 43; Decennial and Am. Dig. Key No. Series § 31.

DONAHOE v. RICHARDS, 38 Me. 376, Smith's Cases L. P. 82. 1854.

Injury to Child, Which Causes Damage to Child Only.

[A father sued a school committee for alleged improper expulsion of his infant child from a public school. Judgment of nonsuit against the plaintiff, and he appealed. Affirmed.]

APPLETON, J. . . . The question presented is, whether the father, if the expulsion were wrongful, has thereby received any such injury as will entitle him to pecuniary compensation. A minor child is subject to the commands of its father during minority, and the father is entitled to its services. Being entitled to such services he can maintain an action for any wrongful act done to the child, by which it is disabled or made less able to render its due and accustomed service. The loss of service in such case is held to be the gist of the action. *Hall v. Hollander*, 4 Bar. & Cress. 660. This principle, however, has been so far extended as to enable the father, when the child is too young to render any service, to recover in case of a bodily injury for the trouble and expense he may have incurred in the care and cure of the child. *Dennis v. Clark*, 2 Cush. 347. But in such case he cannot recover for the injury done to his parental feelings, or for the pain and suffering, or the circumstances of insult and aggravation with which the infliction of the injury may have been attended. *Flemington v. Smithers*, 2 C. & P. 292; *Whitney v. Hitchcock*, 4 Denio. 461. For injury to the person, the reputation, or the property, the suit must be in the name of the child, and the damages be awarded in accordance with the circumstances which may have accompanied and aggravated the wrong.

In this case there is no act done by which the ability of the child to render service is diminished. The school is for her benefit and instruction. The education is given to her, and if wrongfully deprived thereof, the loss of such deprivation falls on her. The wrong committed, the injury done, is done to her alone; and if her rights have been violated, she alone is entitled to compensation. The claim of a plaintiff, under circumstances like those in the present case, has heretofore been examined and determined by courts entitled to the highest consideration, and with an entire uniformity of result. . . . Nonsuit confirmed.

See *Spear v. Cummings*, 23 Pick. 224, and *Sherman v. Charlestown*, 8 Cush. 161, which are cited in the principal case. See "Schools and School Districts," *Century Dig.* § 347; *Decennial and Am. Dig. Key No. Series* § 177.

WILTON v. MIDDLESEX R. R. CO., 125 Mass. 130, *Smith's Cases L. P.* 83. 1878.

Injury to Child Causing Damage to Both Parent and Child.

[The father of an infant child sued for damages resulting to him from alleged negligence of the defendant, whereby the child was injured. Judgment against the defendant. Defendant alleged exceptions. Exceptions overruled.]

The child was twelve years old when injured. She recovered five thousand dollars from the defendant for the same injuries which were the basis of this action. Her father, the present plaintiff, acted as her next friend in the action in which she recovered the damages. That recovery was relied upon as a defense to this action; but the judge ruled that it was no bar to this action, and that the father could recover the

reasonable value of the child's net earnings over and above what, but for the accident, her support would have cost him."]

Lord, J. If the defendant's servant, in the course of his employment, carelessly ran over the child, and did an injury to her which resulted in a loss of service to the parent, the defendant is liable, wholly irrespective of the question whether such child was a passenger. The previous suit is not a bar to the present. The money which the plaintiff received in the former action is not his money; nor can he appropriate it to the payment of labor which the child was bound to perform. The measure of damages in the former action was the injury to the child, and not the injury to the father. It is analogous to the cases, formerly quite frequent, in which, for injuries to a wife, the husband and wife must join for personal injuries to the wife; but, for the expenses incident thereto, the husband must bring his sole action in his own name. . . . The principles acted upon by the presiding judge were quite sufficiently favorable to the defendant. Exceptions overruled.

That one action lies by the child for its suffering and injury, and another action lies by the parent for loss of service and for expenses incurred, see *Scarlett v. Norwood*, 115 N. C. at p. 286, 20 S. E. 459; *Cuming v. Brookl. City R. R. Co.*, 109 N. Y. 95, 16 N. E. 65; 21 Am. & Eng. Enc. L. 1044; 6 L. R. A. (N. S.) 552, and note. As to recovery by the parent if the child be too young to earn anything at the time of the injury, consult *Russell v. Steamboat Co.*, 126 N. C. 961, 36 S. E. 191, citing *Hurst v. Detroit R. R.*, 84 Mich. 539, 48 N. W. 44, and see also *Dennis v. Clark*, 2 Cush. 347, *Smith Cases on L. P.* 84, which limits the father's recovery, in such cases, to expenditures incident to the injury of the infant, and shows that the English law allowed the father nothing in such cases, as that law stood in 1848; and see also *Cuming v. Brookl. City R. R.*, *supra*, which says that the English doctrine denies the right of the parent to recover even for expenses incurred by reason of the child's injury, if the child be too young to render services; and holds that in New York the parent may recover not only for expenditures rendered necessary by the injury to the child, but for estimated prospective earnings of the child. See 29 Cyc. 1638, 1651. See "Judgment," Century Dig. § 1123; Decennial and Am. Dig. Key No. Series § 584.

WILLIAMS v. RAILROAD, 121 N. C. 512, 28 S. E. 367. 1897.

When the Parent Cannot Recover.

[Action by the father for damages resulting to him from the injury of his son while employed by the defendant without the father's permission. There was no proof of any negligence of the defendant. Judgment against plaintiff, and he appealed. Affirmed. The facts appear in the opinion.]

CLARK, J. The defendant employed the minor son of the plaintiff. The son told the defendant's representatives that his father consented to his working for himself, but in fact his father did not know of the defendant's employing his son; and the latter was

injured while in the defendant's service, but, it is admitted, without any negligence on the part of the defendant or of its servants. The plaintiff sues for loss of services after and in consequence of the injury. For the services the son had rendered, compensation belonged to the father; but, as the loss of further services was caused by an injury which was not caused by the fault of the defendant, it cannot be held liable for such loss. No error.

See "Parent and Child," Century Digest, §§ 86-90; Decennial and Am. Dig. Key No. Series § 7.

(c) Parent's Right to Earnings of Child.

LENSON v. REMINGTON, 2 Mass. 113. Smith's Cases L. P. 51. 1806.
Father's Right to Recover Child's Earnings.

[Assumpsit by the father for earnings or wages of his minor child, a daughter, alleged to be owing by the defendant. Verdict against the defendant, who moved for a new trial. Upon that motion the opinion is written. Motion overruled, and judgment against the defendant on the verdict.

Plaintiff forsook his wife and children. The defendant in commiseration for the destitute condition of one of the children thus forsaken, took it and cared for it for some years. The plaintiff returned in July, 1801, and demanded that defendant pay him wages for the time the child had been with the defendant. That matter was dropped and plaintiff received nothing. Plaintiff then consented that the child should remain with the defendant until such time as the plaintiff chose to take it away. This was all that was said or agreed to. The child remained with the defendant, under this arrangement, for three years and five months. The plaintiff claimed compensation for the child's services for this period. There was a verdict against the defendant subject to the opinion of the court as to whether or not the plaintiff could recover.]

SEDGWICK, J. I will not say that, where a parent wholly abandons his child, as the defendant's counsel seems to suppose the plaintiff has done here, he has a right to the earnings of such child. This is not, however, the present case. It appeared that plaintiff had paid attention to the child. Everything that had taken place relative to the services of the daughter, antecedent to July, 1801, was then compromised between the parties, and the daughter continued in the service of the defendant three years and five months under a new agreement, or, to say the least, under a caution from the plaintiff that his legal claims were not waived. The plaintiff was responsible for any necessary expenses of his child; and such expenses, if any had been incurred, were proper to be submitted to the jury, by way of set-off against this demand for wages—of the amount of both which, they were the regular and competent judges. I see no foundation to doubt of the correctness of the decision of the judge at the trial and am therefore against setting aside the verdict.

See "Parent and Child," Century Dig. §§ 70-87. Decennial and Am. Dig. Key No. Series §§ 5, 6.

MCGARR v. N. & P. WORSTED MILLS, 24 R. I. 447, 53 Atl. 320, 60 L. R. A. 122. 1902.

Mother's Right to the Earnings of Her Child.

Plaintiff, who is a married woman, living with her husband, brought this action of trespass on the case to recover damages for a loss of services, etc., of the minor child of herself and husband, resulting from an injury caused by the alleged negligence of the defendant. Verdict against the defendant, who asked for a new trial, and upon this petition the opinion is written. There were a number of points raised, and a new trial awarded on a point not germane to the question under consideration in this section. Only so much of the opinion as discusses the rights of a mother to the services and earnings of her minor child, is here inserted. The facts appear in the opinion.]

TILLINGHAST, J. . . . Defendant's counsel starts out with the broad contention that the action will not lie, on the ground that the plaintiff, as the mother of said Sarah, is not entitled to maintain it: First, because she was not bound to support her child, Sarah; and, second, because the right of action for loss of service, having become vested in the father during his lifetime, could not become divested and vest in the mother after his death. Having taken this position at the jury trial, the defendant objected to the introduction of any testimony as to damages. And as the trial court overruled this objection, subject to exception by the defendant, the first question which logically presents itself is whether the action will lie.

1. That at the common law the father is entitled to the benefit of his minor children's labor while they live with him and are supported by him, there can be no doubt. His right to their services, like his right to their custody, rests upon the parental duty of maintenance, and is said to furnish some compensation to him for his own services rendered to the child. Schouler, Dom. Rel. (5th ed.), § 252; Brown v. Smith, 19 R. I. 319, 33 Atl. 466, 30 L. R. A. 680. The mother, on the other hand, not being thus bound for the maintenance of her minor children, has no implied right, at the common law, to their services and earnings. The common-law doctrine as thus briefly stated, however, has been greatly relaxed by modern decisions in this country, if not in England; and the strong tendency of the courts in this country, as well stated by Field, C. J., in Horgan v. Mills, 158 Mass. 402, 33 N. E. 581, 35 Am. St. Rep. 504, "is to give to a widow left with minor children, who keeps the family together and supports herself and them with the aid of their services, very much the same control over them and their earnings during their minority and to impose on her, to the extent of her ability, much the same civil responsibility for their education and maintenance, as are given to and imposed on a father." The chief justice then stated the opinion of the court in that case to be as follows: "We are of opinion that when a minor child lives with its mother, who is a widow, and the child is supported by the mother, and works for her as one of the family, the

mother is entitled to recover for the loss of services of the child, and for labor performed and expenses reasonably incurred in the care and cure of the child, so far as they are the consequences of an injury to the child negligently caused by the defendant." This statement of the law is abundantly supported by the authorities cited in the opinion, and by numerous others which might be added. See 17 Am. & Eng. Enc. Law (1st ed.) p. 387, and cases collected in notes 1 and 2; *Drew v. Railroad Co.*, 26 N. Y. 49; *McElmurray v. Turner*, 86 Ga. 215, 12 S. E. 359; 2 Kent, Comm. 205, 206; *Nightingale v. Withington*, 15 Mass. 274, 8 Am. Dec. 101; *Railroad Co. v. Cook*, 63 Miss. 38; *Commissioners v. Hamilton*, 60 Md. 340, 45 Am. Rep. 739; *Kennedy v. Railroad Co.*, 35 Hun, 186; *Moritz v. Garnhart*, 7 Watts, 302, 32 Am. Dec. 762; *Furman v. Van Sise*, 56 N. Y. 435, 15 Am. Rep. 441; *Matthews v. Railway Co.*, 26 Mo. App. 75.

2. It being well settled, then, that a widow may maintain an action for loss of services of her minor child, the next question which arises is whether the plaintiff can maintain her action, the cause of which accrued prior to the death of her husband. The answer to this question, in so far as it relates to the plaintiff's right to recover for loss of service, etc., prior to the death of the father, depends primarily upon the relation which existed between the mother and daughter at the time of the accident as to the right of service; that is, whether the mother or the father of the girl at that time was legally entitled to her services. And as the father was presumably entitled thereto, it devolves upon the plaintiff to prove that he had in some way relinquished his right or conferred it upon her. While the right to the child's services is naturally in the father, he can doubtless surrender this right to another by contract or otherwise, in various ways, as (a) by binding the child as an apprentice (*Ames v. Railroad Co.*, 117 Mass. 541, 19 Am. Rep. 426); (b) by allowing another person to so act that he stands in loco parentis (*Whitaker v. Warren*, 60 N. H. 26, 49 Am. Rep. 302). This principle is fully recognized in *Morse v. Welton*, 6 Conn. 547, 16 Am. Dec. 73, where it was held that the right of a parent to the services of his minor children "is bottomed on his duty to maintain, protect, and educate them. . . . But this right and this duty may be transferred to another, and may be relinquished to a child." The law doubtless is, however, that the father cannot permanently transfer his rights and duties to another, except by deed. *State v. Libbey*, 44 N. H. 321, 82 Am. Dec. 223.

FACTS. The testimony upon which the plaintiff relies to show that the services of Sarah belonged to her at the time of the accident is to the effect that the plaintiff is, and long has been, the real head of the family; that she owns the property, takes care of the family, and pays the bills; and that, by express direction from the father in his lifetime, she was entitled to, and did, receive all of the earnings of the daughter, Sarah. She employed the physician who has attended the daughter since the accident, and is

personally responsible to him for his services. Dr. O'Keefe testifies that he rendered his services at the request of the mother; that the night he was called he saw the case would be prolonged, and he had a talk with the mother, and she told him she wanted him to attend her daughter, and would see him paid; and that his services have been charged to her. The testimony further shows that the father had no property, and no income except his current earnings. In view of this state of the proof, plaintiff's counsel contends that the wages of Sarah were the property of the mother, for the recovery of which she could have maintained an action. In other words, the contention is that the arrangement and understanding between the father and mother of Sarah as to her wages, taken in connection with the other facts aforesaid, amounted to a relinquishment by the father of his right to the daughter's services and earnings and an assignment thereof to the mother, and hence that the latter can recover for the loss thereof. We think this is so. . . .

See *Hammond v. Corbett*, 50 N. H. 501, 8 Am. Rep. 288, where there is a more elaborate discussion of the mother's rights. That case does not go to the full length of the principal case, because in that case the father was dead, and the right of the mother while the father is alive, was not presented. For a mother's rights in North Carolina, see *Jordan v. Coffield*, 70 N. C. 110; *In re Lewis*, 88 N. C. 31; *Revisal*, sec. 1765; *Mordecai's Law Lect.* 389. See "Parent and Child," *Century Dig.* §§ 86-99; *Decennial and Am. Dig.* Key No. Series § 7.

BROWN v. RAMSAY, 29 N. J. L. 117, 119-121. 1860.

When is the Father Entitled to the Services and Earnings of His Adult Children?

[The plaintiff sued to recover the value of work done by his adult son who lived with plaintiff and, on account of weakness of mind, was cared for and treated by plaintiff as if he were still a minor. There was judgment against the defendant, who took the case to the supreme court *ex certiorari*. Affirmed.] •

WHELPLEY, J. . . . The court must have decided that the son was non compos mentis, incapable of taking care of himself or of making any valid contract, and, as such, is still sub potestate patris, like an infant. The right of a father to the services of his sane child ceases at twenty-one. It is then the right of the child to be emancipated, to be thenceforth his own master, make his own contracts and receive into his own hands the fruit of his own labor. But arriving at the age of twenty-one is not ipso facto emancipation. The child may elect still to remain the servant of the father, to abide under his roof, and to receive sustenance and support from him. In such a case he is not emancipated, and the father is liable for his support and entitled to receive his earnings. *Overseers of Alexandria v. Overseers of Bethlehem*, 1 Harr. 122. This, it is true, was a settlement case, but it seems to me that the principles upon which it was decided rule this case. That case holds

distinctly the doctrine that attaining the age of twenty-one is not emancipation; that whether it is so or not, is a question to be settled by the circumstances of the case; that it requires the election of the child to make it emancipation, and that an idiot, or person of such weak mind as to be incapable of making the election, is not emancipated, and cannot be, at attaining that age, so far as to prevent the acquisition of a derivative settlement. That case, I think, was rightly decided.

But I am by no means prepared to hold that an imbecile child over twenty-one years, not residing with his father and supported by him, cannot be emancipated by the act of the father turning him out of his family and from the shelter of his roof, and refusing to maintain him, so far as to enable him to sue for his own wages. In such a case the emancipation would be complete even without the assent of the child, for the common-law liability of the father to support his child ceases when he attains his majority; he is no longer liable because of the infancy of the child. *Mills v. Wyman*, 3 Pick. 207, and cases there cited; *Cook v. Bradley*, 7 Conn. 57; 1 *Parsons on Cont.* 259. After that time it requires either the express or tacit assent of the father to the continuance of his child in the relation of his unemancipated servant. That assent may be manifested by permitting the child to remain in his family as before, supported and sustained by him. The female children of many parents often remain in this way unemancipated long after attaining majority, rendering service to the father and supported by him, and for such services so rendered it has been held that no action lies. *Ridgway v. English*, 2 Zab. 416. The law will not presume any change in the existing relation of parent and child from the mere fact that the child is twenty-one. Whether emancipation has taken place or not must be a question of fact, not of law.

In this case there was proof before the court that the child had always lived with and been supported by the father, although he had occasionally worked out and received his own wages; but the latter fact would not of itself prove emancipation. Upon the evidence before them, the court might lawfully decide that the relation of a non-emancipated child still subsisted, and we must presume they did so decide. . . . The judgment of the common pleas must be affirmed.

The principal case is a peculiar one, in that the adult child was of unsound mind. That children incapable of taking care of themselves by reason of mental or bodily infirmity are not emancipated by arriving at age, is stated to be the law in a note to 5 L. R. A. 476, citing several cases from Pennsylvania and one from Vermont in support of the statement.

That persons occupying the relation of one family cannot recover from each other for services or board, in the absence of a contract or understanding to that effect, is well settled; but arriving at age ordinarily works a complete emancipation, and the right of the parent to his adult child's services then ceases, as does also his liability for such child's support. *Schouler, Dom. Rel.* sec. 269; *Smith's Cases* L. P. 74-78; *Mordcan's L. L.* 109, 114. For further discussion see 29 Cyc. 1672; 21

Amer. & Eng. Enc. L. 1959, 11 L. R. A. (N. S.) 873, and elaborate note. See "Parent and Child," Century Dig. §§ 70-85, 165-175; Decennial and Ann. Dig. Key No. Series, §§ 5, 6, 16.

TENN. MFG. CO. v. JAMES, 91 Tenn. 154, 18 S. W. 262, 15 L. R. A. 211, 1892.

Emancipation of Infants. Effect of on Parent's Right to Earnings.

Minnie James, by her next friend, sued in quantum meruit for work and labor done by her for the Tenn. Mfg. Co. Judgment against the company. The company carried the case to the supreme court by writ of error. Reversed.

The contract by which Minnie James was employed was in writing executed by her and her father also. It contained a clause by which wages earned and unpaid should be forfeited by certain acts of the employee. By this clause there was a forfeiture of the wages sued for. The judge below ruled that the contract in question was with the minor and that she could repudiate it. Only a part of the opinion is here inserted.]

LURTON, J. . . . The circuit judge being of opinion that the contract was invalid, as being one with a minor who had a legal right to repudiate same, gave judgment for the plaintiff. In this we think his honor erred. If the contract had been alone with the minor, she might undoubtedly repudiate it, and recover upon a quantum meruit. The law would give the infant the privilege of judging whether such a contract was beneficial or not, and of avoiding it if she elected to do so, and recovering the value of her services as if she worked without any contract. 10 Amer. & Eng. Enc. Law, tit. "Infant." But this contract was, in law, with the father, who agreed that the wages in law due to him might be paid over to his child, "subject to all the conditions of this contract." The wages of a minor, peculiar circumstances out of the way, are due to the father. This springs from his legal duty to support and educate his child. He may permit the minor to take and use his own earnings. This is called "emancipation," and emancipation will be a defense to the father's suit for the minor's wages. It may be express or implied; entire or partial. It may be conditional. It may be in writing or oral; for the whole minority or for a shorter term; as to a part of the child's wages or as to the whole. Emancipation will not enlarge the minor's capacity to contract; it simply precludes the father from asserting his claim to the wages of his child. Bish. Cont. § 898. If one employ a minor with notice of the non-emancipation of the infant, it will be no defense to the father's suit for the wages that the child has received them. On the other hand, payment to the father will be no defense to the minor's suit, if the employer knew of the fact of emancipation. These principles of the common law are well settled, and have not been affected by statute. Cloud v. Hamilton, 11 Humph. 105. The cases in America are collected in a note to Wilson v. McMillan, 35 Amer. Rep. 117.

In view of these principles, we must construe the contract of the father as an emancipation, subject to the conditions as to damages in case his child shall quit without cause and without the stipulated notice. It is as much as if he had said: "My child is a minor. As such, I am entitled to her wages. I am willing that she shall work in your mill, and that the wages she may earn shall be paid to her. I agree that she shall comply with this contract, and, if she does not, then the wages legally due me shall be detained by you to the extent provided in the contract I make for her, and only such wages paid to her as I would be entitled to receive if the contract were exclusively with me." This was a conditional emancipation, under a special contract made by and with the father for himself and his child. Her emancipation was partial. The father, having a legal right to her entire wages, has stipulated that none shall be paid her beyond the sum due under this agreement with him. If this contract is binding on him, the minor cannot recover beyond its limits. . . .

[The contract was held to be a valid one and binding on the father, and, hence, a bar to the action for the reasons given.]

See "Parent and Child," Century Dig. §§ 70-76, 165-175; Decennial and Am. Dig. Key No. Series §§ 5, 16.

COMMONWEALTH v. GRAHAM, 157 Mass. 73, 31 N. E. 706, 16 L. R. A. 578. 1892.

Marriage, How Far an Emancipation.

[Prosecution under a statute, for non-support of wife. Verdict of guilty. Defendant alleged exceptions. Exceptions overruled.

The defendant married when he was nineteen years old, and without the consent of his father. After his marriage his father still took most of his wages. He requested the judge to charge that his marriage without his father's consent did not work an emancipation and entitle him to his earnings. The marriage was solemnized in Maine.]

FIELD, C. J. . . . The consequences of this marriage must be the same as if it had been solemnized in this commonwealth; and the presiding justice, therefore, correctly ruled that this marriage "imposed upon the defendant all the duties and responsibilities of the marital relation."

The real question is whether, when a minor son marries without the consent of his father, and the father never consents to it, and needs the son's wages for his support and the support of his family, the father is entitled to the son's wages during minority in preference to the wife, who also needs the wages for her support. The ruling was that the "wife would be entitled as of right to receive support from" her husband, and that he "would be entitled as of right to such portion of his wages as to enable him to support his wife; that the father could only claim the rest." It seems to be settled that the marriage of a minor son, with the consent of his father, works an emancipation; and it is not clear that the

marriage of a minor son without his father's consent does not have the same effect, although the decision in *White v. Henry*, 24 Me. 531, is contra. It has been said that "the husband becomes the head of a new family. His new relations to his wife and children create obligations and duties which require him to be master of himself, his time, his labor, earnings, and conduct." *Sherburne v. Hartland*, 37 Vt. 528. There seems to be little doubt that, when an infant daughter marries, she is emancipated from the control of her parents. *Aldrich v. Bennett*, 63 N. H. 415; *Burr v. Wilson*, 18 Tex. 367; *Porch v. Fries*, 18 N. J. Eq. 204; *Rex v. Wilmington*, 5 Barn. & Ald. 525; *Rex v. Everton*, 1 East. 526; *Northfield v. Brookfield*, 50 Vt. 62. See, however, *Babin v. Le Blanc*, 12 La. Ann. 367. The meaning of emancipation is not that all the disabilities of infancy are removed, but that the infant is freed from parental control, and has a right to his own earnings. In *Taunton v. Plymouth*, 15 Mass. 204, it was intimated that the marriage of an infant son with the consent of the father entitled the son to his own earnings for the support of his family; and in *Davis v. Caldwell*, 12 Cush. 512, it was said that an infant husband is liable for necessities furnished for himself and his family. It is clear, we think, that it is the duty of an infant husband to support his wife, and that, if he have property and a guardian, it is the duty of the guardian to apply the income, and, so far as is necessary, the principal, of his ward's property, to the maintenance of the ward and his family, under Pub. St. c. 139, § 30. We are of opinion that these considerations make it necessary to hold that an infant husband is entitled to his own wages, so far as they are necessary for his own support and that of his wife and children, even if he married without his father's consent, and that the ruling of the court was sufficiently favorable to the defendant. Whether sound policy does not require that in every case in which the marriage is valid an infant husband should be entitled to all his earnings need not now be decided. Exceptions overruled.

As to how far marriage effects an emancipation, see also the note to *State v. Stigall*, 22 N. J. L. 286, inserted at ch. 6. sec. 2. (a). Not only may emancipation be effected by contract between parent and child, but also by cruelty, neglect, abandonment, etc., on the part of the parent—leaving the child to shift for itself, or treating it so badly that it is justified in law in leaving the parent. So, acting in so depraved a manner as to make it improper for the child to live with its father, will work an emancipation. *Atwood v. Holcomb*, 39 Conn. 270, *Smith's Cases* L. P. 65, 68; *Nightingale v. Withington*, 15 Mass. 272; note in 35 Am. Rep. 117.

"A father may, by agreement with his minor child, relinquish to the child the right he has to his services and earnings, and he will afterward have no right to claim his wages from his employers, but the child may claim and recover them in his own name for his own benefit. Such an agreement operates as a release of the father's right, and he has no power to reclaim or resume it afterward. *Preston, Touchstone*, 307; *Litt. sec. 367*; nor will his right revive, unless from the actual agreement of the minor or one fairly inferable from the circumstances and conduct of the parties. An agreement of the father with his son stands on a different ground from his agreement with a third person, to give up to

him the control of his child for a limited time or during minority. As between them, the right of the father over his child has been held a personal trust which cannot be transferred unless by indenture under *statute*, and which it has been held the father may resume at pleasure, . . . though upon this point the decisions do not agree." Hall v. Hall, 44 N. H. 293, Smith's Cases on L. P. 78, 79.

As the earnings of a minor child belong to the father, he cannot give such earnings to the child, after they have been paid or earned, any more than he can give away any other property, in violation of the statute of 13 Elizabeth, which makes void, as to creditors, all dispositions of property made with intent to hinder, delay, or defraud the creditors of the donor, etc.; but there is a great difference between that which is already earned and the prospective earnings of a child. The creditors of the father have no right to the *services* of the child, for the child is not the property of the father. Therefore, if the father emancipate the child, its earnings subsequent to such emancipation are free from the claims of the father's creditors. Winchester v. Reid, 53 N. C. 377, 57 Pac. 908; 45 L. R. A. 645; note at pp. 117-121 of 35 Am. Rep., where will be found a very valuable condensed statement of the law governing the rights of all concerned in the earnings, status, etc., of an emancipated child, as well as what constitutes emancipation of a minor. See also 29 Cyc. 1672 et seq. See "Parent and Child," Century Dig. § 73; Decennial and Am. Dig. Key No. Series § 5.

SEC. 3. MASTER AND SERVANT.

(a) Master's Liability to Servant on Contract.

SMITH v. LUMBER CO., 142 N. C. 26, 54 S. E. 788. 1906.

Remedies of Servant for Breach of Contract of Hiring. Entire Contracts. Wages Payable in Installments. Constructive Service. Duty of Discharged Servant to Seek Other Employment. Estoppel by Judgment on One Installment.

[Action for one hundred and fifty dollars alleged to be due upon a contract of hiring. Verdict and judgment against defendant, and defendant appealed. Affirmed, except as to one point.

Plaintiff alleged that he was employed by the defendant for the term of four months at \$75 a month; that he was paid for the first month, and then discharged without cause; that he failed, after diligent effort, to obtain other employment; that he sued for the second installment of wages and obtained judgment. The plaintiff's term of service began on Feb. 5, 1904, and he was paid for the month ending March 5, 1904. For the wages due on April 5, he brought suit on May 5, at which time there was also due the wages for the month ending May 5, which were not included in the suit. He now sues for the wages due on May 5, and for the amount due on June 5. Although there were two installments due on May 5—when he brought his first action—only one was included in the suit. The defendant insisted that by failing to sue for the third installment which was due when he sued for the second, the judgment rendered for the second installment was *res judicata* and an estoppel as to all installments due at the time that action was commenced. The judge ruled otherwise, and so instructed the jury on the fourth issue, which was submitted to raise this question.

The defendant also insisted that plaintiff could not sue for the installments as they fell due, but could only sue in quantum meruit or for damages for breach of contract; and, that having brought suit on one in-

stallment, such action was a complete bar to any further recovery on the contract. The judge ruled against this position.

On the third issue, which was as to how much the plaintiff was entitled to recover, the defendant requested the judge to charge that, if the plaintiff did not try to get work after his discharge, he could recover nothing in this action. The judge refused this request.]

WALKER, J. When this case was before us at the last term (140 N. C. 375, 53 S. E. 233), it appeared by admission of the parties that the plaintiff had brought suit before the magistrate after June 10, 1904, and at a time when the last installment had fallen due, and it was then contended with much force that having sued for one of the installments, when all were due, and recovered judgment, the plaintiff could not sue and recover for any other installment, because, to prevent unnecessary and oppressive litigation, the law construes the former adjudication to be a full satisfaction and a complete bar. The position, whether intrinsically correct or not, seems to be sustained by high authority. *Jarrett v. Self*, 90 N. C. 478; *Kearns v. Heitman*, 104 N. C. 332, 10 S. E. 467; *McPhail v. Johnson*, 109 N. C. 571, 13 S. E. 799; 2 *Parsons, Cont.* 464; *Freeman, Judgments*, § 240; *Ref. Dutch Church v. Brown*, 54 Barb. (N. Y.) 191; *Am. & Eng. Enc. Law* (2d ed.), p. 791 and note 1. It now appears from the testimony that the suit before him was actually commenced on May 5th, and the defendant contends that having recovered judgment if for but the amount of one installment, the plaintiff cannot again sue for the other installment which was then due, upon the principle just mentioned, and that the judgment should be reduced by the amount of one installment, or \$75. So that we must now decide the question. . . .

In this case, the suit was commenced on May 5th as the sheriff received the summons from the clerk on that day. The plaintiff's term of service began on February 5th, and the third month expired on May 4th, so that the salary of the third month was due immediately on the expiration of that day, and suit could therefore have been brought for the same on the fifth day of that month. "Where wages are by express stipulation payable at stated periods during the term, the wages for any period are due and payable immediately on the completion thereof." 20 *Am. & Eng. Enc.* (2d ed.) 21; *White v. Atkins*, 8 Cush. (Mass.) 367-371; *Harris v. Blen*, 16 Me. 175; *Green v. Robertson*, 64 Cal. 75, 28 Pac. 446. As one full month's work had been performed, one full month's pay was then due and demandable. The plaintiff, therefore, could have recovered the amount of both the second and third installments in the suit brought on the 5th of May, and is consequently barred from the recovery of either one of them in this action, under the principle settled by the authorities above cited.

The defendant also contended that the plaintiff could not sue on the successive installments as they fell due, but must sue on a quantum meruit or for damages for the breach of the contract, and that his recovery for the one installment was a complete satis-

faction of all damages arising from the breach of the contract, as his recovery in either of the other two forms of action would have been. We do not assent to this proposition in its entirety. Numerous and well-considered authorities hold, in accordance with what we consider the correct principle and the better reason, that when the contract is entire and the services are to be paid for by installments at stated intervals, the servant or employe, who is wrongfully discharged, has the election of four remedies: (1) He may treat the contract as rescinded by the breach and sue immediately on a quantum meruit for the services performed, but in this case he can recover only for the time he actually served. (2) He may sue at once for the breach, in which case he can recover only his damages to the time of bringing suit. (3) He may treat the contract as existing and sue on it at each period of payment for the salary then due. (We do not consider the right to proper deduction in this case, as it is not now presented). (4) He may wait until the end of the contract period, and then sue for the breach, and the measure of damages will be *prima facie* the salary for the portion of the term unexpired when he was discharged, to be diminished by such sum as he has actually earned or might have earned by a reasonable effort to obtain other employment. This rule as thus stated, is supported by the great weight of authority. 14 A. & E. Enc. (1st ed.), 797; 20 A. & E. Enc. (2d ed.), 36 et seq., and it is clearly recognized and adopted by this court in *Markham v. Markham*, 110 N. C. 356, 14 S. E. 963. The difficulty in establishing the right to sue upon the contract for the whole amount of the wages originated in the doctrine of "constructive service." The law, in theory at least, required that the servant wrongfully dismissed before the expiration of his term must keep himself in readiness at all times to perform the required service, and an averment that he had done so was necessary in an action on the contract for a breach. By a fiction of the law, his constant readiness to perform was considered equivalent to actual service, so as to enable him to recover the full amount of the wages, the same as if the service had been actually performed, and it was so construed by the courts. But this principle was inconsistent with the rule as to the measure of damages, which permitted the master to show in diminution of the servant's recovery for wages that the latter either obtained or could have obtained other employment, inasmuch as to be always strictly ready he must be always idle. The two requirements of the law could not reasonably and logically coexist, and for this reason the doctrine of constructive service, first asserted by Lord Ellenborough in *Gandell v. Pontigney*, 4 Camp. 375, was repudiated in later cases and the servant's remedy was restricted to either a quantum meruit (if he elects to rescind the contract) or an action for the damages resulting from the breach, and his right to an action for the wages, treating the contract as constructively performed, was denied. *Goodman v. Peacock*, 15 Q. B. 74; *Cutter v. Powell*, 2 Smith's L. C. (9th ed.), 1245; 20 A. & E. Enc. 40.

This court recognized the doctrine of constructive service in *Hendrickson v. Anderson*, 50 N. C. 246, and *Brinkley v. Swicegood*, 65 N. C. 626, to the extent of expressly asserting the right of the servant to recover the full amount of the wages for the unexpired portion of the term, provided his action is brought after the end of the term, even though there had been no actual service during that time. The case of *Costigan v. Railroad*, 2 Denio (N. Y.) 609, 43 Am. Dec. 758, is cited and approved in *Hendrickson v. Anderson*, and in that case the doctrine is thus stated: "Where one contracts to employ another for a certain time at a specified compensation and discharges him without cause before the expiration of the time, he is in general bound to pay the full amount of wages for the whole time." The court also there holds that the said amount may, of course, be diminished by showing that the servant has during the same period engaged in other business. This rule for the measure of the damages accruing for a wrongful dismissal is surely the equitable, and, we think, the correct, one, whatever may be the true principle upon which it should be held to rest. If the doctrine of constructive service is illogical, in view of the right of the master to have the damages diminished by showing that the servant engaged in other business and consequently was not always ready to perform the service, it does not follow that the rule itself as to the damages is not a sound one, for other cogent reasons may and have been assigned in its support. As a master has, by his wrong in breaking the contract, prevented the servant from completing the work for which he had stipulated, the measure of the servant's damages would be the amount which he will actually sustain in consequence of the defendant's default, and that is the amount of the wages he would have earned had the contract been fulfilled. Laying down the rule in *Hendrickson v. Anderson*, *supra*, this court said: "It would seem to be a dictate of reason that if one party to a contract be injured by the breach of it by the other, he ought to be put in the same condition as if the contract had been fully performed on both sides. He certainly ought not to be a loser by the fault of the other; nor can he be a gainer without introducing into a broken contract the idea of something like vindictive damages. The true rule then is to give him neither more nor less than the damages which he has actually sustained, and so we find the authorities to be."

The court then holds, as we have shown, that the damages are the full amount of wages for the whole time, less the amount received or which could have been realized from other employment. The right to full damages, measured by the wage rate, arises from the master's breach, and his wrongful act in preventing the servant from performing the service. He will not be permitted to take advantage of his own wrong and to allege, in his defense and to defeat a clear right, a nonperformance by the servant, which has proceeded from his own unlawful act, especially, when he at the same time insists that the servant should have obtained other employment in order to reduce the damages. We have held that a

party to a broken contract, who is unable to fulfill it by reason of the wrongful act of the other party, may recover for profits lost as well as gains prevented, if they are reasonably certain, such as those to be received from outstanding contracts for the sale of goods at a fixed price. *Winston C. M. Co. v. W. T. Co.*, 141 N. C. 284, 53 S. E. 885; *Johnson v. Railroad Co.*, 140 N. C. 574, 53 S. E. 362. And yet, in that class of cases, the service contracted for was not fully performed. So here the employe, by no fault of his own, loses his wages which are fixed by the contract, and their amount should be the true measure of his damages under the ordinary rule obtaining in the case of other contracts. He could not recover these damages before the expiration of his term because of the other rule that the master is entitled to diminish them by the amount he may or could have received from other employment which cannot be determined until the full period is at an end. Before that time the amount would be speculative. But, at the end of the term, there is no sound reason why he should not be entitled *prima facie* to the full amount of wages, unless we make his condition worse than it would have been if the contract had not been broken by the master. It would be an aggravation of the latter's wrong, if we hold that he may profit by it, and it would further present the temptation to break such contracts. Every dictate of reason and right requires that the rule should stand, even if the original reason assigned for it must fail. We may discard the reason as illogical, but not the rule, which is necessary to do justice and to promote fair dealing. The doctrine, as we have stated it, has been accepted by this court, as the authorities we have cited show, and we believe that it is sustained by the best-considered cases in other jurisdictions. In 20 A. & E. Enc. p. 37, it is said: "Where the action is brought subsequent to the expiration of the term of employment, the decisions are practically unanimous to the effect that the measure of damages is *prima facie* the wages for the unexpired portion of the term, this amount to be diminished by such sums as the servant has earned or might have earned by a reasonable effort to obtain other employment in the same line of business." *Wilkinson v. Black*, 80 Ala. 329; *McMullan v. Dickinson Co.* (Minn.), 62 N. W. 120, 27 L. R. A. 409, 51 Am. St. Rep. 511; *Hale on Damages*, 67. Numerous cases are collected in the notes to be found in 20 A. & E. p. 37, and we refer to them without any particular enumeration here. In *Pierce v. T. C. I. & R. Co.*, 173 U. S. 1, 19 Sup. Ct. 335, 43 L. Ed. 591, the court applying the rule that in an action for breach of contract the amount which would have been received if the contract had been kept is the measure of damages if it is broken, held that the servant is entitled to receive the full amount of wages, subject to proper deductions, even when the suit was brought for the breach prior to the expiration of the full period of service. When there is a breach of the contract by the master a liability arises out of his implied undertaking to indemnify the servant against all loss resulting from his wrong, and this indemnity may accrete to the

servant by installments and is continuing in its nature. *McMullan v. Dickinson Co.* (Minn.), 62 N. W. 120, 27 L. R. A. 409, 51 Am. St. Rep. 511. The fact that the plaintiff sued and recovered judgment for the second installment is no bar to this suit as to the one remaining, or the last, installment, for the latter was not then due, and that judgment settled nothing except as to the second and third months' wages which were then due and unpaid. It would be strange, indeed, if the plaintiff could be barred by that judgment when at the time it was obtained he could not have sued for the last installment. The law is the other way. It has been so expressly decided. *Armfield v. Nash*, 31 Miss. 361; *Isaacs v. Davies*, 68 Ga. 169; *La Coursier v. Russell*, 82 Wis. 265, 52 N. W. 176; *Strauss v. Meertief*, 64 Ala. 299, 38 Am. Rep. 8. The principle results from the right to sue as the installments become due. *Markham v. Markham*, *supra*. This disposes of the first and second prayers for instructions.

The instruction requested in the third prayer was properly refused, as the duty of the employe to seek other employment could be considered only in diminution of damages. He might not have been able to get employment if he had made proper effort, or not as good wages. "A recovery, of course, cannot be entirely defeated by showing that the servant obtained or could have obtained other employment; but it is always competent for the master to show these facts in mitigation of damages; the burden of proof in all cases being upon him." 20 A. & E. Enc. p. 37. Plaintiff was entitled, at least, to nominal damages for the breach. *Id.* note 3. . . .

The court committed an error in its charge to the jury upon the fourth issue, as the suit before the justice constituted a bar to the recovery of the third installment of wages, which under the erroneous instruction was included in the verdict and became afterwards a part of the judgment. There must be a new trial as to the fourth issue, unless the plaintiff thinks he will be unable to show a state of facts different from those which now appear in respect to the actual time of issuing the summons in the former suit, and agrees before the opinion is certified to the court below to remit the amount of the third installment, in which case the judgment will be reduced accordingly, and, as thus modified, it will be affirmed, and so certified. New trial.

If the wages be payable in installments and the servant be wrongfully discharged, or quit for justifiable cause, before the expiration of his term of employment, the servant may recover on each installment as it matures. *McMullan v. Dickinson*, 62 N. W. 120, 27 L. R. A. 409; which is directly contrary to the ruling in Maryland, *Olmstead v. Bach & Son*, 27 Atl. 501, 22 L. R. A. 74. See *Mordecai's L. L.* 128-131, for the doctrines announced in the principal case. The rule as to constructive service is this: The servant who is wrongfully discharged, or who quits for proper cause, must exercise reasonable diligence in seeking employment of not lower grade, and his recovery will be diminished by the amount he did so earn or might have earned. The burden is on the master to show what was or could have been thus earned by the servant. *Hassard-*

Short v. Hardison, 114 N. C. 482, 19 S. E. 728; same case, 117 N. C. 60, 65, 23 S. E. 96; Oldham v. Kerchner, 81 N. C. at pp. 432-433; Mordecai's L. L. 125, 128-131; Maynard v. R. W. Corset Co., 200 Mass. 1, 6, 85 N. E. 877, 879, which last case says: "Where one is under contract for personal service, and is discharged, it becomes his duty to dispose of his time in a reasonable way, so as to obtain as large compensation as possible, and to use honest, earnest, and intelligent efforts to this end. He cannot voluntarily remain idle and expect to recover compensation stipulated in the contract from the other party. Olds v. Mapes-Reeve C. Co., 177 Mass. 41, 58 N. E. 478; Ransom v. Boston, 192 Mass. 299, 78 N. E. 481; same case, 196 Mass. 248, 81 N. E. 998. The amount of the damages is to be determined by the wages which he would have earned under the contract, less what he did in fact earn, or in the exercise of proper diligence might have earned, in another employment. Cutter v. Gillette, 163 Mass. 95, 39 N. E. 1010. It seems to be the generally accepted rule that the burden of proof is upon the defendant [master] to show that the plaintiff found, or, by the exercise of proper industry in the search, could have procured other employment of some kind reasonably adapted to his abilities, and that in the absence of such proof the plaintiff is entitled to recover the salary fixed by the contract. Milage v. Woodward, 186 N. Y. 252, 78 N. E. 873; Porter v. Burkett, 65 Tex. 383; Bennett v. Morton, 46 Minn. 113, 48 N. W. 678; Beisel v. Vermillion F. El. Co., 102 Minn. 229, 113 N. W. 575; Hendrickson v. Anderson, 50 N. C. 246; Troy Co. v. Logan, 96 Ala. 619, 12 So. 712; Fitzpatrick S. B. G. Co. v. McLaney, 153 Ala. 586, 44 So. 1023; King v. Steiren, 44 Penn. St. 99; Barker v. K. Ins. Co., 24 Wis. 630, 638; Hamilton v. Love, 152 Ind. 641, 53 N. E. 181, 54 N. E. 437; Mathesius v. B. H. R. R., 96 Fed. 792; Winkler v. Racine W. & C. Co., 99 Wis. 184, 74 N. W. 793; Larkin v. Hecksher, 22 Vroom, 133, 16 Atl. 703; Rosenberger v. P. C. Ry., 111 Cal. 313, 43 Pac. 963; Roberts v. Crowley, 83 Ga. 429, 7 S. E. 740; Realty Co. v. Ellis, 4 Ga. App. 402, 61 S. E. 832; Fuller v. Little, 61 Ill. 21; Saxonia M. & R. Co. v. Cook, 7 Colo. 569, 4 Pac. 1111; Chisholm v. P. B. Assur. Co., 112 Mich. 50, 55, 70 N. W. 415; Boland v. Glendale Q. Co., 127 Mo. 520, 30 S. W. 151; Chamberlain v. Morgan, 68 Penn. St. 168; Latimer v. York C. Mills, 66 S. C. 135, 44 S. E. 559."

See further, as to actions on installments, Farnham v. Hay, 3 Blackford, 167, inserted at ch. 8, sec. 2, post, and notes to that case. See 8 L. R. A. (N. S.) 1004, and note (master's waiver of right to discharge and his condonation of breach of duty by servant); 6 Ib. 49, 5 Ib. 439, 579, and elaborate notes (servant's remedy for wrongful discharge); 6 Ib. 82, and note (measure of damages for wrongful discharge); 5 Ib. 439, 6 Ib. 94, and notes (servant's duty to seek employment). See "Master and Servant," Century Dig. §§ 41-61; Decennial and Am. Dig. Key No. Series §§ 34-46.

CHAMBLEE v. BAKER, 95 N. C. 98, 100-103. 1886.

Entire Contracts. Remedy.

[Action on a quantum meruit for services rendered. Judgment against defendant, and he appealed. Affirmed.]

Plaintiff was hired in February to work on defendant's farm for the term ending with the current year. It was agreed, at the trial, that the contract was an *entire contract*. By the terms of this contract, plaintiff was to be paid "ten dollars per month." Plaintiff quit the defendant's service, without legal excuse, before the end of his term of employment. The defendant suffered no loss by the plaintiff's quitting. The value of plaintiff's services, for the time he worked for defendant, was seventy dollars. He had been paid twenty dollars and he sued for the balance due him.]

SMITH, C. J.

The appellant insists, that, the contract being special for labor for the entire residue of the year, though the compensation is measured by months, the plaintiff, having left before the expiration of the time "without legal excuse," cannot recover for the partial service performed.

The general rule is thus laid down, and is sustained by numerous adjudications cited in the American Editors' Notes to the case of *Cutter v. Powell*, 2 Smith's Leading Cases, 1: "But if there has been an entire executory contract, and the plaintiff has performed a part of it, and then wilfully refuses, without legal excuse, and against the defendant's consent, to perform the rest, he can recover nothing, either in general or special assumpsit." The same rule has been repeatedly recognized and acted on in this court, the more recent cases, wherein references to others may be found, being *Thigpen v. Leigh*, 93 N. C. 47, and *Lawrence v. Hester*, *Id.* 79. Indeed, so stringent was the former practice, that in an action upon a special contract to pay for services to be rendered, and which were rendered, no evidence in defense or to reduce the recovery, was admissible to prove inattention, neglect, wasted time or other misconduct of the plaintiff, and dereliction in the undertaken duty, and the defendant was driven to a separate action for redress. *Hobbs v. Riddick*, 50 N. C. 80. It is otherwise under the present system, and the entire dispute, involving opposing demands, is now adjusted in a single suit. This is some relaxation of the doctrine regarding special contracts, and the enforcement of the obligations they create.

The manifest injustice, upon such technical grounds, of refusing all compensation for work done and not completed, or for goods supplied short of the stipulated quantity, and of allowing the party to appropriate them to his own use, without paying anything, has been often felt and expressed by the judges, and a mode sought by which the wrong could be remedied. The mischief is adverted to by this court, in *Gorman v. Bellamy*, 82 N. C. 496, when referring to the case of *Dumott v. Jones*, 23 How. (U. S.) 220, and *Monroe v. Philips*, 8 Ellis and Black, 739, this language is used: "The inclination of the courts, is to relax the stringent rule of the common law, which allows no recovery upon a special unperformed contract, nor for the value of the work done, because the special excludes an implied contract to pay. In such case, if the party has derived any benefit from the labor done, it would be unjust to allow him to retain it without paying anything. Accordingly, restrictions are imposed upon the general rule, and it is confined to contracts entire and indivisible, and when, by the nature of the agreement or by express provision, nothing is to be paid till all is performed."

If, by the terms of the agreement, certain sums are due on performance of certain parts of the work, thus severing the consideration, separate actions are maintainable for each. And in the construction of the agreement, the court will be guided by a respect to general convenience and equity, and the reasonableness of the

particular case. Thus, the modified rule has been declared to be, that though the consideration and contract be entire by the apparent terms of the agreement, yet such may be the circumstances as to entitle the plaintiff to a ratable compensation for part performance. So, the inference [is], that compensation is payable in installments at certain periods, as weekly or monthly, according to service; unless there is a clear and distinct understanding that compensation, as a unity, is demandable only at the expiration of the full period of service. These views are presented in the able discussion in the note from which we have extracted a part, and rest upon a series of adjudications cited.

In our case, the plaintiff's wages are measured by monthly sums, and for two months of his work he has received full compensation. *This indicates an understanding between the parties*, that the wages were to be paid as the work progressed and as the plaintiff's necessities may have required, and that he should not be delayed until the end of the year. The defendant loses nothing by the plaintiff's leaving, nor is it stated that the departure was against the defendant's will. Under these circumstances, and to avoid manifest injustice, we hold the ruling to be right, and that there is no error. The judgment must be affirmed.

For further discussion of the doctrine of Entire Contracts, see 5 L. R. A. (N. S.) 524, and elaborate note; 3 Page on Cont. sec. 1487; McIntosh on Cont. 543; Mordecai's L. L. 118, 119; Tussey v. Owen, 139 N. C. 457, 52 S. E. 128; Cranmer v. Graham, 1 Blackf. 406, inserted at ch. 8, sec. 3, (a). See "Master and Servant," Century Dig. §§ 90-102; Decennial and Am. Dig. Key No. Series § 73.

(b) *Master's Liability to Servant in Actions Ex Delicto.*

HOBBS v. RAILROAD, 107 N. C. 1, 12 S. E. 124. 1890.

Fellow-Servant Doctrine. History. The Rule and its Limitations or Exceptions.

[Action for damages arising from the alleged negligence of the defendant. The fellow-servant doctrine was relied on as a defense. Judgment against defendant, overruling its demurrer, and defendant appealed. Reversed.]

The complaint alleged that the plaintiff, a fireman, was injured by the negligence of the engineer, under whose direction and control he was placed in defendant's service; that the engineer negligently ordered him to go out upon the engine and oil certain machinery while the engine was in swift motion; that thereafter the engineer, while the plaintiff was out on the engine, negligently stopped it so that the plaintiff was injured thereby. The defendant demurred, on the ground that the complaint did not state facts sufficient to constitute a cause of action.]

CLARK, J. In this case, as in *Hagins v. Railroad Co.* 106 N. C. 537, 11 S. E. Rep. 590, it is set out in the complaint that the injury to the plaintiff, who was a fireman, as in that case a brakeman, was caused by the negligence of the engineer. This case must be governed by that. While it is not always easy to draw the

line between what constitutes a fellow-servant and what a superior employe, or vice principal, the relation between a brakeman or fireman and the locomotive engineer is well settled to be that of fellow-servants. It was so held in the first case on the subject (*Murray v. Railroad Co.*, 1 McMul. 385), and has been repeatedly and uniformly so ruled since (*Jordan v. Wells*, 3 Woods, 527; Fed. Cas. No. 7,525; *Bull v. Railroad Co.*, 67 Ala. 206; *Railroad v. Handman*, 13 Lea, 123; *Henry v. Railroad Co.*, 49 Mich. 495; 13 N. W. Rep. 832; *Paulmier v. Railroad Co.*, 34 N. J. Law, 151; *Railroad Co. v. Elliott*, 1 Cold. 611; *Jones v. Yeager*, 2 Dill. 64; Fed. Cas. No. 7,510; *Caldwell v. Brown*, 53 Pa. St. 453; *Railroad Co. v. Rush*, 15 Lea, 145; *Railroad Co. v. Waller*, 48 Ala. 459; *Howard v. Railroad Co.*, 26 Fed. Rep. 837; *Railroad Co. v. Blohn*, 73 Tex. 637, 11 S. W. Rep. 867, 1889.) And there are many others. In *Dobbin v. Railroad*, 81 N. C. 446, it is held that, to make the company liable, the negligent employe must be something more than a mere foreman over other hands; and in *Kirk v. Railroad Co.*, 94 N. C. 625, Smith, C. J., says: "The operation of the principle [of non-liability of master for negligence of fellow-servant] is not altered by the fact that the servant chargeable with negligence is a servant of superior authority, whose lawful directions the other is bound to obey." The same view is held in *Webb v. Railroad Co.*, 97 N. C. 387, 2 S. E. Rep. 440, by the present chief justice, although in the latter case the negligent servant had authority to employ and dismiss the injured employe. The principle above quoted from *Kirk v. Railroad Co.* is fully sustained by *Whart. Neg.* § 229; *Wood, Mast. & S.* § 437; *Cooley, Torts*, pp. 543, 544; *Shear. & R. Neg.* § 100; *Pierce, R. R.* 366; *Wright v. Railroad Co.*, 25 N. Y. 546, and cases cited. It is not necessary to draw the line in this case, as the relationship of the parties here falls clearly on the side of their being fellow-servants. There is no allegation here that the company exposed the plaintiff to unusual and unnecessary risks, or that, knowing that the engineer was unfit or incapable, they retained him in their service. Indeed, the services appear to have been those incident to the scope of plaintiff's employment as fireman, and the injury was caused by negligence of the engineer, his fellow-servant. The allegations in the complaint that, "as such fireman, the plaintiff was under the direction and control of the locomotive engineer," and that "engine, with train of freight cars attached, were managed, controlled, and conducted by said engineer, and other agents and servants of defendant company," in no wise distinguish the case from the ordinary one of fireman and engineer. The doctrine that a master is not liable to an employe for the negligence of a co-employe rests upon the principle that a man, as a rule, is no more liable for the wrongs done by another than he is for his debts. There are some exceptions to the rule, among them, for instance, that passengers injured by the negligence of servants of a common carrier can recover damages of the carrier, because of the breach of the contract of safe carriage, and so where a stranger is injured by the

acts of a servant within the scope of his employment. This last is upon the ground of public policy, and also because, as to the stranger, the servant is the agent of the master. An effort to make a further exception so as to make the common master liable to a servant for an injury done him by the negligence of a fellow-servant first came before the courts in England, in 1837, in the case of *Priestley v. Fowler*, 3 Mees. & W. 1, in which Lord ABINGER (Sir James Scarlett), in a very able opinion, pointed out the inconveniences, and often the great injustice, which would be produced if the master were held responsible. The principle laid down was that a servant, on entering upon his employment, contracted with a view to the ordinary risks of such employment; and further that it was public policy that it should be so, since, if, for injury to a servant by negligence of his fellow, he could not hold the master liable, servants would be prompted by their own interests to observe want of skill or care on the part of their fellows, and promptly report the same. This principle was also laid down, without any knowledge of the Westminster decision, by the supreme court of South Carolina in *Murray v. Railroad Co.*, 1 McMul. 385 (1841), and applied to railroad corporations (the case was that of a fireman injured by the negligence of an engineer), and followed by the able opinion of SHAW, C. J., in *Farwell v. Railroad Co.*, 4 Mete. (Mass.) 49. It was applied to the railroads in England, in 1850, in the case of *Hutchinson v. Railroad Co.*, 5 Exch. 343. Since then the same ruling has been made in a long line of decisions so that GRAY, J., in *Randall v. Railroad Co.*, 109 U. S. 478, 3 Sup. Ct. Rep. 322, well says that "the rule of law is now firmly established that one who enters the service of another takes upon himself the ordinary risks of the negligent acts of his fellow-servants, in the course of his employment." There are modifications where the fellow servant is acting as principal, or alter ego, also when the master furnishes machinery which he knows, or, with care, ought to have known, to be defective, or retains an unfit or incompetent servant, who does the injury, or exposes the servant to unusual risks, not contemplated by the scope of his employment. But the present case, as we have seen, does not come within any of these. Notwithstanding that the general rule of nonliability of the master is so well settled, it is still frequently urged that, as to railroads, there should be an exception made. But whatever may be argued in favor of or against the propriety of such exception, the courts have not felt authorized to make it. The change, wherever it has been made, has come by legislative enactment. In Georgia, the common law has been repealed by sections 2083 and 3036 of the Code, which provide that when an employe of any railroad company is injured by another employe, without any default or negligence on his own part, the company is liable for damages, as to passengers, for injuries caused by want of due care and diligence. Similar provisions have been adopted in several other states (*McKinney, Fellow Servants*, §§ 100-109), and in their courts are to be found

the decisions which are in conflict with ours. Wherever the common law has remained, as in this state, unchanged by statute, the holdings of the courts are in substantial conformity to ours. The common-law rule has also been very much modified in England by statutory enactment (the Employers' Liability Act of 1880, commonly known as the "Gladstone Act"); and that fact must be considered with reference to all the later English decisions. The demurrer should have been sustained. Error.

See "Master and Servant," Century Dig. §§ 422-544, 567-573; Decennial and Am. Dig. Key No. Series §§ 186-198, 216.

RAILROAD CO. v. KEARY, 3 Ohio St. 202, 212. 1854.

The Fellow-Servant Doctrine Criticised.

RANNEY, J. "After referring to a number of cases which sustain the doctrine." We entertain the highest respect for these courts, and their undivided opinions upon any question arising upon principles of the common law, would cause us to hesitate long before we differed from them. But even upon such a question, we should be compelled to follow the dictates of our own understandings; and the more especially should we feel at perfect liberty to do so, when they did not profess to base their decisions upon any settled principle of law, but undertook to declare a new rule for their action. If such a rule did not seem to us consistent with the analogies of the law, and calculated to promote justice, we should feel bound to reject it. Upon this question, we find no occasion to depart from established principles. It lies upon those who deny the defendant in error the benefit of these principles, to show some good reason for the exclusion. We have carefully examined all these cases, and can find in none of them any such reason, or any denial of the principle upon which we base this decision. While we cannot approve all that is said in some of them, no one of them has determined the question now before us. Priestley v. Fowler was decided in 1837, and is the first case to be found in the English books where the limitation of the liability of the master is even hinted at. That action was brought by a servant against his master, for the negligence of another servant in overloading a van, by which the plaintiff was injured. It was held that the action could not be maintained. Chief Baron Abinger, in delivering the opinion, says: "There is no precedent for the action by a servant against a master. We are therefore to decide the question upon general principles; and in doing so we are at liberty to look at the consequences of a decision one way or the other." He accordingly looked at the consequences, *with a view to the actual state of English society*, and concluded they would carry him to an "alarming extent." After referring to several instances where the liability of the master would attach, he concludes that "the inconvenience, not to say absurdity of

these consequences," afford a sufficient argument against the action. It can admit of very little doubt that holding the relation of master and servant to exist between the buyer and seller of a coach or a harness (instances put by his lordship) would, indeed, be both inconvenient and absurd. It is unnecessary to examine, at any length, the other cases decided in that court. Upon a similar state of facts they each follow and affirm the doctrine of *Priestley v. Fowler*.

As these cases were decided upon no settled principle of the common law, but upon general principles, with a view to consequences, I may be permitted to refer to the opinion of another court, equally learned and able, sitting in the same kingdom and subject to review, if I am not mistaken, in the same ultimate tribunal. In the case of *Dixon v. Ranken*, 1 Am. Railway Cas. 569, determined by the highest court in Scotland, as late as 1852, the doctrines of the English cases were repudiated, and an exactly contrary decision made. The lord justice clerk, after referring to the English decisions, proceeds to say: "The master's primary obligation in every contract of service, in which his workmen are employed in a hazardous and dangerous occupation for his interest and profit, is to provide for and attend to the safety of the men. That is his first and leading obligation, paramount to that even of paying for their labor. This obligation includes the duty of furnishing good and sufficient machinery and apparatus, and of keeping the same in good condition, and the more rude and cheap the machinery, and the more liable on that account to cause injury, the greater his obligation to make up for its defects by the attention necessary to prevent such injury. In his obligation is included, as he cannot do everything himself, the duty to have all acts by others whom he employs done properly and carefully in order to avoid risk. This obligation is not less than the obligation to provide for the safety of the lives of his servants by fit machinery. The other servants are employed by him to do acts which, of course, he cannot do himself, but they are acting for him, and instead of himself, as in his hands. For their careful and cautious attention to duty, and for their want of vigilance, and for their neglect of precaution by which danger to life may be caused, he is just as much responsible as he would be for such misconduct on his own part if he were actually working or present. And this particularly holds as to the person he intrusts with the direction and control over any of his workmen, and who represents him in such a matter." And he adds: "There have been many cases in Scotland at all periods, and during the last fifty years a very large number, which proceeded on this as a fixed principle of the law as to the contract of service."

Lord Cockburn, after stating that "the plea that the master is not liable, rests solely on the authority of two or three very recent decisions of English courts," says: "if this be the law of England, I speak of it with all due respect. But it is most certainly not the law of Scotland. I defy any industry to produce a single decision,

or dictum, or institutional indication, or any trace of any authority to this effect, or of this tendency, from the whole range of our law. If such an idea exists in our system, it has, as yet, lurked undetected. It has never been condemned, because it has never been stated." After alluding to the fact that the rule had been pressed upon the court, not only on account of the weight of English authority, but for its own inherent justice, he proceeds: "This last recommendation fails with me, because I think the justice of the thing is exactly in the opposite direction. I have rarely come upon any principle that seems less reconcilable to legal reason. I can conceive some reasonings for exempting the employer from liability altogether, but not one for exempting him only when those who act for him injure one of themselves. It rather seems to me that these are the very persons who have the strongest claim upon him for reparation, because they incur danger on his account, and certainly are not understood, by our law, to come under any engagement to take these risks on themselves."

Such is the diversity of opinion, not only as to the existence of the doctrine, but also as to its justice and propriety, found to obtain in two of the learned courts in Great Britain; both uncontrolled by any statutory regulation, or other consideration peculiar to the system of law administered by either; but each determining the obligation arising from a relation, founded upon contract, which must be the same in England and Scotland. . . . While the principle of respondeat superior is as old as the law itself, it is everywhere admitted that no such exception to its operation as is now contended for, was ever asserted until the case of *Priestley v. Fowler* was decided. . . .

WARDEN, J. . . . By the case of *Priestley v. Fowler*, 3 M. & W. 1, and the American cases which have followed it, the maxim to which I have referred [*qui facit per alium, facit per se*] is so restricted as to deny the liability of a master, in any case, for the negligence of one of his servants whereby another sustained injury. This court, as I understand the effect of the decision just pronounced, refuses so to qualify the rule, *but does confine the liability of one who is the employer of several persons, for the negligence of one of his employes whereby another is hurt, to cases in which he who was damaged was subordinate to the negligent agent or servant.*

I have been unable to satisfy myself with either restriction. I think none such is made by law, or demanded by public policy. That in England, a menial servant could not have an action against his master for the negligence of a fellow-servant, of the like state and condition with himself, does not strike me as a novel view of the law; though, so far as I know, it had never been taken before the days of Lord Abinger. The reasoning of that learned, but somewhat eccentric judge, does not, indeed, very strongly lead my mind toward any such conclusion; for his whole opinion is but one of the many instances of how little some of the most shining talents of the advocate appear to prepare their possessor

for the office of the judge. But a view of the English legal and social system reveals some apparently valid reasons for denying a right of action by a domestic servant against his master for negligence, whether of the master or of another servant. Were such an action brought in an English court, there would be vividly present to the judge all the features of that division and subdivision of the English people into classes, which has survived every shock given to the constitution, and resisted every reform attempted in the state. From the highest of the degrees of nobility and honor derived from the king as their fountain, there is a long descent through the ranks of dignity and worship, and even through the condition and esteem of tradesmen, artificers, and laborers, down to the lowest estate held by the menial servant.

Putting aside for the present, what suggestions of policy would arise out of the intimate and familiar character of the relationship between master and servant, I should not be astonished beyond measure to find that the contempt in which the class of menial servants was anciently held, had so continued down to 1837, that even then the assertion of a claim by an individual of that class, founded on the negligence of his master, would have encountered some opposition from that reverence for rank, which must have entered into the constitution of any English tribunal whatever. Descendants of the servi, the villeins, and born thralls, who led the hard life of servitude throughout the governmental changes of ancient times in England, menial servants had a very poor estimate in legal regard. Their condition is treated of by Blackstone in immediate connection with that of slaves and villeins. They were not left to their own volition as to serving or not serving. All single men, between twelve years old and sixty, and married ones under thirty years of age, and all single women between twelve and forty, not having any visible livelihood, were compellable, by two justices, to go out to service, in husbandry or certain specific trades, for the promotion of honest industry. 1 Blk. 425, 426. The contract of hiring, where no limitation was expressed, was construed with reference to a supposed duty of the master, to protect his dependents throughout the changes of the year, whether there was work to be done or not. Ibid. No master could put away his servant, or servant leave his master, after being so retained, either before, or at the end of his term, without a quarter's warning, unless upon reasonable cause, to be allowed by a justice of the peace, although they might part by consent, or make a special bargain. Ibid. Such a servant had no clear right of action for a moderate correction by his master—in some instances, that exercise of authority was clearly lawful. The master could justify a battery in defense of his servant, and the servant the like in defense of his master. In these respects, and in the enforcement of strict obedience and outward reverence, the master almost stood in loco parentis. In a word, the menial servant was so far a member of the household, that Blackstone evidently looks upon his master as the paterfamilias even as to him.

1 Blk. 431. We begin now to appreciate the ludicrous alarm of Lord Abinger, at what he supposes to be some of the consequences of allowing a servant to sue his master for the negligence of a fellow servant. We can discover whose interests he has in mind, and what is the source of his anxiety, when he says: "The master, for example, would be liable to the servant for the negligence of the chambermaid in putting him into a damp bed," etc.

In any view I take of this question, the right of the plaintiff must be as broad as I have stated. I disagree to the restriction of that right, because I believe that there can be found to warrant such limitation, no rule of law, no maxim of any system of jurisprudence whatever, and no consideration of public policy. I think it is a novelty in the law, resting on a doubtful foundation of justice, and making a discord in the system into which it has been forced. On the other hand, a wise and salutary maxim seems to establish the right as I believe it to exist. And if that right has not been pronounced by the ancient oracles of the law, the common sense and common humanity of such as tempt men into hazardous employments, constantly recognize the answering duty, and establish precedents of its obligation none the less valuable because they do not enter into the books of reports.

See "Master and Servant," Century Dig. §§ 318-534; Decennial and Am. Dig. Key No. Series §§ 159-201.

HANCOCK v. RAILROAD, 124 N. C. 222, 32 S. E. 679. 1899.

The "Fellow-Servant Act."

[Action for damages caused by negligence of a fellow-servant. Verdict against defendant, who moved in arrest of judgment. Motion overruled. Judgment against defendant and it appealed. Affirmed. The case is inserted because it passes upon the Fellow-Servant Act, Revisal, sec. 2646.]

CLARK, J. The decision of this case depends upon chapter 56, Priv. Laws 1897.—"An act to prescribe the liabilities of railroads in certain cases." This statute, commonly known as the "Fellow-Servant Act," was ratified on the 23d day of February, 1897, and provides:

"Section 1. That any servant or employe of any railroad company operating in this state, who shall suffer injury to his person, or the personal representative of any such servant or employe, who shall have suffered death in the course of his services or employment with said company by the negligence, carelessness or incompetency of any other servant, employe or agent of the company, or by any defect in the machinery, ways or appliances of the company, shall be entitled to maintain an action against such company.

"Sec. 2. That any contract or agreement, expressed or implied, made by an employe of said company to waive the benefit of the aforesaid section shall be null and void."

The plaintiff was injured in the service of the defendant since the ratification of this act. The defendant contends that the injury was caused by the negligence of a fellow-servant of the plaintiff, to wit, a brakeman on the passenger train, in leaving the switch open, whereby the hand car was derailed. Its counsel cites, *inter alia*, *Ponton v. Railroad Co.*, 51 N. C. 245; *Pleasants v. Railroad Co.*, 121 N. C. 492, 28 S. E. 267, and *Wright v. Railroad Co.*, 122 N. C. 852, 29 S. E. 100, which sustain the contention that, if the injury was thus caused, the action could not have been maintained at common law. The defendant excepts as to above statute, which the judge held confers a right of action in such case, because: "(1) It is a private act, and, as such, under section 264 of the Code of North Carolina, it should have been pleaded. (2) Whether this act is public or private, it is unconstitutional and void when applied, in a case like this, to fellow-servants of a 'railroad company operating in this state,' upon the ground that it 'undertakes to confer upon servants and employes of such companies separate and exclusive privileges from the rest of the community engaged in similar private employment, which are denied even to servants and employes of railroad construction companies and of street railroad and railroad bridge companies, and partnerships operating lumber and mining railroads, since its provisions are confined strictly to railroad companies,' and therefore violates article 1, § 7, of the constitution of the state."

As to the second ground of exception, nothing in this case requires us to pass upon the questions, which cannot arise upon the facts herein, whether the fellow-servant act applies to street railroads, partnerships operating lumber and mining railroads, railroad construction companies, and railroad bridge companies, and whether the defendant can set up the defense of a knowledge of defective machinery by the plaintiff and assumption of risk. Beyond controversy, the plaintiff was in the employment of "a railroad company operating in this state" when injured. These matters may possibly come up for adjudication when the facts of some case present the question, but in the meantime "sufficient unto the day is the evil thereof."

As to the other question learnedly argued in the brief, whether, under the fellow-servant statute, the defendant can plead contributory negligence on the part of the servant injured, there can be no doubt. The statute goes no further than to remove the defense that the injury was sustained by the negligence of a fellow servant. The defendant does not take his own argument on this point seriously; for, in fact, he sets up the plea of contributory negligence, and an issue thereon was submitted to the jury, and found in favor of the plaintiff.

We see no ground for the defendant's contention that the act in question violates article 1, § 7, of the North Carolina constitution, by "conferring exclusive privileges upon any set of men." The law exempting a master from liability to a servant for the

negligence of a fellow-servant is by judicial construction and of comparatively recent origin. Its history is traced in *Hobbs v. Railroad Co.*, 107 N. C. 1, 12 S. E. 124. Its extent has been differently outlined in different states by judicial construction, and in several states it has been restricted by legislative enactment so as not to extend to employes of railroad companies, as has now been done in this state. As the original ground of the decision was that a servant knew the character for care of his fellow-servant, and entered service with a view to that risk, the courts themselves might logically have long since modified the ruling not to extend to an employment like that of railroads, embracing many thousands of employes, and exposing its servants to peculiar risks. The fellow-servant act now in question applies to a well-defined class, and operates equally as to all within that class. Indeed, any act incorporating a company confers special privileges upon the stockholders, but not exclusive privileges, within the meaning of the constitution. We fail to see in this act any conferring of "exclusive privileges," within the language or intent of the constitutional provision in question (*Broadfoot v. Town of Fayetteville*, 121 N. C. 418, 28 S. E. 515); and similar fellow-servant acts, almost in totidem verbis, in other states, have been held by the federal supreme court to be not in conflict with the "equal protection" clause of the fourteenth amendment. Our statute specifies "servants or employes of any railroad company operating in this state," etc. The Kansas statute (1 Gen. St. 1889, p. 415), which uses the words, "every railroad company organized and doing business in this state shall be liable," etc., was held valid in *Railway Co. v. Mackey*, 127 U. S. 205, 8 Sup. Ct. 1161; and the Iowa statute (Code 1873, § 1307), which uses the words, "every corporation operating a railroad shall be liable," etc., was sustained in *Railway Co. v. Herriek*, 127 U. S. 211, 8 Sup. Ct. 1176; and both cases have been very recently reviewed and reaffirmed in *Railroad Co. v. Mathews*, 165 U. S. 1, 25, 17 Sup. Ct. 243,—all of which have been lately cited as authority by this court in *Broadfoot v. Town of Fayetteville*, at page 422, 121 N. C., and page 516, 28 S. E. In another recent case (*Railroad Co. v. Pontius*, 157 U. S. 209, 210, 15 Sup. Ct. 586), the federal supreme court, through Chief Justice Fuller, approving *Railway Co. v. Mackey*, 127 U. S. 205, 8 Sup. Ct. 1161, has thus stated the ruling with approval: "As to the objection that the law (the Kansas statute above cited) deprived railroad companies of the equal protection of the laws, and so infringed the fourteenth amendment, this court held that legislation which was special in its character was not necessarily within the constitutional inhibition, if the same rule was applied under the same circumstances and conditions; that the hazardous character of the business of operating a railroad seemed to call for special legislation with respect to railroad corporations, having for its object the protection of their employes as well as the safety of the public; that the business of other corporations was not subject to similar dangers to their em-

ployes; and that such legislation could not be objected to on the ground of making an unjust discrimination, since it met a particular necessity, and all railroad corporations were, without distinction, made subject to the same liability." The attack of the defendant's counsel upon the constitutionality of the fellow-servant act has been delivered with force and ability, but we cannot perceive that the reasoning in the above decisions of our highest federal court is otherwise than sound. . . .

In what is known as "The Ross Case," decided in 1884, 112 U. S. 377, 5 Sup. Ct. 184, the supreme court of the United States decided that all servants of a common master were not fellow-servants within the fellow-servant doctrine; but that where one servant was subordinate to another—under the authority of another—the common master was liable for injuries suffered by the subordinate in consequence of the negligence of the superior servant. This ruling was overturned in 1899, by the same court, in *New England R. R. v. Conroy*, 175 U. S. 323, 340-347, 20 Sup. Ct. 85. By the Act of June 11, 1906, 34 U. S. Stat. 232, common carriers engaged in interstate commerce were made liable to their employes regardless of the fellow-servant doctrine. This act was declared to be unconstitutional, in part, in "The Employers' Liability Cases," 207 U. S. 463, 28 Sup. Ct. 141. Thereupon by the Act of April 22, 1908, the statute was re-enacted in terms thought to meet the objections to its constitutionality.

For the fellow-servant doctrine in general, see 26 Cyc. 1276. For the North Carolina law on the subject, see *Mordecai's L. L.* 140-154. See 17 L. R. A. (N. S.) 773, 1 Ib. 288, 2 Ib. 751, 10 Ib. 1043, 20 Ib. 322, 331, and notes (selection and retention of fellow-servants); 8 Ib. 631, 13 Ib. 1214, 20 Ib. 39, 22 Ib. 738, and notes (general doctrine); 1 Ib. 696, 6 Ib. 452, 12 Ib. 1040, 15 Ib. 479, 17 Ib. 117, 18 Ib. 478, and notes (the doctrine as affected by statutes); 1 Ib. 682, 4 Ib. 1161, 7 Ib. 651, 13 Ib. 1196, 16 Ib. 146, 17 Ib. 334, 20 Ib. 354, 434, 1180, 21 Ib. 601, and notes (who are fellow-servants); 1 Ib. 669, 670, 8 Ib. 798, 10 Ib. 1103, 11 Ib. 840, 15 Ib. 439, 17 Ib. 542, 568, 18 Ib. 279, and notes (for what acts of fellow-servants the master is liable). If the master's negligence be the proximate cause of the injury, the concurring negligence of a fellow-servant is no defense. *H. & B. Car Co. v. Przewdziankowski*, 170 Ind. 1, 8, 83 N. E. 626, citing 3 Ell. on R. R. (2d ed.), s. 1306; see also 2 L. R. A. (N. S.) 647, 4 Ib. 516, and notes, for further discussion of the subject of concurring negligence. See "Master and Servant," *Century Dig.* §§ 354-374; *Decennial and Am. Dig.* Key No. Series §§ 178-184.

YOUNG v. CONSTRUCTION CO., 109 N. C. 618, 14 S. E. 58. 1891.

Machinery, etc. Master's Liability.

'Action for damages sustained by a servant in using an implement furnished by the master, which was alleged to be improper and unsafe. Verdict and judgment against defendant, who appealed. Reversed.

Plaintiff was injured by the slipping of a green round pole substituted for a jack in raising cross-ties.

MERRIMOS, C. J. The complaint alleges that at the time the plaintiff sustained the injuries complained of the defendant's laborers (he being one of them) were engaged in "raising cross-ties, etc., and leveling the roadbed," etc. Now, in view of the nature of such employment and the pole used as a lever in the connec-

tion as described in the complaint, and accepting all the evidence in respect to its use as true, we think the court ought to have told the jury that the pole was an appropriate implement, and not dangerous for the purposes to which it was applied. All the evidence pertinent went to show that the laborers were engaged in raising the track of the road, and that they used the pole to prize it up, placing the end of it under a cross-tie. In its nature the application and use of the pole were simple and appropriate, and the evidence went to prove the same fact. That "jacks" or other instrumentalities might have been employed effectively to raise the track did not make it negligent to employ the lever, another appropriate means. The court ought not, therefore, to have modified, as it did, the instruction the defendant requested it to give the jury. The third issue submitted to the jury had reference to whether or not the plaintiff had knowledge of the nature and use of the pole as a lever. As to this the court "told the jury that he knew of no witness who gave direct testimony tending to show that the plaintiff knew, or had good reason to know, of the nature and character of the implement used by him and consent to use the same, and called upon defendant's counsel to point out such evidence." We think there was such evidence, and that what the court said in that respect may have misled the jury to the prejudice of the defendant. They saw that the court was of opinion that there was not such evidence; and, after the colloquy with counsel, they saw that the court was still not well satisfied as to its character. This, no doubt, impressed the jury. There was certainly evidence that the plaintiff was present. The pole was there plainly to be seen, as was also its purpose and application. He was directed to join in its use, and he did so. Surely these facts constituted some evidence tending to prove that he knew of the character of the pole he aided in using, and that he consented to help in the use of the same. The pole and its use were simple, easy to be seen, and understood at a glance. It may be, however, that the plaintiff did not observe them with scrutiny, though there was evidence that he and the other laborers were cautioned to be careful. But, be this as it may, there was evidence appropriate and pertinent to go to the jury without such possible prejudice as to its character and sufficiency. There is error, and without advert- ing to other exceptions we are of opinion that the defendant is entitled to a new trial, and so adjudge. To that end let this opinion be certified to the superior court. It is so ordered.

See "Master and Servant," Century Dig. §§ 171-263, 1010-1031; Decennial and Am. Dig. Key No. Series §§ 101-129, 286.

AVERY v. LUMBER CO., 146 N. C. 592, 595, 60 S. E. 646. 1908.

Machinery, etc. Master's Liability. Servant's Duty.

[Action for damages sustained by a servant in using an implement furnished by the master, which was alleged to be improper and unsafe. Verdict and judgment against defendant, who appealed. Affirmed.]

Plaintiff was an ordinary green hand, with no knowledge of machinery. He was ordered to oil a machine called an edger, and in doing so his arm was cut off by the machine. The only implement that plaintiff saw about the machine, for oiling it, was a bottle. There should have been a "squirt can" for such work, as to use a bottle was dangerous, especially if used by one not accustomed to oiling such a machine.]

BROWN, J. . . . The specific negligence of which plaintiff complains is that the defendant failed to furnish a safe and suitable appliance with which to oil the edger, and one in general use for such purpose. *Phillips v. Iron Works*, 146 N. C. 217, 59 S. E. 660. It has become elementary in the doctrine of negligence that the master owes a duty, which he cannot safely neglect, to furnish proper tools and appliances to his servant. *Shaw v. Mfg. Co.*, 146 N. C. 235, 59 S. E. 676; *Phillips v. Iron Works*, supra; *Ward v. Mfg. Co.*, 123 N. C. 248, 31 S. E. 495.

While the evidence may be conflicting, there is abundant proof to go to the jury that the defendant failed to furnish the necessary oil squirt can in common use for oiling such machinery, and that such negligence caused the injury to plaintiff. We do not mean to hold that it was defendant's duty to have squirt cans all over the mill, or that under ordinary circumstances a workman should not hunt for one rather than use a bottle. That feature of the defense was submitted to the jury under proper instruction. But the plaintiff's evidence tends to prove that he was a "green hand" placed under Kennedy's direction in operating the edger, and that he had seen the latter repeatedly use the same bottle in oiling the machine. The plaintiff had a right, therefore, to suppose that the bottle was the appliance furnished by defendant for the purpose of oiling the edger, and that it was in common use for such purpose. It is immaterial to determine whether, strictly speaking, Kennedy stood in the relation of vice principal to the plaintiff or not. Kennedy was his immediate "boss," in charge of the machine where plaintiff was working under Kennedy's direction, and Kennedy had the right to direct him to oil the machine. He did not oil it officiously, but in the line of duty, if his evidence is to be believed. We think his honor, therefore, very properly overruled the motion to nonsuit.

Among other instructions the court charged the jury that, if the injury was accidental, and not caused by defendant's negligence, the plaintiff could not recover. Upon the issue of contributory negligence, among other instructions the court charged that "it was plaintiff's duty to be careful and guard against accidents; and, if the jury find from the evidence that plaintiff knew the manner in which the edger machine ought to be oiled, or ought to have known that it was dangerous to get on top of the machine and pour oil down on the collars, and that by looking and by using ordinary care, that is, such care as a reasonably prudent man would use under like circumstances, he could have seen this danger and failed to do so, then he was guilty of negligence, and the jury will answer the second issue 'Yes.'"

The charge of the court upon the issues especially those as to negligence and contributory negligence, is unusually full and clear. It presented correctly and intelligently to the jury every phase of the case. To review it would be only to reiterate what has been so often stated in the opinions of this court, which seem to have been carefully followed and applied. Upon an examination of the entire record, we find no error.

In *Nail v. Brown*, 150 N. C. at bot. p. 535, 64 S. E. 425, Brown, J. gives the following clear summary of the law: "Where there is one appliance only which is approved and in general use for performing a certain function it is the master's duty to use it. Where there are several appliances used for the same purpose, all of which are approved and in general use, the master fills the measure of his duty if he exercises reasonable care in making a selection. It is culpable negligence which makes him liable,—not a mere error of judgment. We think this is the consensus of the best authorities. *Horne v. Power Co.*, 141 N. C. 50, 53 S. E. 658; *Phillips v. Iron Works*, 146 N. C. 217, 59 S. E. 660; *Young v. Constr. Co.*, 109 N. C. 618, 14 S. E. 58; *Harley v. Car Co.*, 142 N. Y. 31, 36 N. E. 813; *O'Neill v. R. R.*, 66 Neb. 638, 92 N. W. 731." In connection with this summary it must be remembered that the liability of a railroad company operating in North Carolina, for injuries suffered by its servants by reason of any defect in the machinery, ways, or appliances of the company, is fixed by sec. 2646 of the Revisal, which is quoted in *Hancock v. R. R.*, 124 N. C. 222, 32 S. E. 679, inserted supra in this section.

See 12 L. R. A. (N. S.) 853, 861, and notes (when the relation of master and servant exists); 1 Ib. 944, 6 Ib. 602, 492, 787, 11 Ib. 738, 13 Ib. 384, 668, 14 Ib. 972, 15 Ib. 812, 1109, 16 Ib. 128, 140, 715, 978, 984, 1084, 17 Ib. 104, 19 Ib. 242, 20 Ib. 473, 21 Ib. 774, 22 Ib. 582, 634, 738, 917, 951, and notes (duty of master to provide a safe place to work and safe appliances); 3 Ib. 209, 8 Ib. 284, 19 Ib. 997, 21 Ib. 89, 22 Ib. 738, 23 Ib. 1071, 296, and notes (duty of master to warn servant of dangers and to instruct minors, etc., in use of machinery, etc.); (151 N. C. 31), 6 Ib. 337, 16 Ib. 214, 23 Ib. 171, 1022, and notes (*res ipsa loquitur*); 6 Ib. 981, 9 Ib. 338, 12 Ib. 461, 1038, 15 Ib. 443, 784, and notes (liability of master to his servant for injuries resulting from the master's violation of Employers' Liability Acts, Child-Labor Laws, and statutes providing for safeguards in the operation of factories, mines, etc., and in the construction of buildings, operating machinery, etc.); 9 Ib. 338, and elaborate note (master's liability to servant for violation of statutes not expressly conferring a right of action upon the servant); 12 Ib. 1038, and note (effect of Employers' Liability Act upon the servant's common law remedies); 7 Ib. 337, 11 Ib. 182, and notes (validity of contracts exempting the master from liability for negligence); 11 Ib. 182, and elaborate note (contracts requiring the servant to look to relief funds, etc., instead of to the master, for injuries suffered; and for releases obtained by the master by proper or by devious methods). See "Master and Servant," *Century Dig.* §§ 171-263; *Decennial and Am. Dig. Key No. Series* §§ 101-129.

(c) Remedy of the Master Against the Servant.

"Breach of Contract by Workmen.—Intimately, indeed inseparably, connected with the legal position of trades unions is the question of the legal consequences formerly attaching to the breach on the part of a workman of his contract with his master, in the making of which he was permitted so small a share. At the com-

mencement of the 19th century the Act of the twentieth year of Geo. II. c. 19, was still in force. By this Act, the justices of the peace for their counties were to decide all disputes between masters and workmen arising out of their contracts of service. A breach on the master's part was punishable by damages, but a breach on the workman's part was a criminal offense punishable by imprisonment and flogging.

"This Act has been spoken of, with somewhat grim humor, as the Act introducing the principle of arbitration between master and workman. By a statute passed in the year 1823 justices were given power to deal with, and to punish by imprisonment, breaches of contract on the part of workmen in refusing to enter into, or in quitting the master's service. Such was the state of the law until the year 1867. The remedy of a servant against his master was always a civil remedy, whilst that of the master against the servant was always of a criminal nature. Until the year 1848 (Jervis' Act) whilst masters upon complaint were brought before justices on summons, workmen were always brought before them on warrant, and until the year 1867 the proceedings took place in private. The combined result of the statute and common law was that individual breach of contract by a workman was punishable by statute, concerted breach, either by statute or as a conspiracy.

"In the year 1867 was passed the statute called 'Lord Elcho's Act,' abolishing imprisonment for breach of contract, except in case of what was called aggravated breach of contract. In the year 1874 a Royal Commission recommended that proceedings against workmen for breach of contract should be divested entirely of a penal character. The report made by this Commission led to the passing of the two statutes, 'The Employers and Workmen Act, 1875,' and 'The Conspiracy and Protection of Property Act, 1875,' the first to regulate the civil, the second to regulate the criminal questions arising out of contracts of service, made between employers and employed—as they were therein for the first time called.

"The former of these Acts gives jurisdiction to the county courts, and a limited jurisdiction to justices, in disputes between employers and workmen, but such proceedings were henceforth to be of a civil and not of a criminal nature; the second declares that an agreement or combination to do any act in furtherance of a trade dispute shall not render the person committing it indictable for conspiracy, if such act, committed by one person, would not be punishable as a crime.

"These latter words may almost be described as 'The Workmen's Charter of Liberty,' for they dispose at once and forever of the contention that a combination to do acts, not illegal in themselves, is entitled to be regarded by the law as a 'conspiracy.' There are two exceptions: First—Breach of contract having the effect, or likely to have the effect, of depriving the public of either gas or water. Second—Breach of contract which the workman has reasonable cause to believe will endanger life, or cause serious bodily

injury or endanger valuable property. The specific offenses of violence, intimidation, besetting, etc., are set out and carefully defined.

"Thus was secured to workmen after a long struggle the right of combination in protection or advancement of their interests, a legal recognition of their trade societies, and equality of contract. The statement of Mr. Disraeli, as he then was, at the Mansion House dinner, in the year 1875, contained more truth than does some post prandial oratory, when he said: 'For the first time in the history of this country the employer and the employed sit under equal laws.' The members of trades unions have since the decision of the House of Lords in *Allen v. Flood* been further protected from civil liability in respect of their combinations, even where the motive prompting their acts is malicious, provided the acts themselves are not unlawful." *A Century of Law Reform*, pp. 251-254.

EX PARTE HOLLMAN, 79 S. C. 9, 60 S. E. 19, 21 L. R. A. (N. S.) 242.
1908.

Statutes Making It a Crime for a Servant to Break His Contract With the Master. Imprisonment for Debt. 13th and 14th Amendts. Const. U. S.

[Habeas corpus to obtain release from imprisonment under a sentence for violating a contract of service. Prisoner discharged. Only selections from the opinion are here inserted.]

WOODS, J. . . . Section 357 of the Criminal Code of 1902, the statute under which the petitioner was convicted, and which is here attacked, is as follows: "Any laborer working on shares of crop or for wages in money or other valuable consideration under a verbal or written contract to labor on farm lands, who shall receive advances either in money or supplies and thereafter wilfully and without just cause fail to perform the reasonable service required of him by the terms of the said contract shall be liable to prosecution for a misdemeanor, and on conviction shall be punished by imprisonment for not less than twenty days nor more than thirty days, or to be fined in the sum of not more than twenty-five dollars nor more than one hundred dollars in the discretion of the court: Provided, the verbal contract herein referred to shall be witnessed by at least two disinterested witnesses."

The first question is whether this statute violates section 24 of article 1 of the state constitution, which provides: "No person shall be imprisoned for debt except in cases of fraud." The act refers exclusively to a farm laborer working for a consideration under a contract, who (1) "shall receive advances in money or supplies, and (2) thereafter wilfully and without just cause fail to perform the reasonable service required of him by the terms of the said contract. "It will be observed the statute does not require for the completion of the crime, proof of the making of the contract

and the obtaining of the advances on the faith of it with the intention formed at the time not to perform the service. Such action as that on the part of the laborer would be fraudulent, and a statute providing for its punishment would not violate a constitutional provision allowing imprisonment for debt in cases of fraud. But the act under consideration provides imprisonment as a punishment for conduct after the contract has been made and the work begun, and the important inquiries are, first, is the conduct so made criminal a failure to pay a debt? and, second, is such conduct consistent with good faith, with entire absence of fraud? If these inquiries are to be answered in the affirmative, then it follows that the acts should be declared unconstitutional as providing for imprisonment for debt without proof of fraud. The statute does not go to the extent of requiring the laborer to pay the advances in labor, and therefore there is nothing to prevent his discharge of the debt for advances in the same manner as other debts are discharged. It is equally clear that the service due by the laborer under the contract is also a debt within the meaning of the constitution. Debt is that which is due from one person to another, whether money, goods, or services, and whether payable at present or at a future time. *Century Dictionary*; 13 Cye. 399, and authorities cited. The term "debt," within the meaning of the constitution, is generally held to embrace obligations arising out of contract, and to exclude liability for tort and for fines imposed for crime. *Carr v. State*, 34 L. R. A. 634, note; *State v. Brewer*, 38 S. C. 263, 16 S. E. 1001, 19 L. R. A. 362, 37 Am. St. Rep. 760. Therefore, beyond dispute, the laborer referred to in the statute falls under the terms of the constitution as a person who by his contract incurs a debt for advances received by him and for labor which he promises to perform. For the mere failure to discharge these debts the constitution forbids his imprisonment. If, however, the laborer contracts such a debt fraudulently or fraudulently avoids the discharge of it, he falls without the protection of the constitution.

It is strenuously argued, however, that the act does not provide for imprisonment for debt under civil process, and that the general assembly may make an act criminal and punishable by imprisonment which is not fraudulent and recognized as morally wrong. The power of the general assembly to make an act criminal, which was before innocent, is familiar. But the legislative power to make acts criminal and punishable by imprisonment cannot be extended to an invasion of the rights guaranteed the citizen by the constitution. It is impossible to frame a valid statute punishing by imprisonment the exercise of the right to religious liberty, or the right to petition for the redress of grievances, or the right to be exempt from imprisonment for debt, except in cases of fraud. These are all constitutional rights which cannot be abridged under the guise of legislation against crime. The exercise of them cannot be crime.

The respondents urged that imprisonment for the failure to per-

form personal service has been sustained by the supreme court of the United States in the case of *Robertson v. Baldwin*, 165 U. S. 275, 17 Sup. Ct. 326, 41 L. Ed. 715. This is true. That case does hold constitutional an act of congress authorizing punishment by imprisonment of deserting sailors. But the constitution of the United States contains no provision against imprisonment for debt.

[After discussing the validity of the statute under the 13th and 14th amendments to the constitution of the United States and the acts of congress forbidding peonage, etc., the opinion concludes:] We conclude that the statute under which the defendant was convicted is invalid, because opposed to section 24, article 1, of the constitution of the state, to the thirteenth amendment to the constitution of the United States and the act of congress passed in pursuance thereof, known as the "peonage statute," and to the fourteenth amendment of the constitution of the United States, and section 5, article 1, of the constitution of this state. It may be, in the long run, the welfare of all the people and the development of the negro race in virtue and strength would have been better promoted by laws imposing upon the people of that race on their emergence from slavery a degree of restraint and discipline under rigid laws for their protection. But that question is not for the court. The constitutions of the United States and of this state, as they are, must control the courts; and the fundamental principle of these constitutions is that the welfare of all the people is promoted by the enjoyment of equal liberty by all alike, and that even if prosperity is not always promoted by constitutional guarantees, liberty is better than prosperity.

The opinion of the court is that the prisoner be discharged.

[In the course of the opinion it is said:] Finally, we consider whether the statute is opposed to the fourteenth amendment to the constitution of the United States and section 5 of article 1 of the constitution of the state as denying to a farm laborer falling under it the equal protection of the laws. We incline to the opinion that a statute not admitting of this objection could be framed, making criminal and punishable by imprisonment a farm laborer's fraud in obtaining advances, and a landlord's fraud in contracting with a laborer, and that it would be no valid objection to such a statute that it did not apply to all persons or even to all laborers and employes.

The opinions in the principal case are very comprehensive and cite and review a great many authorities. They should be carefully read because of their invaluable and unanswerable arguments in protecting the liberty of the citizen. See also note to the principal case in 21 L. R. A. (N. S.) 242; *Ib.* 259.

That such legislation is invalid under the constitution of North Carolina is ruled in *State v. Williams*, 150 N. C. 802, 63 S. E. 949. It will be seen that the North Carolina statute, Revisal, sec. 3367, is framed to meet the suggestion in the principal case that such laws would not violate the 14th Amendment, *if aimed at master and servant alike*.

In *Robertson v. Baldwin*, 165 U. S. 275, at p. 281, 17 Sup. Ct. 329, we

find this: "The breach of a contract for personal service has not been recognized in this country as involving a liability to *criminal punishment*, except in case of soldiers, sailors, and possibly some others; *nor would public opinion tolerate a statute to that effect*." "The contract of a sailor has always been treated as an exceptional one and involving, to a certain extent, the surrender of his personal liberty during the life of the contract." *Ibid.* headnote 4.

The 13th Amendment to the Const. of U. S. forbids slavery or other involuntary servitude, except as a punishment for crime. Sections 1990 and 5526 of the U. S. Rev. Stat. prohibit peonage. These sections are held to be constitutional in *Clyatt v. U. S.*, 197 U. S. 207, 25 Sup. Ct. 429. Peonage is defined to be "a status or condition of compulsory service, based upon the indebtedness of the peon to the master. The basal fact is indebtedness." 197 U. S. at p. 215, 25 Sup. Ct. 430. See 30 Cyc. 1382, for a full discussion of peonage. See ch. 11, sec. 1, post, "Arrest and Bail." See "Constitutional Law," Century Dig. §§ 150-151½; Decennial and Am. Dig. Key No. Series § 83; "Master and Servant," Century Dig. § 75; Decennial and Am. Dig. Key No. Series § 67.

THE CASE OF MARY CLARK, 1 Blackford, 122. 1821.

Specific Performance of Contract to Serve.

[Habeas corpus proceedings to obtain freedom from the detention of a master. Judgment against applicant, who appealed. Reversed.]

A colored free woman bound herself to serve the respondent for twenty years as housemaid. She concluded to break her covenant and quit the service. The respondent insisted upon a specific performance of the covenant of service and a consequent right to detain the applicant.]

HOLMAN, J. . . . We shall discard all distinctions that might be drawn from the color of the appellant, and consider this indenture as a writing obligatory, and test it, in all its bearings, by the principles that are applicable to all cases of a similar nature. It is a covenant for personal service, and the obligee requires a specific performance. It may be laid down as a general rule, that neither the common law nor the statutes in force in this state recognize the coercion of a specific performance of contracts. The principal, if not the only exceptions to this general rule, are statutory provisions, few, if any of which are applicable to this state, and none of them has any bearing on this case. Apprentices are compellable to a specific performance of the articles of apprenticeship, but their case rests on principles of a different nature. They are not considered as performing a contract of their own, but acting in conformity to the will of those whose right and duty it was to exact obedience from them. That right and duty existed by nature in the parent, and are, by legal regulations, transferable to the master during the minority of the child; and when transferred, either by the parent, or those who stand in loco parentis, the duty of obedience arises, and is enforced on the ground of parental authority, and not on the principle of specific performance of contracts; and cannot be urged as an exception to the rule, that the coercion of a specific performance of contracts is not content-

plated in law. The case of soldiers and sailors depends on national policy, and cannot be used in the elucidation of matters of private right.

There are some covenants that may be specifically enforced in equity, but they are of a very different nature from the contract before us. They are mostly covenants for the conveyance of real estate, and in no case have any relation to the person. But if the law were silent the policy of enforcing a specific performance of a covenant of this nature, would settle this question. Whenever contracting parties disagree about the performance of their contract, and a court of justice of necessity interposes to settle their different rights, their feelings become irritated against each other, and the losing party feels mortified and degraded in being compelled to perform for the other what he had previously refused, and the more especially if that performance will place him frequently in the presence or under the direction of his adversary. But this state of degradation, this irritation of feeling, could be in no other case so manifestly experienced, as in the case of a common servant, where the master would have a continual right of command, and the servant be compelled to a continual obedience. Many covenants, the breaches of which are only remunerated in damages, might be specifically performed, either by a third person at a distance from the adversary, or in a short space of time. But a covenant for service, if performed at all, must be personally performed under the eye of the master; and might, as in the case before us, require a number of years. Such a performance, if enforced by law, would produce a state of servitude as degrading and demoralizing in its consequences, as a state of absolute slavery; and if enforced under a government like ours, which acknowledges a personal equality, it would be productive of a state of feeling more discordant and irritating than slavery itself. Consequently, if all other contracts were specifically enforced by law, it would be impolitic to extend the principle to contracts for personal services. Very dissimilar is the case of apprentices. They are minors, and for the want of discretion, are necessarily under the control of parents, guardians, or masters; and obedience is exacted from them, whether considered as children, wards, or apprentices. They are incapable of regulating their own conduct, and are subjected by nature and by law to the government of others; and that government, instead of humbling and debasing the mind, has a tendency to give it a regular direction, and a suitable energy for future usefulness. But it is not the master who in this case applies for legal aid. He has not appealed to a court of justice to obtain a specific performance of this indenture. All he asks from the constituted authorities is, that they would withhold their assistance from his servant. Does this alter the case in his favor? Is it more consistent with good policy, that a man possessing the power, should be left to enforce a specific performance of a contract in his own behalf, than that the officers of justice, on a full consideration of his case, should enforce it for him? These questions are not only

easily answered in the negative, but their reverse is unquestionably true. Deploable indeed would be the state of society, if the obligee in every contract had a right to seize the person of the obligor, and force him to comply with his undertaking. In contracts for personal service, the exercise of such a right would be most alarming in its consequences. If a man, contracting to labor for another a day, a month, a year, or a series of years, were liable to be taken by his adversary, and compelled to perform the labor, it would either put a stop to all such contracts, or produce in their performance a state of domination in the one party, and abject humiliation in the other. We may, therefore, unhesitatingly conclude, that when the law will not directly coerce a specific performance, it will not leave a party to exercise the law of the strong, and coerce it in his own behalf. A state of servitude thus produced, either by direct or permissive coercion, would not be considered voluntary either in fact or in law. It presents a case where legal intendment can have no operation. While the appellant remained in the service of the obligee without complaint, the law presumes that her service was voluntarily performed: but her application to the circuit court to be discharged from the custody of her master, establishes the fact that she is willing to serve no longer; and, while his state of the will appears, the law cannot, by any possibility of intendment, presume that her service is voluntary. The case of an apprentice presents a different state of things. The minor is considered as having no legal will. He has neither the power nor the right of choosing whether he will obey or disobey the commands of his master. The law, therefore, on account of the immaturity of his will, cannot presume that any of his services are involuntarily performed. The appellant in this case is of legal age to regulate her own conduct: she has a right to the exercise of volition; and, having declared her will in respect to the present service, the law has no intendment that can contradict that declaration. We must take the fact as it appears, and declare the law accordingly. The fact then is, that the appellant is in a state of involuntary servitude; and we are bound by the constitution, the supreme law of the land, to discharge her therefrom. Judgment reversed.

For when one who has contracted to serve one person exclusively, will be enjoined from serving another, see chap. 8, sec. 9, post.

In *Casey v. Robards*, 60 N. C. 434, 436, it is said: "In the case of *Phillips v. Murphey*, 49 N. C. 45, it was decided that a deed made by a free negro, of his services for a term of years, did not operate to make a slave of him, or to pass a property in him; but simply to give the grantee a right to his services upon an executory agreement, for a breach of which an action of covenant would lie. So, in the case before us, the deed for services for a term of years does not alter the social or political condition of the negro. No other or different legal consequences result from his agreement, than if it had been entered into by a white man. Both, upon a breach of it, are subject to be sued for damages. Neither is subject to have enforced against him a specific execution." See "Specific Performance," *Century Dig.* §§ 206-210; *Decennial and Am. Dig.* Key No. Series § 73.

(d) *Master's Right to Exoneration Against the Servant.*

SMITH v. FORAN, 13 Conn. 244, 21 Am. Rep. 647. 1875.

Liability of a Servant to a Master Who Has Been Mulcted in Damages for Servant's Negligence.

[Trespass on the case by a carrier, for damages resulting from the negligence of its servant in handling a piano. Judgment against defendant, who moved in error. Motion overruled and judgment affirmed.]

The defendant's negligence caused the piano to be injured. The plaintiff paid the shipper for the injury done, without any litigation. The defendant insisted that, as the master paid damages without compulsion of legal proceedings, the master could not recover from him, the servant, the amount so paid.]

PARK, C. J. If the plaintiffs in this case had been the owners of the piano, which was injured through the carelessness of the defendant, it would be clear that the defendant would be liable to them for the amount of the damage done to the property; for a hired servant is as much bound to exercise reasonable care not to injure the property of his employer while engaged in his service, as he is to exercise such care in relation to the property of other persons. There is nothing implied in the contract of employment which absolves him from such responsibility, but, on the contrary, the implication is that he undertakes to exercise such care.

But it is said that the liability of the defendant to the plaintiffs in this case arises from the supposed liability of the plaintiffs to the person whose property was injured by the carelessness of the defendant while engaged in their business, and, this being the case, that the liability of the plaintiffs must first be established in a suit brought by the owner of the property against them, and the amount of the damages ascertained before a suit can be sustained by the plaintiffs against the defendant. It is unnecessary to determine how this would be in an ordinary case of a liability of a master for the negligence of his servant, as where the servant in driving the master negligently runs into the carriage of another and injures it. There the master is liable in damages for the act of the servant, and the servant to the master for whatever loss he is subjected to by the servant's negligence. Here, however, another element comes in. The plaintiffs, being common carriers, had a special property in the piano and could, as such special owners, maintain an action against the servant for an injury by his negligence to such special property. And besides this, the plaintiffs, by reason of their undertaking as common carriers, were liable to the owner of the piano for its destruction or injury, even though it had been destroyed in the hands of the servant with no fault of his, as where the horses he was driving had run away and broken the piano in pieces, in spite of his careful driving and in his efforts to control them. The liability of the plaintiffs stands upon its own ground, their implied contract to deliver the piano in good condition at its place of destination, in spite of all obstacles except those caused by

the act of God or of a public enemy. And this liability rests upon no other ground where the delivery is prevented by the negligence of their servant. He is liable to them for his negligence, they to the owner for non-performance of their undertaking.

But the two kinds of liability have this in common, that where, as here, the carrier fails to deliver the property solely because of its destruction or injury by his servant, the amount of damage to which the carrier is liable at the suit of the owner is precisely the same as that to which the servant is liable at the suit of the carrier. And upon this fact the counsel for the defendant base their claim that the plaintiffs should have first had their liability and the exact amount of it established in a suit at law before they could maintain a suit against the defendant. But the reason of the thing is wholly against this claim. In the first place, if the plaintiffs were liable to the owner of the piano, it is absurd to require the owner to bring a suit, and the plaintiffs to defend against it, and finally pay, after a judgment and with costs, what they were perfectly willing to pay at the outset, and what the judgment would show they were legally bound to pay. And in the next place, the judgment would not establish the liability of the defendant. That, as we have seen, would stand upon its own ground, and his negligence, on which alone his liability would rest, would not even enter into the suit against the plaintiffs as a matter for consideration. He could still, in the suit against him, deny the fact of his negligence, and could prove the amount of the damage. All this he could do if the plaintiffs had settled with the owner without suit. If in such settlement they had paid the owner more than the actual damage, such payment would not have bound the defendant. He would be liable to them only for the actual damage. If, however, they had settled with the owner for less than the real damage, they could recover of the defendant no more than the damages paid. The damage which the defendant is to pay is the actual damage to the plaintiffs. That of course cannot be greater than the sum they have had to pay, though it may be less, if they have unnecessarily and of their own folly paid more than they were obliged to pay. They were bound to pay the actual damage done to the piano, and if they got off with paying less, then they were themselves damaged so much less, and could recover only such reduced sum from the defendant.

Until the plaintiffs have settled with the owner it is to be presumed that they will be compelled, either upon a voluntary settlement or upon suit, to pay the owner the actual damage. If the defendant had reason to suppose that a settlement could be effected for a less sum, he could himself settle with the owner, and save the plaintiffs from the necessity of paying damages at all; and this it would be equally his duty and his interest to do. We think there is no error in the judgment complained of.

See also *Meares v. Comrs. of Wilmington*, 31 N. C. at p. 79, where it is said by Pearson, J. "If the work be done according to the directions of the superior and the agent is sued and pays damages, he has his redress

against the superior; if the work is done contrary to the directions of the superior and the superior is sued and pays damages, he has his redress against the agent."

In *Wiswall v. Brinson*, 32 N. C. at p. 555, Pearson, J., again says: "When one procures work to be done, if a third person be injured by the negligence or want of skill of the persons employed, the person for whose benefit and at whose instance the work is done, must make compensation. The party injured may sue the person whose negligence was the immediate cause of the injury. So may the employer, if he is compelled to pay the damage;" and speaking of the employer's remedy against the employee, he says, at p. 562: "He selected his man; the work was done for his benefit; and he can be indemnified by the person he employed, unless he be insolvent; and if so, it was his folly to employ an insolvent man." See *Mordecai's L. L.* 85. For a ruling on an allied subject, see *Brown v. Louisburg*, 126 N. C. 701, 36 S. E. 166. See "Master and Servant," *Century Dig.* § 1237; "Indemnity," *Decennial and Am. Dig. Key No. Series* § 13.

cc Remedies of Both Master and Servant Against Third Persons.

BURGESS v. CARPENTER, 2 S. C. 7, 16 Am. Rep. 643. 1870.

Remedy of Master Whose Servant Is Disabled by a Tort of Another. Menial Servant.

[Action on the case for damages resulting from defendant's wounding one in the employ of plaintiff. Judgment of nonsuit against plaintiff, and he appealed. Affirmed.]

WRIGHT, J. This was an action brought to recover damages which plaintiff claimed to have sustained by reason of a gunshot wound, charged to have been inflicted by defendant upon one Henry Burgess, who was a contractor with plaintiff, in common with other persons, for a share of the crop, which all parties to the contract were laboring to raise at the time the gunshot wound was said to have been inflicted upon the said Henry Burgess.

It was claimed by plaintiff, that the said Henry Burgess was his servant, inasmuch as he had contracted with him to raise a crop. The relation of master and servant, as it existed in England, was wholly different from the relation of employer and employed as it exists in this country. At common law, in England, the master might bring an action for damages against a third party for any loss he might have sustained by reason of such party unlawfully injuring or interfering with his servant or servants; but this power, given the master, was only to be exercised toward menial servants—domestics *infra moenia*. It was a relation which the common law classed with the relation of "parent and child." The master was held to stand in *loco parentis*. No such relation existed between the plaintiff and Henry Burgess. In Pennsylvania, in a case under the intestate law of April, 1794, in which a preference is given to the wages of servants, the courts have restricted the term "servant" used in the act to "persons employed in the house and about the intestate's person," in order that, when disease had rendered the master helpless, there might be an additional reason

to attention on the part of the domestic or menial. A case arose in which a barkeeper brought suit for his wages, and Chief Justice Gibson and Justice Duncan, of the supreme court, decided that he had preference under the law, because his position as barkeeper brought him within the term "servant," as his duties as such made him a domestic. *Boniface v. Scott*, 3 S. & R. 352.

Chief Justice Gibson says, in *Pennsylvania* none are called "servants whose persons are not subjected to the coercion of the master, whether the business in which they are employed be servile or not. No person to whom wages could be due for his services would endure the name, as it would be considered offensive, and a term of reproach. I take all who are employed for hire in the domestic concerns of the family, in whatever station they may be, to be servants, entitled to a preference under the act. Neither do I apprehend it to be necessary that the occupation of such persons should be exclusively confined to the family. The clerk in a counting house, etc., is exclusively concerned with the occupation or trade by which his employer gets his living; and there being nothing of a domestic cast in the nature of his services, he would not fall within the act. If, in this country, a tavern were a separate establishment, unconnected with the domestic scene, I should suppose the plaintiff not entitled to a preference; but the contrary is the fact; with, perhaps, the exception of one or two large establishments in Philadelphia, the concerns of the family are so blended that it is impossible to separate them," etc.

In the same case, Justice Duncan says: "The term 'servants,' whose wages under the act of 1794, are ranked with physic and funeral expenses, to be paid out of the intestate's estate, has received a judicial construction in *Ex parte Measan*, 5 Binn. 167. It has been held to embrace only those who, in common parlance, are called servants; that is, as I understand the opinion of the court, hirelings, who make a part of a man's family, employed for money, to assist in the economy of the family or in matters connected with it."

Henry Burgess being exclusively concerned in the cultivation of soil and the proceeds arising therefrom, and there being no domestic cast within the nature of his services, he does not fall within the class to which the term "servant" can, in any sense, be applied. He was a party to the contract, and liable for any breach of good faith on his part to comply with the terms of that contract; and the plaintiff, being also a party to the same contract, sustained the same relation to Henry Burgess that Henry Burgess did to him; therefore, each was *sui juris*, and neither the servant of the other. Henry Burgess being a free man, and competent to make a contract, is responsible for his own actions, and has the legal right of action against the defendant for any private injury he has sustained at his hands. As each of the parties to the contract contributed his special portion of the means necessary to the production of the *crop*, and each was to receive his special portion after an equitable division, if there was a loss it was a common loss; and if

the defendant committed an unlawful act which was the cause of such loss, then the parties to the contract, severally, have the legal right of action against the defendant for damages.

This court holding that on the statement of the plaintiff he had no cause of action, it made no difference at what stage of the case the judge below ordered the nonsuit, and his interposition, stated in the brief, did not prejudice the plaintiff. The motion is dismissed.

See *Huff v. Watkins*, 15 S. C. 82, distinguishing the principal case. In 26 Cyc. 1580, note 41, it is said that the rule that the master's right of recovery, for injuries, etc., to his servants, is confined to menial servants, no longer holds; but no authority is cited. In a letter from Mr. E. D. Smith, of the American Law Book Company, to the editors, is the following: "The statement in 26 Cyc. 1580, note 41, 'but such limitation is not now recognized,' is amply supported by authorities but, as you say, they are for enticement and torts other than personal injuries to the servant. I have made a very thorough search in all available sources and have been unable to find a case similar to *Burgess v. Carpenter*, 2 S. C. 87, 16 Am. Rep. 643. *Huff v. Watkins*, 15 S. C. 82, is an action for enticement."

It is held in *Walker v. Cronin*, 107 Mass. at p. 567, that to entice any servant to leave his master is actionable—whether the servant be a menial servant or not. For a general discussion of the master's right to recover for injuries to his servant, see 20 Am. & Eng. Enc. Law, 184; 25 Ib. 218; 26 Cyc. 1580. The principal case is doubted in *Haskins v. Royster*, 70 N. C. 601, inserted post in this subsection. See "Master and Servant," Century Dig. §§ 1281, 1282; Decennial and Am. Dig. Key No. Series §§ 336, 337.

THE QUEEN v. DANIEL, 6 Modern, 182. 1705.

Remedy of the Master Whose Servant Is Enticed to Quit His Service.

Per Totam Curiam.—This term, the indictment is naught. First. The enticing an apprentice or a servant to depart from his master, is not an offense of a public nature, but the party's remedy is by an action upon his case, which he may well maintain. Secondly. A common action of trespass will not lie for enticing an apprentice or servant from his master. But if one will take away my servant or apprentice by force, trespass will lie for the matter, declaring upon the force, *per quod servitium amisit*. . . .

In an action for enticing, persuading, and procuring a servant to quit the service of the master, it is said to be necessary that plaintiff allege and prove that the defendant had knowledge or notice that the relation of master and servant existed. *Clark v. Clark*, 63 N. J. L. 1, 42 Atl. 770, citing *Blake v. Lanyon*, 6 T. R. 221; 2 Chit. Pl. 643, note (e); 8 Went. 458. But in an action for seducing a daughter it is not necessary to allege or prove that the defendant knew or had notice that the daughter was the servant of the plaintiff. *Ibid.*, citing 22 Chit. Pl. 644, n. a, and *Sm. Mast. and Servt.* *175. See "Master and Servant," Century Dig. §§ 1283, 1285, 1288; Decennial and Am. Dig. Key No. Series §§ 339, 340, 343.

HASKINS v. ROYSTER, 70 N. C. 601. 1874.

Remedy of Master Whose Servant Is Enticed, etc. Intermeddlers.

[Action by a master for damages resulting from alleged enticing. Judgment against the plaintiff, and he appealed. Reversed.]

RODMAN, J. We take it to be a settled principle of law that if one contract upon a consideration to render personal services for another, any third person who maliciously, that is, without a lawful justification, induces the party who contracted to render the service to refuse to do so, is liable to the injured party in an action for damages. It need scarcely be said that there is nothing in this principle inconsistent with personal freedom, else we should not find it in the laws of the freest and most enlightened states in the world. It extends impartially to every grade of service, from the most brilliant and best paid to the most homely, and it shelters our nearest and tenderest domestic relations from the interference of malicious intermeddlers. It is not derived from any idea of property by the one party in the other, but is an inference from the obligation of a contract freely made by competent persons.

We are relieved from any labor in finding authorities for this principle by a very recent decision of the supreme court of Massachusetts, in which a learned and able judge delivers the opinion of the court. *Walker v. Cronin*, 107 Mass. 555. That case was this: The plaintiffs declared in substance that they were shoemakers and employed a large number of persons as bottomers of boots and shoes, and defendant, unlawfully and intending to injure the plaintiff in his business, persuaded and induced the persons so employed to abandon the employment of the plaintiff, whereby plaintiff was damaged, etc. A second count says that plaintiff had employed certain persons named to make up stock into boots and shoes, and defendant well knowing, etc., induced said persons to refuse to make and finish such boots and shoes, etc. Third count is not material to be noticed. The defendant demurred. The court held each of the counts good.

I shall make no apology for quoting copiously from this opinion, because the high respectability of the court, and the learning and care with which the question is discussed, make the decision eminently an authority.

"This (the declaration) sets forth sufficiently (1) intentional and wilful acts, (2) calculated to cause damage to the plaintiffs in their lawful business, (3) done with the unlawful purpose to cause such damage and loss, without right or justifiable cause on the part of the defendant which constitutes malice, and (4) actual damage and loss resulting. The general principle is announced in Com. Dig., action on the case, A. In all cases where a man has a temporal loss or damage by the wrong of another, he may have an action upon the case to be repaired in damages. The intentional causing such loss to another, without justifiable cause, and with the malicious purpose to inflict it, is of itself a wrong. See *Carew v. Ruth-*

erford, 106 Mass. 1, 10, 11. Thus every one has an equal right to employ workmen in his business or service; and if by the exercise of this right in such manner as he may see fit, persons are induced to leave their employment elsewhere, no wrong is done to him whose employment they leave, unless a contract exists by which such other person has a legal right to the further continuance of their services. If such a contract exists, *one who knowingly and intentionally procures it to be violated*, may be held liable for the wrong, although he did it for the purpose of promoting his own business.

Every one has the right to enjoy the fruits and advantages of his own enterprise, industry, skill and credit. He has no right to be protected against competition; but he has a right to be free from malicious and wanton interference, disturbance or annoyance. If disturbance or loss come as a result of competition, or the exercise of like rights by others, it is *damnum absque injuria*, unless some superior right by contract or otherwise is interfered with. But if it come from the merely wanton or malicious acts of others, without the justification of competition or the service of any interest or lawful purpose, it then stands upon a different footing, and falls within the principle of the authorities first referred to.

It is a familiar and well-established doctrine of the law upon the relation of master and servant, that one who entices away a servant, or induces him to leave his master, may be held liable in damages therefor, *provided there exists a valid contract for continued service known to the defendant*. It has sometimes been supposed that this doctrine sprang from the English statute of laborers and was confined to menial service. But we are satisfied that it is founded upon the legal right derived from the contract, and not merely upon the relation of master and servant, and that it applies to all contracts of employment, if not to contracts of every description."

In *Hart v. Aldridge*, Cowp. 54, it was applied to a case very much like the present. In *Gunter v. Astor*, 4 J. B. Moore, 12, it was applied to the enticing away of workmen not hired for a limited or constant period, but who worked by the piece for a piano manufacturer. In *Shepperd v. Wakeman*, Sid. 79, it was applied to the loss of a contract of marriage, by reason of a false and malicious letter claiming a previous engagement. In *Winsmore v. Greenbank*, Willes, 577, the defendant was held liable in damages for unlawfully and unjustly "procuring, enticing and persuading" the plaintiff's wife to remain away from him, whereby he lost the comfort and society of his wife, and the profit and advantage of her fortune. *Barbee v. Armstead*, 32 N. C. 530. In *Lumly v. Gye*, 2 El. & Bl. 216 (20 Eng. L. & E. 168), the plaintiff had engaged Miss Wagner to sing in his opera, and the defendant knowingly induced her to break her contract and refuse to sing. It was objected that the action would not lie, because her contract was merely executory, and she had never actually entered into the service of the plaintiff; and Coleridge J., dissented, insisting

"that the only foundation for such an action was the statute of laborers, which did not apply to a service of that character; but after full discussion and deliberation it was held that the action would lie for the damage thus caused by the defendant." To the same effect are *Jones v. Jeter*, 43 Geo. 331, and *Salter v. Howard*, Ib. 601, in both which cases the servants enticed were employees in husbandry. The only case to the contrary that we are aware of is *Burgess v. Carpenter*, 2 Rich. S. C. 7; but the authorities relied on in that case seem to us not in point. And although this action is not brought under our Act of 1866, Bat. Rev. ch. 70 [Revisal secs. 3365, 3374], yet that act is evidence of the common law.

Again it is suggested, that the contractors of the second part in this contract are croppers and not servants. By cropper, I understand a laborer who is to be paid for his labor by being given a proportion of the crop. But such a person is not a tenant, for he has no estate in the land, nor in the crop until the landlord assigns him his share. He is as much a servant as if his wages were fixed and payable in money. It is unnecessary to discuss the question whether one who maliciously persuaded a tenant to abandon his holding, would not be liable in damages for such officious intermeddling.

But whatever may be the effect of the provisions commented on, as between the parties to the contract, the authorities are clear and decisive that a person in the situation of the defendant can take no advantage from them. As the case now stands, he cannot pretend to play the part of a chivalrous protector of defrauded ignorance. For the present, at least, he must be regarded as a malicious intermeddler, using the word malicious in its legal sense.

There is a certain analogy among all the domestic relations, and it would be dangerous to the repose and happiness of families if the law permitted any man under whatever professions of philanthropy or charity, to sow discontent between the head of a family and its various members, wife, children and servants. Interference with such relations can only be justified under the most special circumstances, and where there cannot be the slightest suspicion of a spirit of mischief-making or self-interest.

To enable a plaintiff to recover from one who entices his servant, it is sufficient to show a subsisting relation of service, even if it be determinable at will. In *Keane v. Boycott*, 2 H. Bl. 611, the plaintiff sued a recruiting officer for enticing his servant. The servant was an infant and had been a slave in St. Vincents, where he indentured himself to serve the plaintiff for five years. The indenture of course was void upon a double ground, but the court held the plaintiff entitled to recover. Eyre, C. J., says: "The defendant in this case had no concern in the relation between the plaintiff and his servant; he dissolved it officiously, and, to speak of his conduct in the mildest terms, he carried too far his zeal for the recruiting service." In *Sykes v. Dixon*, 9 Ad. & El. 693, that case is distinguished from *Keane v. Boycott*, upon the ground that the

servant had quitted his master before the defendant employed him, and there was then no subsisting relation of service. In *Evans v. Walton*, 2 C. P. 615 (E. L. R.), it was held not necessary to show a valid and binding contract for service, but only the existence of the relation. If the servant was one at will, the action could be sustained. *Salter v. Howard*, 53 Ga. 601, is to the same effect.

We are of opinion that the complaint sets forth a sufficient cause of action. The judgment is reversed.

It will be observed that the principal case is based upon *Walker v. Cronin*, 107 Mass. 555. That case is approved in *Vegelahn v. Guntner*, 167 Mass. 92, 44 N. E. 1077, inserted next following this case. See, in connection with the principal case, *Mordecai's L. L.* 157-161; *McIntosh on Contracts*, 406, 407. Compare *Francesco v. Barnum*, L. R. 45 C. D. 430, 443, *Smith's Cases L. P.* 184. See "Master and Servant," *Century Dig.* § 1283; *Decennial and Am. Dig. Key No. Series* § 339.

VEGELAHN v. GUNTNER, 167 Mass. 92, 44 N. E. 1077. 1896.
Master's Remedy by Injunction for Enticing, Intimidating, etc., His Servants.

[Bill in equity to enjoin defendants from intimidating and interfering with the employees of the plaintiff, and from doing all other acts which would tend to obstruct plaintiff in the prosecution of his business, or intimidate or annoy plaintiff's workmen or those who might wish to work for him. Decree against the defendants, and they appealed. Affirmed.]

The defendants were strikers who by various means endeavored to prevent other workmen from taking their places. The final decree was as follows: "This cause came on to be heard, and was argued by counsel; and thereupon, on consideration thereof, it is ordered, adjudged, and decreed that the defendants, and each and every of them, their agents and servants, be restrained and enjoined from interfering with the plaintiff's business by obstructing or physically interfering with any persons in entering or leaving the plaintiff's premises numbered 141, 143, 145, 147, North Street in said Boston, or by intimidating, by threats, express or implied, of violence or physical harm to body or property, any person or persons who now are or hereafter may be in the employment of the plaintiff, or desirous of entering the same, from entering or continuing in it, or by in any way hindering, interfering with, or preventing any person or persons who now are in the employment of the plaintiff from continuing therein, so long as they may be bound so to do by lawful contract."]

ALLEN, J. The principal question in this case is whether the defendants should be enjoined against maintaining the patrol. The report shows that, following upon a strike of the plaintiff's workmen, the defendants conspired to prevent him from getting workmen, and thereby to prevent him from carrying on his business, unless and until he should adopt a certain schedule of prices. The means adopted were persuasion and social pressure, threats of personal injury or unlawful harm conveyed to persons employed or seeking employment, and a patrol of two men in front of the plaintiff's factory, maintained from half past six in the morning till half past five in the afternoon, on one of the busiest streets of

Boston. The number of men was greater at times, and at times showed some little disposition to stop the plaintiff's door. The patrol proper at times went further than simple advice, not obtruded beyond the point where the other person was willing to listen; and it was found that the patrol would probably be continued if not enjoined. There was also some evidence of persuasion to break existing contracts. The patrol was maintained as one of the means of carrying out the defendants' plan, and it was used in combination with social pressure, threats of personal injury or unlawful harm, and persuasion to break existing contracts. It was thus one means of intimidation, indirectly to the plaintiff, and directly to persons actually employed, or seeking to be employed, by the plaintiff, and of rendering such employment unpleasant or intolerable to such persons. Such an act is an unlawful interference with the rights both of employer and of employed. An employer has a right to engage all persons who are willing to work for him, at such prices as may be mutually agreed upon, and persons employed or seeking employment have a corresponding right to enter into or remain in the employment of any person or corporation willing to employ them. These rights are secured by the constitution itself. *Conn. v. Perry*, 155 Mass. 117, 28 N. E. 1126; *People v. Gillson*, 109 N. Y. 389, 17 N. E. 343; *Braceville Coal Co. v. People*, 147 Ill. 71, 35 N. E. 62; *Ritchie v. People*, 155 Ill. 98, 40 N. E. 454; *Low v. Printing Co. (Neb.)*, 59 N. W. 362. No one can lawfully interfere by force or intimidation to prevent employers or persons employed or wishing to be employed from the exercise of these rights. It is in Massachusetts, as in some other states, even made a criminal offense for one, by intimidation or force, to prevent, or seek to prevent, a person from entering into or continuing in the employment of a person or corporation. Pub. St. c. 74, § 2. Intimidation is not limited to threats of violence or of physical injury to person or property. It has a broader signification, and there also may be a moral intimidation which is illegal. Patrolling or picketing, under the circumstances stated in the report, has elements of intimidation like those which were found to exist in *Sherry v. Perkins*, 147 Mass. 212, 17 N. E. 307. It was declared to be unlawful in *Reg. v. Druitt*, 10 Cox. Cr. Cas. 592; *Reg. v. Hibbert*, 13 Cox. Cr. Cas. 82; *Reg. v. Bauld*, *Id.* 282. It was assumed to be unlawful in *Trollope v. Trader's Fed.* (1875) 11 L. T. 228, though in that case the pickets were withdrawn before the bringing of the bill. The patrol was an unlawful interference both with the plaintiff and with the workmen, within the principle of many cases; and, when instituted for the purpose of interfering with his business, it became a private nuisance. See *Carew v. Rutherford*, 196 Mass. 1; *Walker v. Cronin*, 107 Mass. 555; *Barr v. Trades Council (N. J. Ch.)*, 30 Atl. 881; *Murdock v. Walker*, 152 Pa. St. 595, 25 Atl. 492; *China Co. v. Brown*, 164 Pa. St. 449, 30 Atl. 261; *Coeur D'Alene Consol. & Min. Co. v. Miners' Union of Wardner*, 51 Fed. 260; *Temperton v. Russell* [1893], 1 Q. B. 715; *Floyd v. Jackson* [1895], 11 L. T. 276; *Wright v. Hennessey*, 52 Alb. Law J. 104 (a case be-

fore *Baron Pollock v. Judge v. Bennett*, 36 Wkly. Rep. 103; *Lynons v. Wilkins* [1896], 1 Ch. 811.

The defendants contend that these acts were justifiable, because they were only seeking to secure better wages for themselves, by compelling the plaintiff to accept their schedule of wages. This motive or purpose does not justify maintaining a patrol in front of the plaintiff's premises, as a means of carrying out their conspiracy. A combination among persons merely to regulate their own conduct is within allowable competition, and is lawful, although others may be indirectly affected thereby. But a combination to do injurious acts expressly directed to another, by way of intimidation or constraint, either of himself or of persons employed or seeking to be employed by him, is outside of allowable competition, and is unlawful. Various decided cases fall within the former class; for example, *Worthington v. Waring*, 157 Mass. 421, 32 N. E. 744; *Snow v. Wheeler*, 113 Mass. 179; *Bowen v. Matheson*, 14 Allen, 499; *Com. v. Hunt*, 4 Mete. (Mass.) 111; *Heywood v. Tillson*, 75 Me. 225; *Cote v. Murphy*, 159 Pa. St. 420, 28 Atl. 190; *Bohn Manuf'g Co. v. Hollis*, 54 Minn. 223, 55 N. W. 1119; *Steamship Co. v. McGregor* [1892], App. Cas. 25; *Curran v. Treleven* [1891], 2 Q. B. 545, 561. The present case falls within the latter class.

Nor does the fact that the defendants' acts might subject them to an indictment prevent a court of equity from issuing an injunction. It is true that, ordinarily, a court of equity will decline to issue an injunction to restrain the commission of a crime; but a continuing injury to property or business may be enjoined, although it may also be punishable as a nuisance or other crime. *Sherry v. Perkins*, 147 Mass. 212, 17 N. E. 307; *In re Debs*, 158 U. S. 564, 593, 599, 15 Sup. Ct. 900; *Baltimore & P. R. Co. v. Fifth Baptist Church*, 108 U. S. 317, 329, 2 Sup. Ct. 719; *Cranford v. Tyrrell*, 128 N. Y. 341, 344, 28 N. E. 514; *Gilbert v. Mickle*, 4 Sandf. Ch. 357; *Port of Mobile v. Louisville & N. R. Co.*, 84 Ala. 115, 126, 4 South. 106; *Arthur v. Oakes*, 11 C. C. A. 209, 63 Fed. 310; *Toledo, A., A. & N. M. Ry. Co. v. Pennsylvania Co.*, 54 Fed. 730, 744; *Emperor of Austria v. Day*, 3 De Gex, F. & J. 217, 239, 240, 253; *Hermann Loog v. Bean*, 26 Ch. Div. 306, 314, 316, 317; *Monson v. Tussaud* [1894], 1 Q. B. 671, 689, 690, 698.

A question is also presented whether the court should enjoin such interference with persons in the employment of the plaintiff who are not bound by contract to remain with him, or with persons who are not under any existing contract, but who are seeking or intending to enter into his employment. A conspiracy to interfere with the plaintiff's business by means of threats and intimidation, and by maintaining a patrol in front of his premises, in order to prevent persons from entering his employment, or in order to prevent persons who are in his employment from continuing therein, is unlawful, even though such persons are not bound by contract to enter into or to continue in his employment; and the injunction should not be so limited as to relate only to persons

who are bound by existing contracts. *Walker v. Cronin*, 107 Mass. 555, 565; *Carew v. Rutherford*, 106 Mass. 1; *Sherry v. Perkins*, 147 Mass. 212, 17 N. E. 307; *Temperton v. Russell* [1893], 1 Q. B. 715, 728, 731; *Flood v. Jackson* [1895], 11 L. T. 276. We therefore think that the injunction should be in the form as originally issued. So ordered.

See same case, 44 N. E. 1077, 35 L. R. A. 722; *Beck v. Rwy. P. Pro. Union*, 77 N. W. 13, 42 L. R. A. 407; *Passaic Print Works v. Ely & W. D. G. Co.*, 105 Fed. 163, 44 C. C. A. 426, 62 L. R. A. 673; *In re Debs*, 158 U. S. 564, 15 Sup. Ct. 900. See 5 L. R. A. (N. S.) 1091, and note, and at p. 1161, for full discussion of what constitutes enticing, and of the master's remedies both at law and in equity. See "Injunctions," *Century Dig.* § 172; *Decennial and Am. Dig. Key No. Series* § 99.

McGURK v. CRONENWETT, 199 Mass. 457, 85 N. E. 576, 19 L. R. A. (N. S.) 561. 1908.

Remedy of Servant Against Intermeddler Who Causes His Master to Discharge Him.

[Tort for maliciously causing plaintiff's discharge by his employer. Judgment against plaintiff, and he appealed. Defendant also appealed from an order overruling his demurrer to the second count in the declaration. Reversed in part and affirmed in part.

The first count alleged that plaintiff was employed by a certain corporation at a certain salary, and that defendant "wrongfully, without cause and maliciously" prevented the plaintiff from performing his part of the contract, and, in preventing plaintiff from carrying out his agreement, the defendant brought about plaintiff's discharge.

The second count alleged that the defendant maliciously induced and persuaded plaintiff's employer to break its agreement and to discharge the plaintiff.

The defendant demurred for that: (1) The first count failed to aver any wrongful word spoken or written, or any act done, by defendant whereby plaintiff was prevented from performing his contract; (2) The first count also failed to set out any word spoken or written by defendant, or any act done by him which brought about plaintiff's discharge by his employer; (3) The second count failed to aver any word or act of defendant's causing plaintiff to be discharged; (4) That the declaration appears to be intended as an action of slander or libel and yet does not set forth the words, etc.; (5) That the declaration sets forth no actionable words or acts of the defendant; (6) There was no allegation that defendant was not an officer of, or person in authority connected with, the corporation which employed plaintiff; (7) The entire contract between plaintiff and his employer was not set forth. The judge below sustained the 1st, 2nd, 3rd, and 5th grounds of the demurrer, but overruled it on the 4th, 6th, and 7th grounds.]

SHELDON, J. The judge of the superior court rightly declined to sustain the defendant's demurrer on either one of the fourth, sixth and seventh grounds assigned. It does not appear that the action was intended to be for slander or libel, or for any words or statements uttered or published by the defendant concerning the plaintiff; and the doctrine of *May v. Wood*, 172 Mass. 11, 51 N. E. 191, and *Rice v. Albee*, 164 Mass. 88, 41 N. E. 122, does not apply

here. The rule of those cases ought not to be extended to actions not brought for slander or libel.

Nor is it necessary that the contract between the plaintiff and the Standard Plate Glass Company should be set out in full or by copy: its effect, so far as material to the case, was sufficiently stated.

It would make no difference in the defendant's liability, if the charges in the declaration were proved, whether he was a mere stranger to the plaintiff's contract or an officer or representative of the Plate Glass Company. The corporation was in either event a third person within the meaning of *Moran v. Dunphy*, 177 Mass. 485, 59 N. E. 125, and *Bowen v. Hall*, 6 Q. B. D. 333.

The second count of the declaration set forth a good cause of action within the rule of *Moran v. Dunphy*, 177 Mass. 485, 59 N. E. 125, and see the cases there cited. There are no material differences between this count and the one sustained in that case. The count cannot be held bad for the lack of a direct averment that the company did discharge the plaintiff in consequence of what defendant did, because that is not stated as one of the grounds of demurrer. The averments of the count are somewhat meagre; but it must be remembered that the defendant has the right to ask for a bill of particulars under R. L. c. 173, § 68.

But different considerations apply to the first count. It contains no averment that the defendant has committed any act in itself actionable. The material averment is only that he has "wrongfully, without cause and maliciously prevented the plaintiff from further performing his obligation under" a certain agreement of employment, and thus "brought about the discharge of the plaintiff," and "caused the plaintiff great damage." There is no averment that the defendant knew of the existence of this agreement, unless that is implied in the word "maliciously." We do not doubt that there is a right of action for purposely and maliciously preventing the performance of a contract, whether of employment or otherwise. *Walker v. Cronin*, 107 Mass. 555; *Beekman v. Marsters*, 195 Mass. 205, 80 N. E. 817. But where, as under the count now considered, this is the sole cause of action relied on, it is essential both to aver and prove the defendant's knowledge of the contract in question. This was the doctrine of both *Walker v. Cronin* and *Beekman v. Marsters*, *ubi supra*, and of *Lumly v. Gye*, 2 El. & Bl. 216; and justice requires this doctrine to be upheld. A defendant who has not been guilty of conduct otherwise actionable ought not to be held liable for having brought about, though wrongfully and without cause, the breach of a contract of which he had no knowledge. It follows accordingly that this count is insufficient unless it can be said that the charge that the defendant "maliciously" prevented the plaintiff from performing his obligations under his agreement necessarily imports an allegation that the defendant knew of the agreement of which he prevented the performance.

In the opinion of the majority of the court this cannot be said.

The natural meaning of the word "maliciously" is "wilfully and intentionally." *Commonwealth v. Goodwin*, 122 Mass. 19, 35, cited and followed in *Commonwealth v. Jones*, 174 Mass. 401, 54 N. E. 869. In a capital case tried before two justices of this court, the jury were told that the malice necessary to constitute the crime of murder meant simply that the act was "wilfully done for the purpose of carrying out the defendant's own ends, regardless of the rights of others;" and this was sustained by the full court. *Commonwealth v. Pemberton*, 118 Mass. 36, 37, 39, 40, 43. It means an intention to do an act which is wrongful to the detriment of another, according to the language of Bowen, L. P., in *Mogui Steamship Co. v. McGregor*, 23 Q. B. D. 598, 612, quoted by Lord Watson in *Allen v. Flood* (1898), A. C. 1, 93, 94; and see *South Wales Miners' Federation v. Glamorgan Coal Co.* (1905), A. C. 239. So it was said by Bayley, J. in *Bromage v. Prosser*, 4 B. & C. 247, 255, that "malice in common acceptation means ill will against a person, but in its legal sense it means a wrongful act, done intentionally, without just cause or excuse." And it was said by this court, speaking through the present chief justice, of the right to dispose of one's labor as he will, that "an intentional interference with such a right without lawful justification, is malicious in law, even if it is from good motives and without express malice." *Berry v. Donovan*, 188 Mass. 353, 356, 74 N. E. 603, 604, and see the cases there cited; also those collected in 25 Cyc. 1667. But we have been referred to no case, nor have we found any, in which an averment that the act complained of was done maliciously has been held to include an averment of knowledge of specific facts, when the right of action depended upon such knowledge. It follows that in the first count of this declaration there is no averment that the defendant had knowledge of the agreement between the plaintiff and the Plate Glass Company; and the count sets out no cause of action.

The judgment entered for the defendant must be reversed; the demurrer to the first count must be sustained; and that to the second count must be overruled.

See 5 L. R. A. (N. S.) and note. See "Master and Servant," *Century Dig.* § 1286; *Decennial and Am. Dig. Key No. Series* § 341.

Action by the Master for the Seduction of his Female Servant. That a parent, or one standing in loco parentis may recover for the seduction of a female, see ch. 6, § 2 (c). It is frequently stated by text writers and in judicial opinions that a master may recover for the seduction of his female servant, but we have found no case in which a recovery was actually had in such an action unless the plaintiff was not only master but also a parent or one standing in loco parentis. In this connection the following extract from a letter written by Mr. E. D. Smith, of the American Law Book Company, to the editors, is of interest: "In reply to your question 'Is there any case in the world in which a master,

not being a parent has actually recovered for the seduction of his female servant, we would say that an exhaustive search of our very extensive resources has failed so far to reveal such a case, except the case of *Manvell v. Thomson*, 3 C. & P. 303, 304, 31 R. R. 666, *English Ruling Cases*, volume 17, page 357." But in that case it is expressly stated in the opinion of Abbott, C. J., that the relation of uncle and niece existed and the uncle was in loco parentis: though the ground of recovery was, that the plaintiff was also the master of the girl seduced, and the loss of her services resulted from the seduction.

(f) Remedy of Third Persons Against the Master for the Acts and Negligence of his Servants.

WESSON v. RAILROAD, 49 N. C. 379. 1857.

When Trespass Vi Et Armis, and When Trespass on the Case Lies.

[Action of trespass q. c. f. for acts of contractors who were constructing a railroad for the defendant. There was no evidence that the defendant's officers either sanctioned or knew of the commission of the acts complained of. Judgment of nonsuit against the plaintiff, and he appealed. Affirmed.]

PEARSON, J. There is no error. A master is not liable for the wilful trespass of a servant. He is liable in an "action on the case" for an injury, caused by the negligence, or unskilfulness of a servant, while doing his business. This is an action of trespass vi et armis. "There was no evidence that the master sanctioned, or even knew of the trespass in question." Judgment affirmed.

See "Master and Servant," *Century Dig.* § 1232; *Decennial and Am. Dig.* Key No. Series § 306.

McMANUS v. CRICKETT, 1 East, 106. 1800.

Master's Liability for the Wilful Acts of His Servant.

[Action of trespass for the wilful driving of a chariot by defendant's servant against plaintiff's chaise. Verdict against the defendant. Motion by defendant to set aside the verdict and enter a nonsuit. On this motion the opinion is written. Nonsuit ordered.]

LORD KENYON, C. J. This is an action of trespass, in which the declaration charges that the defendant with force and arms drove a certain chariot against a chaise in which the plaintiff was riding in the king's highway, by which the plaintiff was thrown from his chaise and greatly hurt. At the trial it appeared in evidence that one Brown, a servant of the defendant, wilfully drove the chariot against the plaintiff's chaise, but that the defendant was not himself present, nor did he in any manner direct or assent to the act of the servant, and the question is, if for this wilful and designed act of the servant an action of trespass lies against the defendant.

his master? As this is a question of very general extent, and as cases were cited at the bar, where verdicts had been obtained against masters for the misconduct of their servants under similar circumstances, we were desirous of looking into the authorities on the subject before we gave our opinion: and after an examination of all that we could find as to this point, we think that this action cannot be maintained. It is a question of very general concern and has been often canvassed; but I hope at last it will be at rest. It is said in Bro. Abr. tit. Trespass, pl. 435, "If my servant contrary to my will chase my beasts into the soil of another I shall not be punished." And in 2 Roll. Abr. 553, "If my servant without my notice put my beasts into another's land, my servant is the trespasser and not I—because by the voluntary putting of the beasts there without my assent, he gains a special property for the time, and so to this purpose they are his beasts." I have looked into the correspondent part in Vin. Abr., and as he has not produced any case contrary to this, I am satisfied with the authority of it. And in Noy's Maxims, ch. 44, "If I command my servant to distrain, and he ride on the distress, he shall be punished and not I." And it is laid down by Holt, C. J., in *Middleton v. Fowler*, Salk. 282, as a general position, "that no master is chargeable with the acts of his servant but when he acts in the execution of the authority given him." Now when a servant quits sight of the object for which he is employed, and without having in view his master's orders, pursues that which his own malice suggests, he no longer acts in pursuance of the authority given him, and according to the doctrine of Lord Holt his master will not be answerable for such act. Such upon the evidence was the present case; and the technical reason in 2 Roll. Abr. with respect to the sheep applies here; and it may be said that the servant by wilfully driving the chariot against the plaintiff's chaise without his master's assent, gained a special property for the time, and so to that purpose the chariot was the servant's. This doctrine does not at all militate with the cases in which a master has been holden liable for the mischief arising from the negligence or unskilfulness of his servant who had no purpose but the execution of his master's orders; but the form of those actions proves that this action of trespass cannot be maintained: for if it can be supported, it must be upon the ground that in trespass all are principals; but the form of those actions shows, that where the servant is in point of law a trespasser, the master is not chargeable as such; though liable to make a compensation for the damage consequential from his employing of an unskilful or negligent servant. The act of the master is the employment of the servant; but from that no immediate prejudice arises to those who may suffer from some subsequent act of the servant. If this were otherwise the plaintiffs in the cases mentioned in 1 Lord Raym. 739—one where the servants of a carman through negligence ran over a boy in the streets and maimed him; and the other, where the servants of A, with his cart, ran against the cart of B and overturned it, by which a pipe of

wine was spilt], must have been nonsuited from their mistaking the proper form of action, in bringing an action upon the case, instead of an action of trespass; for there is no doubt of the servants in those cases being liable as trespassers, even though they intended no mischief; for which, if it were necessary, *Weaver v. Ward*, in *Hobart*, 134, and *Dickinson v. Watson*, in *Sir Thomas Jones*, 205, are authorities. But it must not be inferred from this that in all cases where an action is brought against the servant for improperly conducting his master's carriage, by which mischief happens to another, the action must be trespass. *Michael v. Allestree*, 2 *Lev.* 172, where an action on the case was brought against a man and his servant for breaking a pair of horses in *Lincoln's Inn Fields*, where being unmanageable they ran away with the carriage and hurt the plaintiff's wife, is an instance to show that trespass on the case may be the proper form of action. And upon a distinction between those cases where the mischief immediately proceeds from something in which the defendant is himself active, and where it may arise from the neglect or other misconduct of the party, but not immediately, and which perhaps may amount only to a non-feazance, we held in *Ogle v. Barnes*, 8 *Term Rep.* 188, that the plaintiff was entitled to recover. The case of *Savignac and Roome*, 6 *Term Rep.* 125, which was much pressed as supporting this action, came before the court on a motion in arrest of judgment; and the only question decided by the court was, that the plaintiff could not have judgment, as it appeared that he had brought an action on the case for that which in law was a trespass; for the declaration there stated that the defendant by his servant wilfully drove his coach against the plaintiff's chaise. *Day v. Edwards*, 5 *Term Rep.* 648, was also mentioned, which was an action on the case, in which the declaration charged the defendant personally with furiously and negligently driving his cart, that by and through the furious negligent and improper conduct of the defendant the said cart was driven and struck against plaintiff's carriage; and on demurrer the court were of opinion, that the fact complained of was a trespass. And in the last case that was mentioned, *Brucker v. Froment*, 6 *Term Rep.* 659, the only point agitated was, whether evidence of the defendant's servant having negligently managed a cart supported the declaration, which imputed that negligence to the defendant; and the court with reluctance held that it did, on the authority of a precedent in *Lord Raymond's Reports*, 264, *Turberville v. Stamp*. In none of these cases was the point now in question decided; and those determinations do not contradict the opinion we now entertain, which is, that the plaintiff cannot recover, and that a nonsuit must be entered.

The principal case is approved in *Campbell v. Staiert*, 6 *N. C.* 389, and *Parham v. Blackwelder*, 30 *N. C.* 446; but see the subsequent cases in this subsection. See "Master and Servant," *Century Dig.* §§ 1230-1232; *Decennial* and *Am. Dig. Key No. Series* § 306.

PIERCE v. RAILROAD, 124 N. C. 83, 94-97, 98, 99, 32 S. E. 399. 1899.

Master's Liability for the Wilful and Malicious Acts of His Servant.

[Action for damages for the death of a boy. Plaintiff sues as administrator of the deceased boy, under the statute. Verdict and judgment against defendant, and it appealed. Affirmed. Only that portion of the opinion which treats of the wilful and malicious acts of a servant is here inserted. The facts appear in opinion.]

CLARK, J. . . . We will now consider the second and third prayers for instructions, which were: "(2) If the jury believe that the intestate of plaintiff was killed by the wanton, willful, and malicious act of one of the employes of the railroad company, then the company would not be liable, and the jury should respond to the first issue, 'No.' (3) If the jury find that the intestate's death was caused by the wanton and malicious act of the fireman, and that his act was not done in the furtherance of the business of the defendant, they should find the first issue in favor of the defendant, 'No.' " The assumption in these prayers that the defendant is not liable if the plaintiff's intestate was killed by the wanton, willful, and malicious act of one of the employes of the defendant, and especially if such act was not done in furtherance of the business of the defendant, cannot be sustained. The true test is, was it done by such employe in the scope of the discharge of duties assigned him by the defendant, and while in the discharge of such duties? "In furtherance of the business of employer" means simply in the discharge of the duties of the employment; and the court properly told the jury that the defendant is responsible for the injury, if caused by the wrongful act of the employe while acting in the scope of his employment. In *Ramsden v. Railroad Co.*, 104 Mass. at page 120, Gray, J., says: "If the act of the servant is within the general scope of his employment, the master is equally liable, whether the act is willful or merely negligent (*Howe v. Newmarch*, 12 Allen, 49), or even if it is contrary to an express order of the master (*Railroad Co. v. Derby*, 14 How. 468)." The rule is thus laid down in 2 Wood, R. R. (2d ed.) § 316, at page 1404: "Where the act is within the scope of the servant's authority, express or implied, it is immaterial whether the injury resulted from the result of his negligence, or from his willfulness and wantonness. Nor is it necessary that the master should have known that the act was to be done. It is enough if it is within the scope of the servant's authority. Thus, where a servant of a railway company, employed to clean and scour its cars and keep persons out of them, kicked a boy 11 years old from a railing while the cars were in motion, whereby he was thrown under the cars and killed, it was held that, the act (although in nobody's line of duty) being done in the course of the servant's employment, the company was chargeable therefor;" citing *Railroad Co. v. Hack*, 66 Ill. 238, and other cases as authorities. Among many other cases almost on "all fours" with the

present are *Railroad Co. v. Kelly*, 36 Kan. 655, 14 Pac. 172, in which it was held that "where a boy 15 years old gets upon a freight train wrongfully and as a trespasser, for the purpose of riding without paying his fare, and is commanded by the brakeman to jump off the train while in dangerous motion, in the nighttime, and in obedience to that command, and in fear of being thrown off, jumps off the train and is run over and injured, the company is liable;" and it is further held that whether the brakeman "acted wantonly and maliciously, or merely failed to exercise due care and caution, the railroad company is liable" for damages resulting from the brakeman's conduct—citing many cases. In *Rounds v. Railroad Co.*, 64 N. Y. 129, the defendant was held liable where the plaintiff jumped upon the platform of a baggage car to ride to a place where the cars were being backed to make up a train (this being against the regulations of the defendant), and the baggage master knocked him off, and in falling he fell upon some wood, rolled under the car, and was injured; the court holding that, to "make the master liable, it is not necessary to show that it expressly authorized the particular act; it is sufficient to show that the servant was acting at the time in the general scope of his authority; and this although he departed from his instructions, abused his authority, was reckless in the performance of his duty, and inflicted unnecessary injury." In *Lovett v. Railroad Co.*, 9 Allen, 557, it was held that where a boy of ten years old wrongfully got upon a street car, and the driver ordered him to jump off while running at a dangerous speed, the company is responsible for the injuries sustained by the boy in doing so, unless it was found that the injury was caused by the boy's negligent manner of getting off. Another instance of liability for injuries sustained by a trespasser from the servant's violently and forcibly putting the trespasser off is *Carter v. Railroad Co.*, 8 Am. & Eng. Ry. Cas. 347, which cites numerous precedents of like purport. But it is needless to multiply cases. All of them hold that such ejection is done by the servant in the general scope of his employment, and if done recklessly or wantonly and maliciously, and even if in a manner forbidden by the master's orders, the company is liable for the tortious act. The ground is that the proximate cause of the injury is not the trespasser's wrongfully getting on the cars, but the tortious manner in which the servant makes him get off and that, this act being in the general scope of the servant's employment, the master is liable. In the present case, whether the child jumped off because ordered by the brakeman, or by reason of the hint of a lump of coal whizzing by his head, or was actually struck and knocked off, this mode of getting him off the moving car was tortious, and the defendant is liable for the injury caused thereby. 14 Am. & Eng. Enc. Law, 822, 823, and cases cited in the notes thereto; *Pierce*, R. R. 278, 279; *Kline v. Railroad Co.*, 99 Am. Dec. 282, and notes; *Peck v. Railroad Co.*, 70 N. Y. 587; *Railway v. Harris*, 122 U. S. 597, 7 Sup. Ct. 1286. *Coal Co. v. Heeman*, 86 Pa. St. 418, was a case exactly like this,—where the evidence was that a brakeman, by

throwing coal at a boy who was wrongfully on a moving train, caused him to fall; and it was held that the company was liable in damages for the injury. The defendant, however, earnestly contends that, if the servant's act was malicious, the company is not liable for negligence. If that theory ever obtained, the above authorities show that it was contrary to reason, and has been duly and fully exploded. The company is not charged in this case with malice because of the alleged malice of its agent, and whether it could be held liable for punitive damages is not before us. It is certainly liable for compensatory damages for the injury sustained from the tort of its servant.

[FACTS.] Here the plaintiff's intestate was admittedly run over and killed by the defendant's train. Upon the uncontroverted facts of this case, the brakeman, as a matter of law, was acting in the scope of his general employment; and the court properly instructed the jury that if the boy was made to get off the car (though he was on there wrongfully) by the act of the brakeman, whether malicious or not, while the train was moving, so that the boy was killed in consequence of so doing, the defendant was liable for the damage caused by the negligent conduct of its lessee in thus operating its train. . . . A careful consideration of the charge shows, besides, that there is no error therein of which the defendant could complain. Affirmed.

That the law is stricter upon railroad corporations than upon other employers, in the matter of liability for the wilful, wanton, and malicious acts of their servants, is shown in *Stewart v. Lumber Co.*, 146 N. C. 47, 59 S. E. 545, and cases there cited. That case limits the master's liability to actual damages where the servant's act is wanton, wilful, etc.; but compare 10 L. R. A. (N. S.) at p. 403. That the servant must be "on duty" at the time of the wilful, wanton, etc., act, is held in *Cook v. R. R.*, 128 N. C. at p. 336, 38 S. E. 925; *Palmer v. R. R. & Elec. Co.*, 131 N. C. 250, 42 S. E. 604; *Jones v. R. R.*, 150 N. C. 473, 64 S. E. 205. See, also, for a discussion of the master's liability for the wilful and malicious acts of his servant, 26 Cyc. 1527; *Mordecai's L. L.* 81-85. See 4 L. R. A. (N. S.) 485, 6 Ib. 567, 9 Ib. 475, 929, 12 Ib. 1155, 13 Ib. 1193, 18 Ib. 297, 418, 22 Ib. 527, and notes (liability of the master for unauthorized assaults, trespasses, slanders, etc., committed by his servant wilfully and maliciously, or in sport; and for the unauthorized and excessive force used by his servant in doing authorized acts); 9 Ib. 1033, 14 Ib. 216, and notes (liability of the master for his servant's negligence, etc., in using an automobile, etc., of the master for the servant's own business or pleasure); 10 Ib. 367, 923, and notes (master's liability to third persons for injuries resulting from his servant's negligent use of dangerous instrumentalities, commodities, etc., placed in his hands by the master); 13 Ib. 1132, 6 Ib. 544, 4 Ib. 651, 13 Ib. 572, 10 Ib. 933, 23 Ib. 289, 1056, and notes (liability of the master for his servant's negligence, etc., in the rule which holds the master liable for the torts of his servant); 1 Ib. 283, 3 Ib. 595, 13 Ib. 1122, 1177, 14 Ib. 913, 16 Ib. 255, 816, 17 Ib. 370, 788, and notes, 20 Ib. at p. 547, 147 N. C. 26, 150 N. C. 333, *Mordecai's L. L.* 79-81 (Independent contractor as distinguished from servant); 12 Ib. 669, 775, and notes (will an action lie against both master and servant—as joint defendants—for the servant's torts?). See "Railroads," *Century Dig.* §§ 906, 907; *Decennial and Am. Dig.* Key No. Series § 281.

CHAPTER VII.

INJURIES TO TANGIBLE PERSONAL PROPERTY.

SEC. 1. REPLEVIN, DETINUE, AND ALLIED REMEDY IN EQUITY.

(See ch. 4, § 3, d. e.)

SCOTT v. ELLIOTT, 61 N C. 104. 1867.

Who Can Maintain Replevin.

[Replevin for a steamboat. Upon an intimation of the judge, the plaintiff submitted to a nonsuit and appealed. Reversed.]

A sheriff sold the steamboat under an attachment. The plaintiff bought it with the understanding that if the sale was not valid he would return the boat to the sheriff. The plaintiff hired Williams to take the boat to Fayetteville and placed the boat in Williams' possession for that purpose. The sale was judicially determined, in another action, to be invalid. The defendant got possession of the boat and refused to surrender it to the plaintiff. The judge ruled that, as the sale to the plaintiff was invalid, the plaintiff had no title or interest which would sustain his action of replevin against the defendant.]

PEARSON, C. J. One who has possession of a chattel for himself, in respect to either a special or general property, may maintain replevin or trover. One who has possession of a chattel for another, and not for himself, cannot maintain an action. This rule is settled, and the only difficulty is in making its application. Our case falls under the first branch of the rule, as will be made apparent by citing a few instances under each.

A common carrier has possession for himself in respect to his special property, and may maintain an action. So one who hires or borrows a horse is in possession for himself in respect to his special property. Such is the case in every bailment, and an action lies in the name of the bailee, and an indictment for larceny may lay it as his property. On the other hand, an overseer holds possession for his employer and not for himself, and cannot maintain an action. So one who is driving the wagon of another is not in possession for himself, but as the servant of the other. His possession is that of the man who hired him to take charge of the wagon. Such was the status of Williams in our case. He was the mere servant of Scott, and his possession was Scott's possession. So, if the sheriff making a levy puts the property in charge of a third person, who is to deliver it on the day of sale, that person is considered as a mere servant holding possession

for the sheriff, and having no general or special property in himself. Such is the case in 9 Mass. 104, and the other cases cited on the argument.

In our case the sheriff sold the steamer to Scott, and put her in his possession, with the understanding that if the sale was not valid, he would return her to the sheriff. Obviously Scott did not take possession for the sheriff, but for himself in respect to the general ownership which he supposed he had acquired. The character of his possession was not at all affected by the understanding as to the return of the steamer. The suit in which the validity of the sale is put in controversy was not decided until December Term, 1860. So, from the time of the sale, 1857, up to 1860, Scott was holding possession "for himself." During this time the sheriff had no right to take the boat from him. This is the test to show that he was not the servant of the sheriff. Suppose one hires my horse for a year; but agrees to return him before the end of the year on the happening of a contingency. Will any one say that he is my servant, and is holding possession for me and not for himself? There is error.

Replevin does not lie against one who was not in possession when the summons was issued. *Myers v. Credle*, 63 N. C. 504; *Webb v. Taylor*, 80 N. C. 305. It lies for a house severed from the owner's land, so long as the house remains, a chattel after the removal. *Fitzgerald v. Anderson*, 81 Wis. p. 344, 51 N. W. 554, and see *Ins. Co. v. Cronk*, 93 Mich. 49, 52 N. W. 1035, and *Turner v. Mebane*, 110 N. C. 413, 14 S. E. 974, inserted at ch. 3, s. 8. It was held in *Eisenhauer v. Quinn*, 93 Pac. 38, 14 L. R. A. (N. S.) 435, that replevin lies for a house tortiously taken from the land of A, and permanently fixed to the land of B. See the case at ch. 3, sec. 8, ante.

That detinue lies for a certain quantity out of a large bulk, see *Boone v. Darden*, 109 N. C. 74, 13 S. E. 728. See "Replevin," *Century Dig.* §§ 45-68; *Decennial and Am. Dig. Key No. Series* § 8.

CROUCH v. MARTIN, 3 Blackford, 256. 1833.

Who Can Maintain Detinue.

[Detinue by Martin against Crouch for unlawfully detaining a mare to his damage. Crouch pleaded non detinet. Verdict: "We find the *property* to be in the plaintiff and the value thereof to be sixty dollars." Motion in arrest of judgment. Motion overruled, and judgment against Crouch, from which he appealed. Reversed.]

STEVENS, J. . . . The only question before this court is, whether the verdict is sufficient to authorize the rendition of final judgment for the plaintiff.

The issue in this case is, whether the defendant unlawfully detained the property of the plaintiff as stated in the declaration. The gravamen of the issue is the detention. The plaintiff, to recover, had to prove three things. — 1. property in himself; 2. an unlawful detention by the defendant; and 3. the value. The jury have found but two of these facts. They have found the *prop*

erty to be in the plaintiff, and its value; but the *unlawful detention* thereof, which is the main and principal point in issue, *they have not found*.

A verdict must answer all the material points in issue; but a general verdict, that in substance covers the whole, is sufficient; as in this case, if the jury had simply found for the plaintiff, and found the value of the property, etc., it would have been sufficient; for the finding for the plaintiff would have been, substantially, finding property in the plaintiff, and the unlawful detention of it by the defendant; but as it is, it is wholly defective. The judgment should have been arrested. Judgment reversed.

See "Detinue," Century Dig. §§ 4-11, 44; Decennial and Am. Dig. Key No. Series §§ 3-6, 24.

BRILEY v. CHERRY, 13 N. C. 2. 1828.

Effect of Judgment in Detinue and Trover upon the Title to the Subject-matter.

[Detinue for a slave. Verdict and judgment against plaintiff, and he appealed. Affirmed.]

Defendant pleaded title in himself under an execution sale against Jackson. The plaintiffs claimed under a judgment in their favor in an action of detinue against Jackson, and showed that defendant purchased during the pendency of that action. The judge charged that the fact that defendant bought pending that action did not affect his title.]

HENDERSON, J. A verdict and judgment in an action of detinue are conclusive as to the title between the parties and their privies. And I think that the action of detinue is an affirmation of a continuing title to the thing detained, and that the plaintiff does not, as he does in an action of trover, disaffirm a continuance of title in himself, but may sustain an action for the same chattel against a third person, or even against the same party, although he may have obtained judgment for it before, provided that judgment has not been satisfied; and I am at a loss to understand the case of *Wethers v. Wethers*, cited at the bar, where the executor of a former plaintiff brought an action of detinue against the executor of a former defendant, in which the plaintiff had recovered the same slave, and offered that verdict and judgment as evidence of title, which was rejected; because, as is said by the court, it was not declared on. I think that it was evidence of title as much as a bill of sale. And a plaintiff in such case, and in fact in every other, declares not upon the evidence, but upon the fact. Privies in estate are those who come in under the owner, and the estate stands burthened in their hands with those incumbrances created by him before he parted with it. Therefore, if a suit was pending against him for the property when he parted with it, in which there afterwards was a judgment, that judgment relates to the commencement of the suit, and binds subsequent purchasers.

But one who comes in under a sheriff's sale at execution can-

not be called a privy, for he is not only clothed with the title of the defendant in the execution, but also with the rights of the creditor, which may be paramount to those of the debtor quoad the thing sold. It is to his rights also that such purchaser succeeds, and therefore he is not privy in estate to the former owner. The verdict and judgment in this case, therefore, are not evidence against the defendant. Judgment affirmed.

See "Execution," Century Dig. § 826; Decennial and Am. Dig. Key No. Series § 288; "Lis Pendens," Century Dig. § 51; Decennial and Am. Dig. Key No. Series § 25.

BETHEA v. McLENNON, 23 N. C. 523, 530-533, 534. 1841.

Detinue. Destruction of the Subject-matter, by Act of God. Pendente Lite. Detinue and Trover Distinguished. When Optional with Plaintiff to Bring Detinue or Trover.

[Detinue for sundry slaves. One of the slaves died pendente lite, and that fact was pleaded puis darrein continuance. Whether this was a good defense was, by agreement, submitted to the supreme court, along with certain errors assigned in an appeal. Plea sustained.]

GASTON, J. . . . We see no sufficient reason why the death or destruction of the goods demanded may not be pleaded to so much of the action as demands the goods, if in law such destruction is an answer to that claim. Upon principle, it seems to us that a destruction by the act of God is in law an answer thereto. The action of detinue affirms a continuing property in the plaintiff in the goods demanded, and alleges the wrong to consist in withholding from the plaintiff the possession thereof. When the goods cease to be, the property of the plaintiff therein ceases. He has no right to their possession; and upon this appearing, the law would be absurd in awarding that therefore the plaintiff do recover the said goods, or the said sum for the value thereof if they may not be had. The act of God does injury to no man. When a thing ceases to be, because of a dispensation of Providence, there may be loss, but there is no injury; and this loss falls upon the owner of the property. We know of no instance where the law interferes to throw the loss from him upon others, where it is not attributable to culpable act or negligence. Then it is not a mere loss, but an injury; and the wrongdoer is justly answerable for it.

There is a marked distinction between the action of detinue and that of trover, though, in many cases, it is at the option of the plaintiff to bring which he will. The former asserts a continuing property in the plaintiff, and alleges the wrong to consist wholly in the withholding of the possession of his goods from him by his bailee; while the latter affirms that although they were once the proper goods of the plaintiff, they have been made the goods of the defendant, and complains of the injury caused by this conversion. If, after being thus converted the goods perish by unavoidable accident, the loss falls upon the defendant, who has made them

his, and this misfortune shall not exonerate him from answering for the wrongful conversion. If not converted, but remaining in the hands of a bailee, they there perish, the loss is the misfortune of the owner, and the bailee is answerable for the wrong detention.

In asserting the value of the goods, in an action of detinue, the jury is to find the *present* value. This is manifest from the form of the writ of inquiry, which issues where there has been a judgment for the plaintiff on *non sum informatus, nil dicit, or demurrer*—from the form of the verdict, where the jury find the value on the trial of an issue, and from the terms of the final judgment. It is required, too, by obvious reasons of propriety. Great alterations may happen in the value of the things demanded, pending the action; and the object of the action (so far as regards the things themselves) is to regain them, such as they are, or, if that may not be done, then their value. If, in the course of a tedious action, a puny slave child has grown up to vigorous manhood, it would be a poor substitute for the slave himself to give the value of what he was, when the action was instituted. If, on the contrary, a vigorous, healthy slave has been rendered valueless by sickness and decrepitude, it would be unconscientious to set upon him more than a nominal value. How ought the slave to be valued that is no more? If he were on the brink of the grave at the time of the trial, the jury would discharge their duty by valuing him at five cents; but if it is shown that, before the trial, he had fallen into the grave, is he to be paid for as of full health and vigor? Is there not an absurdity in affixing any value to what is judicially ascertained not to exist?

Certainly when a man detains, without just cause, the goods of another, he ought to be answerable to the full extent of the injury thereby inflicted. And so he is rendered through a judgment of damages for the wrong, if the wrong be one of detention merely. But if the injury is not only a wrong of detention, but of conversion, let him then pay also the value of the property converted. Where the owner, by reason of such detention, has been deprived finally of the thing detained, as by voluntary destruction or through culpable negligence of the bailee, it is not very material in what *form* the plaintiff gets his recompense; but he is not wholly compensated, unless he obtains both its use while detained and its value. But when such *injury* has not been inflicted, he is compensated by being paid for the wrong of which alone he can complain. It is not undeserving of consideration, also, that in many cases actions of detinue are brought to try some of the most difficult questions of title to slaves, and when both parties are equally conscientious in asserting a claim thereto. If, in all cases, the holder is not only to be liable, in the event of failure, for hire, while they are in his possession, but also to be insurer of their lives, we drive him to the often inhuman alternative of making the most of them by sale, instead of keeping them to abide the fair result of the contest. In this case, it would be manifestly unjust, because of a mere mistake of title, to make him responsible for an act of Providence.

which no prudence could avert, and which would probably have occurred had the possession been with his adversary. It is enough that using the property humanely and prudently, he account for the use of it while in his possession, and deliver it up, if it exist, when the controversy is decided against him. It would have been a great relief to us could we have found any authorities in point, to guide us in this inquiry. But it is extraordinary how little is to be found in the law books bearing directly upon this subject. The action of detinue, by reason that wager of law was permitted in it, has almost become obsolete in England—though very recently there are indications of a disposition to revive it. . . .

After much consideration, our opinion is, that the defendant may be permitted to plead in an action of detinue, as a plea since the last continuance, the death of a slave named in the declaration; and upon such plea being found true, there is to be no assessment of the value of the said slave in the verdict, and the plaintiff shall have judgment for damages only because of the detention; that when such death has happened while the slave was in the defendant's possession, and without his fault, the jury should be instructed not to include any part of the value of the slave in the estimate of damages; but if it has happened because of ill-treatment, or culpable neglect, or after a disposition of the slave by the defendant, that they be instructed that they may include the value in such estimate; and it is further our opinion, that to prevent surprise, evidence ought not to be received of the alleged death, unless the matter be specially pleaded as aforesaid. The plea may be received, if properly verified, at any moment before the verdict is rendered. 1 Chit. Pl. 698. But notwithstanding the opinion which we entertain on this question, for the reasons heretofore mentioned, the judgment of the superior court must be affirmed with costs.

See "Detinue." Century Dig. §§ 28, 29; Decennial and Am. Dig. Key No. Series § 17.

HOLMES v. GODWIN, 69 N. C. 467, 472. 1873.

Detinue and Claim and Delivery the Same. General Practice. Form of Judgment. Damages. Return of Subject-matter.

[Claim and Delivery for corn in a crib. Verdict and judgment against the plaintiff, and he appealed. Reversed.]

Plaintiff claimed the corn as rent due to his intestate. The corn was taken under the fiat of the clerk in the ancillary proceeding of claim and delivery. The defendant set up as a counterclaim that the corn so seized was in his possession as bailee, and hence was wrongfully taken from him by the plaintiff. He also denied that any rent was due to plaintiff's intestate. The jury found for the defendant and fixed the quantity and value of the corn seized.]

REIDMAN, J. We now take up the main exception of the plaintiff, viz: That the jury, under the instructions of the court, assessed the value of the property at the time it was taken into

possession by the plaintiff, and not at the time of the trial. We think the judge erred in this respect.

Replevin and the action of claim and delivery is but a longer name for the same thing; is founded on the right of the plaintiff to the possession of the property. If the defendant also claims the possession, the main issue is on that right, and the party establishing it will have judgment to retain or to be restored to the possession, as the case may be. To avoid confusion, we will confine ourselves to a case like the present, where the plaintiff obtained the possession, but failed to establish his right to it. In such case it was the right of the defendant to have judgment for the return of the property in specie, if such return could be had, or if it could not be, then for the value of the property. And it is equally the right of the plaintiff to return the property in specie, if he can. It follows that the *value must be assessed as at the time of the trial*, for the value is only to stand in lieu of the property, in case it shall turn out that it cannot be returned; and the plaintiff cannot compel the defendant to accept the assessed value if he can return the property in specie; nor can the defendant compel the plaintiff to pay the value, if he offers to return the property. This is so, notwithstanding any deterioration in the article by decay, or external injury, or fall in price, so long as it remains in specie. Probably if it appeared on the trial that the property had been destroyed, so that it could not be returned in specie, the jury would be justified in so finding, and in giving the value of the property at the time of the taking and interest thereon, as damages for the taking and detention. But that was not the case here. But it does not follow that the owner is to accept the property (deteriorated perhaps) in satisfaction of the injury. He is entitled to full indemnity. After finding the value of the property, the jury should proceed to find the damages resulting from the taking and detention—an element of which is the difference in the value between the time of taking and the time of the trial. *Rowley v. Gibbs*, 14 Johns. 385 (that is, provided the value be less at the latter time; if it be greater, the rule would be different; but it is unnecessary to consider that case, except to exclude it from the rule). The jury may, if they think proper, add to this, damages on the basis of interest on the value of the property during the detention, although the calculation need not always be on the basis of interest, and in many cases would not properly be. Judgment reversed, and venire de novo.

It would seem that mental anguish is not an element of damages in an action for the unlawful seizure and detention of pigs and yearlings. *Chappell v. Ellis*, 123 N. C. 259, 31 S. E. 709. See "Replevin," *Century Dig.* § 405; *Decennial and Am. Dig. Key No. Series* § 103.

WILSON v. HUGHES, 94 N. C. 182. 1886.*Claim and Delivery Under the Code Practice. Counterclaim.*

[Action to recover possession of a horse. The defendant admitted the title to the horse to be in the plaintiff, but denied the unlawful possession and holding thereof by defendant, and set up as a counterclaim damages arising from alleged fraud and deceit practiced upon defendant by the plaintiff in the sale of the horse in controversy to the defendant. Plaintiff held a mortgage on the horse for the balance of the purchase money. Several questions arose in the case, but only a portion of the opinion is here inserted to show the nature of claim and delivery proceedings.]

MERRIMON, J. We observe that this is called an "action of claim and delivery." Properly and strictly speaking, there is no such action. The action commonly so called is an action to recover the possession of personal property—some specific chattel—and is of the nature of the action of detinue under the common law method of procedure. "Claim and delivery of personal property" is a provisional remedy, incident and ancillary, but not essential to the action. The object of such incidental provision is to enable the plaintiff, upon giving an undertaking in double the value of the property in question, with approved security, as required by the statute, to obtain the immediate possession of the same, unless the defendant shall give a similar undertaking and security for its delivery to the plaintiff, if it shall be so adjudged, and for the payment of such costs as may be adjudged against him in the action. Thus the property, or the value of it, is made secure pending the action, in such way as to answer the purpose of the final judgment. This provisional remedy is peculiar to the Code method of procedure, and gives the action something of the nature of the action of replevin at the common law. "Claim and delivery" of the property may be omitted, and the action may be simply to recover the possession of the specific chattel, as in detinue, or to recover the value of the property, as in trover or trespass. In any case, it is incident to an action, and provisional only. The Code, §§ 321–323; *Jarman v. Ward*, 67 N. C. 32; *Alsbrook v. Shields*, *Ibid.* 333; *Hopper v. Miller*, 76 N. C. 402.

The court very properly refused to give judgment for the plaintiff upon the pleadings, because, while the defendant in his answer admitted the allegations of the complaint, except so much thereof as alleged the unlawful possession and detention of the property in controversy, he alleged a counterclaim, and the plaintiff's reply to the same raised issues of fact to be tried by a jury. The defendant alleged in his counterclaim that the plaintiff, for the consideration specified, sold and delivered to the defendant, some time before the bringing of the action, a mare, the subject of the action, representing her to be sound in all respects, and giving his warranty to that effect; that afterwards he discovered that the mare was very unsound and of little value, and this the plaintiff well knew at the time he made the false and fraudulent represen-

rations of soundness to the defendant; and that he was thereby greatly damaged, etc. This alleged claim, if well founded, existed in favor of the defendant and against the plaintiffs, and there might be a several judgment as between them in respect thereto. It arose out of the transaction set forth in the complaint, as the foundation of the plaintiff's claim, and was connected with the subject of the action. It might well be pleaded as a counterclaim. The Code, § 244; *Bitting v. Thaxton*, 72 N. C. 54; *Walsh v. Hall*, 66 N. C. 233; *Hurst v. Everett*, 91 N. C. 399. . . . Reversed.

See "Replevin," Century Dig. § 106; Decennial and Am. Dig. Key No. Series § 12.

WEBB v. TAYLOR, 80 N. C. 305. 1879.

Detinue and Claim and Delivery Under the Code Practice.

[Action to recover possession of a mule. Demurrer by defendant. Demurrer overruled, and defendant appealed. The facts appear in beginning of the opinion.]

SMITH, C. J. This action is brought under C. C. P., Title IX, ch. 2, §§ 176-187, to recover possession of a mule. The complaint alleges the taking of the mule from the plaintiff by the defendant Taylor, his subsequent selling to the defendant Haysty, and the possession of the latter. The defendant Taylor demurs to the complaint, for that it does not show possession in him; and his co-defendant answers. On the hearing of the demurrer it was overruled and Taylor appeals. We think there is error in the ruling of the court, and that upon the pleadings unamended the demurrer ought to have been sustained.

The gist of the action is the wrongful withholding of the plaintiff's property, and the remedy sought, its restoration to the owner with damages for the detention. It resembles, and under the new system is substantially a substitute for, the forms of detinue and replevin in use under the old system of practice, and affords the same measure of relief. Possession must be averred and shown to be in the defendant, or that he retains such control over the property, if in the hands of his bailee or agent, that it can be surrendered to the plaintiff if the court shall so adjudge. The authorities cited in the argument for the appellant clearly establish this proposition. *Jones v. Green*, 20 N. C. 488; *Charles v. Elliott*, 20 N. C. 606; *Foscoe v. Eubank*, 32 N. C. 424.

In *Slade v. Washburn*, 24 N. C. 414, it was held that a joint action of detinue would not lie against two persons who took certain slaves from the plaintiff at one and the same time, one defendant being in possession of a part of the slaves, and the other defendant being in possession of the other slaves; though an action of trespass could be maintained against both. The same principle is applied to the action prescribed in the Code in *Haughton v. Newberry*, 69 N. C. 456. In that case the plaintiff sued to recover a boat which the defendant had sold to another person before the action was commenced, and it was decided that as the boat was not in the

possession nor under the control of the defendant, the plaintiff could not recover in this form of proceeding. In delivering the opinion of the court, Pearson, C. J., says: "In face of the fact that the defendant did not have possession at the time of the commencement of the action, as a matter of course the plaintiff was not entitled to the judgment demanded in the complaint;" and he adds, "that instead of demanding judgment for the recovery of the possession of the boat he ought to have demanded judgment for the value of the boat, by way of damages, as in an action of trover, and thereupon asked leave to amend the complaint so as to conform it to the proof, which would have been allowed without costs as the defendant could not have been misled by the misprision. C. C. P. §§ 128, 129, 132. But instead of this he takes an appeal for the supposed error in ruling that, as the pleading then stood, the plaintiff could not recover."

Not only does the plaintiff here fail to allege any separate possession in the appellant or any common possession in both defendants, but his complaint shows that the appellant had sold the mule to the other defendant and had no control over him. Upon these allegations the plaintiff could not maintain his action against the appellant alone, nor with any more reason against him, when associated in the action with one who may be liable. His defense is several and equally available in either case. The judgment must be reversed.

See *Jarman v. Ward*, 67 N. C. 32, inserted at ch. 11, sec. 2, post. That claim and delivery is an ancillary remedy and not the principal action nor an essential to the action of detinue, see *Wilson v. Hughes*, 94 N. C. 182, next preceding, and *Hargrove v. Harris*, 116 N. C. 418, 21 S. E. 916, which says, "there is no such thing as an action for claim and delivery."

After obtaining possession of the subject-matter of the action by the ancillary proceeding of claim and delivery, the plaintiff will not be permitted to take a nonsuit and retain the property. Should he abandon his action, the defendant will be awarded a writ of restitution along with other relief which will be afforded him. *Manix v. Howard*, 82 N. C. 125. Detinue and claim and delivery lie against a sheriff who seizes the property of one not the defendant in execution. *Smithdeal v. Wilkerson*, 100 N. C. 52, 6 S. E. 71. The venue in detinue and claim and delivery is regulated by *Revisal*, sec. 419, (4), which differs from the statute in force when *Smithdeal v. Wilkerson*, supra, was decided. *Brown v. Cogdell*, 136 N. C. 32, 48 S. E. 515; see *Pell's notes to Revisal*, sec. 419, (4). For *Replevin*, *Detinue*, and *Claim and Delivery*, in sundry instances, see 1 L. R. A. (N. S.) 474, 6 Ib. 556, and notes (against purchaser of goods with fraudulent intent not to pay for them, etc.; same point, *Wilson v. White*, 80 N. C. 280, *McIntosh Cont.* 297, and note); 8 Ib. 448, 10 Ib. 810, and notes (against fraudulent purchaser's vendee); 17 Ib. 1032, and note (against fraudulent purchaser's assignee in bankruptcy); 13 Ib. 413, and note (for chattels sold under mistake as to purchaser's identity; same, *Newberry v. R. R.* 133 N. C. 45, *McIntosh Cont.* 268); 11 Ib. 948, and note (for chattels sold upon cash terms—effect of delay in bringing such action); 3 Ib. 138, and note (for a promissory note); 20 Ib. 597, and note (for title deeds to land; same point, *Pastersfield v. Sawyer*, 132 N. C. 258, and 133 N. C. 42); 23 Ib. 144, and note (bringing action for the price as waiver of the right of vendor in conditional sale to recover the property in specie). See "*Replevin*," *Century Dig.* §§ 69-82, *Decennial and Ann. Dig. Key No. Series* § 9.

DUKE OF SOMERSET V. COOKSON, 3 Peere Williams, 390. 1735.

Remedy in Equity for the Recovery of Chattels.

The Duke of Somerset, as lord of the manor of Corbridge, in Northumberland, was entitled to an altar piece made of silver, remarkable for a Greek inscription and dedication to Hercules. His grace became entitled to it as treasure trove within his said manor. This altar piece had been sold by one who had got the possession of it, to the defendant, a goldsmith at Newcastle, but who had notice of the duke's claim thereto. The duke brought a bill in equity to compel the delivery of this altar piece in specie, undefaced.

The defendant demurred as to part of the bill, for that the plaintiff had his remedy at law, by an action of trover or detinue, and ought not to bring his bill in equity; that it was true, for writings savouring of the realty a bill would lie, but not for anything merely personal, any more than it would for a horse or a cow. So, a bill might lie for an heirloom, as in the case of *Pusey v. Pusey*, 1 Vern. 273. And though in trover the plaintiff could have only damages, yet in detinue the thing itself, if it can be found, is to be recovered; and if such bills as the present were allowed, half the actions of trover would be turned into bills in chancery.

On the other side it was urged, that the thing here sued for, was a matter of curiosity and antiquity; and though at law, only the intrinsic value is to be recovered, yet it would be very hard that one who comes by such a piece of antiquity by wrong, or it may be as a trespasser, should have it in his power to keep the thing, paying only the intrinsic value of it; which is like a trespasser's forcing the right owner to part with a curiosity, or matter of antiquity, or ornament, *volens volens*. Besides, the bill is to prevent the defendant from defacing the altar piece, which is one way of depreciating it; and the defacing may be with an intention that it may not be known, by taking out, or erasing some of the marks or figures of it; and though the answer had denied the defacing of the altar piece, yet such answer could not help the demurrer; that in itself nothing can be more reasonable than that the man who by wrong detains my property, should be compelled to restore it to me again in specie; and the law being defective in this particular, such defect is properly supplied in equity.

Wherefore it was prayed that the demurrer might be overruled, and it was overruled accordingly. [Talbot, Ld. Ch.]

"With respect to other chattel property, justice may be done at law by damages, and therefore equity will not interpose: but for a faithful or family slave, endeared by a long course of service or early association, no damages can compensate—for there is no standard by which the price of affection can be adjusted, and no scale to graduate the feelings of the heart." Taylor, C. J., in *Williams v. Howard*, 7 N. C. at p. 80. The principal case and *Williams v. Howard* are referred to with approval in *Paddock v. Davenport*, 107 N. C. at p. 716, 12 S. E. 465. For further information on the question decided by the principal case, see 6 Pom. Eq. Jurisp. (Eq. Rem. vol. 2), p. 1263, sec. 748, notes and cross references.

The Pusey horn case mentioned in *Paddock v. Davenport*, is *Pusey v. Pusey*, 1 Vern. 273. That slaves came within the rule, see cases in 6 Pom. Eq. Jur. at p. 1264, note. For the rule in equity as to chattels generally, see Pom. Spec. Perf. Cont. secs. 11-15, and notes; 26 Am. & Eng. Enc. L. 103; 16 Cyc. 49. See "Equity," Century Dig. § 39; Decennial and Am. Dig. Key No. Series § 17.

SEC. 2. TROVER.

OLIVANT v. BERINO, 1 Wilson, 23. 1743.

The Relief Afforded in Trover.

In trover for some pictures, it was moved that plaintiff should be obliged to take the pictures and costs, upon an affidavit that they are all the goods that the defendant has of the plaintiff's, and that not denied; but *per curiam*, this action is for damages, and you cannot oblige the plaintiff to accept the thing itself. (In *Buxton and Gabell*, Trin. 9 Geo. 1, trover for a ring; and Pas. 9 or 10 Geo. 2, in trover for goods, this court refused the like motion.)

The ruling in the principal case applies to actions in the nature of trover under the Code practice. *Stephens v. Koonce*, 103 N. C. 266, 9 S. E. 315. See "Trover and Conversion," Century Dig. § 309; Decennial and Am. Dig. Key No. Series § 69.

BOYCE v. WILLIAMS, 84 N. C. 275. 1881.

Trover and Trespass Distinguished. Who May Maintain Trover. Title of Plaintiff. Title in Third Person as a Defense.

[Action to recover the value of cattle taken by defendant from the plaintiff and converted to defendant's use. Verdict and judgment against defendant, and he appealed. Reversed.]

The defendant justified taking the cattle by putting in evidence a mortgage to Harper Williams from plaintiff's father, executed while such mortgagor owned the cattle. The validity of the mortgage was denied by the plaintiff. The court charged that, even if the mortgage were valid, the defendant was not justified in taking the cattle, because he showed no authority from the mortgagee, Harper Williams, so to do, nor did he show any right in himself.]

SMITH, C. J. . . . The action is for property taken and converted to the defendant's use, and not for damages for an invasion of the plaintiff's possessory right, and under the former practice would in form be trover instead of trespass. The action of trespass is for an injury to the possession, and compensation in damages is recovered against a wrong doer, commensurate with the injury sustained. In either form of action, possession of personal goods, being presumptive evidence of title, when not rebutted, entitles the plaintiff to recover in damages their full value. But when the action is for the conversion, or appropriation of the

goods to the defendant's own use, it is a full defense to show that the goods belong to another person, and the plaintiff has no interest in them, although no privity be shown to exist between such owner and the defendant. This doctrine is settled by two adjudications in this state, to which alone we deem it necessary to refer.

In *Laspeyre v. McFarland*, 4 N. C. 620, the action was in trover for a slave in possession of the plaintiff. The defendant showed no title in himself, but offered in evidence a marriage settlement entered into between the plaintiff and his wife and one Davis whereby the slave was conveyed to the latter, as trustee to permit the wife to have the labor and profits of the slave and to allow the slave to be under plaintiff's control. In the superior court upon these facts appearing the plaintiff was nonsuited. In this court, on the hearing of the appeal, Ruffin, J., thus declares the law, in sustaining the judgment below: "It is one of the characteristic distinctions between this action and trespass that the latter may be maintained on possession; the former only on property and the right of possession. Trover is to personals what ejectment is to the realty. In both, title is indispensable. It is true that as possession is the strongest evidence of the ownership, property may be presumed from possession. And therefore the plaintiff may not in all cases be bound to show a good title by conveyances against all the world, but may recover in trover upon such presumption against a wrong-doer. Yet it is but a presumption and cannot stand when the contrary is shown. Here it is completely rebutted by the deed which shows the title to be in another and not in the plaintiff."

The same point came up in *Barwick v. Barwick*, 33 N. C. 80, and was similarly decided. Pearson, J., after presenting the same views as to the law, proceeds: "But if it appears on the trial that the plaintiff, although in possession, is not in fact the owner, the presumption of title inferred from the possession is rebutted, and it would be manifestly wrong to allow the plaintiff to recover the value of the property. For the real owner may forthwith bring trover against the defendant and force him to pay the value a second time, and the fact that he had paid it in a former suit would be no defense." He adds, that trover can never be maintained unless a satisfaction of the judgment will have the effect of vesting a good title in the defendant, except when the property is restored and the conversion was temporary. Accordingly it is well settled as the law of this state that *to maintain trover the plaintiff must show title and a possession, or a present right of possession.*"

Error.

For a good explanation of trover, see 99 Pac. 1089, 23 L. R. A. (N. S.) 573.

In *Russell v. Hill*, 125 N. C. at p. 472, 34 S. E. 640, in passing upon a question somewhat similar to that presented in the principal case, the court say: "The present action is in the nature of the old action of trover, and before the plaintiff could recover in an action of that nature he had to show both title and possession or the right of possession." It is one of the characteristic distinctions between trover and trespass that *tres-*

pass may be maintained on possession; trover only on property and the right of possession. Trover is to personalty what ejectment is to realty. *In both title is indispensable.* Property may be presumed from possession and a plaintiff may recover in trover on such presumption without proving his title against all the world; yet such presumption may be rebutted and, if rebutted, the plaintiff's action fails. If title be shown to be in a third person, the plaintiff fails in his action notwithstanding his possession. *Ibid.* The gist of the action of trover being the conversion, that remedy can be pursued by that person only who, at the time of the conversion, not only had a general or special property in the thing converted, but who had also at that time the possession or right of possession. If the plaintiff had such title, possession or right of possession at the time of the conversion, his transfer of his title to the property converted—such transfer being made prior to the commencement of the action—will not defeat a recovery in trover. *Hamilton v. Overton*, 6 Blackford, 206. Any bona fide possession will sustain the action against a mere wrong-doer. *Coffin v. Anderson*, 4 Blackford, at p. 410. One cotenant may maintain trover against another, where the defendant does acts amounting to a denial of the plaintiff's rights, or inconsistent therewith. *Waller v. Bowling*, 108 N. C. 289, 12 S. E. 990. Under the Code practice either claim and delivery or an action in the nature of trover may be prosecuted, at the plaintiff's election, in some instances. *Alsbrook v. Shields*, 67 N. C. at p. 337.

In connection with the principal case attention is called to the following language in *Coffin v. Anderson*, 4 Blackford, at p. 410: "Where the plaintiff in trover has a title founded simply on a bona fide possession, the defendant cannot defend himself by showing that a third person, between whom and himself there is no connection, has a better title than the plaintiff. The question involved in this instruction is not without difficulty. The defendant has referred us to two cases in which a different opinion is expressed from that contained in this instruction. These cases are, *Schermerhorn v. Van Volkenburgh*, 11 Johns. 529, and *Tanner v. Allison*, 3 Dana, 422. But there are highly respectable authorities on the other side of the question. The instruction is expressly sustained by the opinion of Sergeant Williams in his learned note to the case of *Wilbraham v. Snow*, 2 Saund. 47, and the several authorities which he there relies on in support of that opinion. It is also directly supported by the opinion of Mr. Chitty in the first volume of his *Treatise on Pleading*, 6 Lond. ed. 173. This instruction is also in accordance with the opinion of Chief Justice Parsons, delivered in the case of *Waterman v. Robinson*, 5 Mass. 303." Compare *Barwick v. Barwick*, 33 N. C. 80, inserted post in this section.

"In an action of trover or detinue the plaintiff must allege and show title, and it is open to the defendant, upon a denial of the plaintiff's title, to show that the property belonged to a third person, without setting up in his answer the outstanding title." Admitting possession in the plaintiff at the time of the taking raises a presumption of title in the plaintiff which the defendant has the burden of rebutting. *Vinson v. Knight*, 137 N. C. 408, headnotes, 49 S. E. 891.

See 10 L. R. A. (N. S.) 458, and note (trover for chattels sold under conditional sale and affixed to realty owned by a third person); 20 *ib.* 35, and note (for money collected by an agent or attorney). See "Trover and Conversion," *Century Dig.* §§ 163-166; *Decennial and Am. Dig.* Key No. Series § 23.

SIMMONS v. SIKES, 21 N. C. 98. 1844.

Proving the Conversion. When Trover and When Trespass on the Case Lies for Destruction, etc., of Bailed Chattels.

[Trover for a canoe which defendant had borrowed. No demand by plaintiff and refusal by defendant was shown. Verdict and judgment against defendant, and he appealed. Affirmed.]

While the canoe was in the possession of the defendant it was destroyed by the act of God, or by some tort-feasor, or by the defendant. The defendant insisted that there having been no demand and refusal of the return of the canoe, he could not be held liable in trover unless it were shown that he destroyed the canoe. The court charged that, if defendant destroyed the canoe, he was liable; and that the fact proven, that the canoe was found beached and broken up, was some evidence that the defendant had destroyed it—the weight of such evidence being entirely with the jury.]

DANIEL, J. This action is trover. If there be a deprivation of property to the plaintiff, it will constitute a conversion, though there be no acquisition of property to the defendant. *Keyworth v. Hill*, 3 B. & A. 687. If the property had been lost by the bailee, or stolen from him, or had been destroyed by accident or from negligence, this action could not have been sustained, but case would have been the proper remedy. 2 Saund. Rep. 47; *Packard v. Getman*, 4 Wend. 613; *Ross v. Johnston*, 5 Bur. 2285. To sustain this action of trover, the defendant must have been proven to have been an actor and to have made an injurious conversion, or done an actual wrong. Saik. 655; *Peake's Rep.* 49. The judge informed the jury, that, if they were satisfied from the evidence that the defendant had actually destroyed the canoe, they might find for the plaintiff. The defendant, however, insisted that there was no evidence that he was an agent in the destruction of the property, and that, without some evidence upon this point, the judge should charge the jury to find for the defendant. The judge said there was some evidence of a conversion, the weight of which was left entirely with the jury. It seems to us that there was some evidence from which the jury might infer that the defendant was an agent in the destruction of the property. The defendant had placed the canoe in the dock of the witness, which was a place of safety, and a short time afterwards it was missing, and in two months it was found broken up on the beach. It is not pretended that the canoe was removed from the dock by the winds—no presumption arises that the bailor removed it—the bailee had a right to remove it; and, in the absence of all other proof, the jury might presume that he, who had a right to remove, did remove the canoe, and, the canoe being afterwards found broken up, the jury might presume, in the absence of other evidence, that it was broken up by the agency of him, who had the control and management of the property. The judgment must be affirmed.

See "Trover and Conversion," *Century Dig.* § 99; *Decennial and Am. Dig.* Key No. Series § 12.

GLOVER v. RIDDICK, 33 N. C. 582. 1850.

What Amounts to a Conversion.

[Trover for the conversion of two slaves. Verdict and judgment against defendant. Both parties appealed. Reversed.]

In 1843, plaintiff purchased two runaway slaves, who were at large at the time of such purchase. These slaves appeared in defendant's neighborhood in 1846-7, and passed for freemen. They exhibited certain papers which would indicate that they were free. Defendant being informed of these facts by reputable persons, gave these slaves certificates to the effect that they were free. The judge charged that the giving of these certificates amounted to a conversion of the slaves. This charge is held to be erroneous. The other points in the case are of minor importance.]

NASH, J. None of the acts of the defendant, which are stated in the case, taken separately or together, amount in law to a conversion. A conversion, to subject a defendant in an action of trover, consists either in an *appropriation* of the thing to the party's own use and beneficial enjoyment, or in its *destruction*, or in *exercising dominion over it in exclusion or defiance of the plaintiff's right*, or in *withholding the possession from the plaintiff under a claim of title inconsistent with his own*. Such is Mr. Greenleaf's summary of the acts of a defendant to constitute a conversion in the sense of the law of trover. 2 vol. Ev. § 642. Which one of these acts, it may be asked, has this defendant been guilty of? The defendant is a merchant; and in 1846 and 1847 the negroes in question first appeared in his neighborhood, claiming and acting as freemen. They remained in that neighborhood until the 8th of November, 1849, and during that time worked for different persons openly. They purchased goods out of defendant's store in 1846 and 1847, and settled and paid the account of the first year, and exhibited to various persons free papers, as they are called. On the 8th of November, 1847, they requested the defendant to give them a certificate that they were free, alleging that they had left their free papers at a house some distance off. The defendant called on his clerk and a Mr. Everitt, who was in the store, and for whom they had worked, to state what they knew of their being free. They both stated that the negroes had passed as free ever since they had been in the neighborhood, and that they had seen their free papers with the county seal appended. The defendant then gave them the certificate set forth in the case, in which he certifies they are free. This is the only act upon which the plaintiff relies to prove a conversion. Admit it was a wrongful act, yet it is not every tortious act affecting the property of another, that amounts to a conversion; thus, cutting down his trees, without taking them away, is no conversion. *Myers v. Solebay*, 2 Mod. 245. The giving of the certificate was certainly a very indiscreet act, to say the least of it, but it is no evidence of an act of ownership on the part of the defendant—it expressly disclaims it. His honor, however, ruled that the giving the paper writing by the defendant

was the exercise of such dominion over the slaves as amounted to a conversion. In this opinion we think there is error. . . .

See 23 L. R. A. (N. S.) 573, and note. See "Trover and Conversion," Century Dig. § 59, Decennial and Am. Dig. Key No. Series § 12.

BARWICK v. BARWICK, 33 N. C. 80. 1850.

Effect of Judgment in Trover on the Title to the Subject-matter. Measure of Damages. Gist of the Action. Title That Will Sustain Trover.

[Trover for slaves. Verdict and judgment against defendant, and he appealed. Reversed.]

Certain slaves were owned by Sarah Sutton for life with remainder to her four daughters, one of whom was the wife of the defendant. The defendant and his wife sold their interest in the slaves to the plaintiff who took four of them into his possession. Afterwards the defendant sold two of these which the plaintiff had in his possession to his co-defendant, who took them away from the plaintiff and carried them out of the state. The plaintiff brought this action of trover for the two slaves thus taken away. The defendants insisted that the plaintiff did not have, and could not have, a title and right of possession, although he did have the *actual possession* of the slaves, *because the life tenant was still living*. The judge charged that *if plaintiff was in possession of the slaves when the defendants took them away, he could recover their value from the defendants, because they were wrong-doers who had no title.*]

PEARSON, J. . . . The defendants excepted to the charge of his Honor, and we think the exception well founded.

The bare possession is sufficient to maintain an action of trespass against a wrong-doer, for the gist of that action is an injury to the possession, and the measure of damages is not the value of the property, but the injury done to the plaintiff by having his possession disturbed. In trover, the injury done by the wrongful taking is waived, and the plaintiff supposes he has lost his property; and he alleges that the defendant found it and wrongfully converted it to his own use. So the gist of the action is, not that the defendant having found the property took it into his possession but that, after doing so, he wrongfully converted it to his own use, and the measure of damage is the value of the property.

It is true, that when nothing appears but the fact that the defendant took the property out of the possession of the plaintiff and converted it to his own use, trover will lie. For the possession of personal property is *prima facie* evidence of title, and, in the absence of any proof to rebut this presumption, the person in possession is taken to be the owner and can recover the full value. But, if it appears on the trial, that the plaintiff, although in possession, is not in fact the owner, and that the property belongs to a third person, the presumption of title, inferred from the possession, is rebutted; and it would be manifestly wrong to allow the plaintiff to recover the value of the property: for the real owner may forthwith bring trover against the defendant, and force him to pay the value a second time, and the fact that he had paid it in

a former suit would be no defense. When trover is brought and the defendant satisfies the judgment, he pays the value of the property, and the title is vested in him by a judicial transfer, because he has paid the price. Consequently, trover can never be maintained, unless a satisfaction of the judgment will have the effect of vesting a good title in the defendant, except when the property is restored, and the conversion was temporary. Accordingly, it is well settled as the law of this state, that to maintain trover, the plaintiff must show title and a possession, or a present right of possession. *Hostler's Admrs. v. Scull*, 3 N. C. 139; 4 N. C. 585; *Laspeyre v. McFarland*, 4 N. C. 620; *Andrews v. Shaw*, 14 N. C. 70.

There are cases in the English books, and in the reports of some of our sister states, to the contrary; but we must be allowed to say, that the doctrine of our courts is fully sustained by the reason of the thing, and is most consonant with the peculiar principles of this action. The cases differing from our decision are all based upon a misapprehension of the principle laid down in the leading case, *Delimere v. Armory*. In that case the jewel was lost, and was found by the plaintiff, a chimney sweeper. He had a right to take it into possession, and became the owner by the title of occupancy, except in the event of the true owner becoming known. The former owner of the jewel was not known, and it was properly decided that the finder might maintain trover against the defendant to whom he handed it for inspection, and who refused to restore it. But the result of that case would have been very different, if the owner had been known. The defendant could then have said to the plaintiff, you have no right to make me pay you the value, when I must forthwith deliver up the property to the owner, or else pay him the value a second time.

The distinction between that case, when the possessor was the only known owner, and the ordinary case of one who himself has the possession wrongfully and sues another wrong-doer for interfering with his possession—the true owner being known and standing by ready to sue for the property—is as clear as daylight. In this case, for instance, as the facts appeared on the trial, the plaintiff was in the wrongful possession, which was disturbed by the defendant, and for that injury he had a right to recover *in trespass*. But Sarah Sutton was known as the true owner, and had a right to demand her property of the defendants, or else to recover its value, and they could not protect themselves by showing that they had paid the full value to the plaintiff, under the coercion of a judgment and execution. This result would seem, by the reduction ad absurdum, to show that the inference from the case of *Delimere v. Armory*, that trover can be maintained against a wrong-doer by one having a naked possession, when the true owner is known, is contrary to good sense. That which is not good sense, is not good law. The judgment must be reversed, and there must be a venire de novo.

What is said in the principal case with regard to the effect of the

judgment in trover, and the necessity of plaintiff's showing title and possession or right of possession, is quoted with approval in *Russell v. Hill*, 125 N. C. at p. 473, 34 S. E. 640, and in *Boyce v. Williams*, 84 N. C. at p. 277, inserted ante in this section. As is said in *Barb v. Fish*, 8 Blackf. 481, at p. 482, "there seems to be much uncertainty and contradiction in the cases reported as to how far or under what circumstances, a judgment in trespass or trover vests the right to the property in the goods in the defendant." In that case, decided in 1847, and in the note thereto, will be found an elaborate discussion of this perplexing and unsettled question. For further light on the subject, see 1 *Gray's Cases* L. P. 11; 28 Am. & Eng. Enc. L. 738; *Miller v. Hyde*, 161 Mass. 472, 37 N. E. 760, 25 L. R. A. 42. In *Cooley on Torts*, p. 537, it is said that the modern rule in England is, that the judgment alone does not vest title in the defendant; but the satisfaction of such judgment does have that effect; and such, he says, is the rule in America according to the weight of authority. To the same effect see *Bish. Non-Cont. L.* § 399. See "Trover and Conversion," *Century Dig.* §§ 119-147, 314; *Decennial and Am. Dig. Key No. Series* §§ 15-17, 70; "Remainders," *Cent. Dig.* § 15.

GREENFIELD BANK v. LEAVITT, 17 Pickering, 1. 1835.

Measure of Damages in Trover. Return of the Property.

[Trover for packages of bank bills which were converted by the defendant and afterwards returned to the plaintiff. Verdict against the defendant, subject to the opinion of the court. Judgment according to the verdict. Upon the question as to what judgment should be rendered on the verdict, the opinion is written.]

It would seem from the reported case, that the packages of money in question had been placed in the charge of the defendant as a bailee of some kind. It does appear that the packages were lost and afterwards returned to the plaintiff by some person, upon its offering and paying a reward therefor. Some of the money was missing from the packages. The judge charged that the plaintiff's damages would be the value of the bank bills when converted—to be diminished by the value of the bills restored—and the amount paid out in rewards, if the jury should find that such amounts were reasonable, with interest. The verdict was in accordance with the instructions, subject to the opinion of the court as to the correctness of the charge.]

PUTNAM, J. The general rule in trover, that the measure of damages is the value of the articles at the time of the conversion, with interest until the time of the verdict, is established in this commonwealth. *Kennedy v. Whitwell*, 4 Pick. 466. We are aware that it has been ruled differently by Abbott, C. J., in *Greening v. Wilkinson*, 1 Car. & P. 625; where he held, that the jury might find the value at any subsequent time. But we adhere to the value at the time, as a rule which works well; and its certainty is quite an equivalent for its occasional want of perfect exactness.

It is also well settled, that if the property for which the action is brought should be returned to and received by the plaintiff, it shall go in mitigation of damages. But if it became subjected to a charge after the conversion and before it was returned; if, for example, the conversion were of a watch, which the defendant threw into a well, and the plaintiff hired a man to descend into the

well and get it, the expense of reclaiming it should be deducted from the value, when returned. It is the charge that regulates the damages, as Thomson, J., said in *Murray v. Burling*, 10 Johns. 176; as where one takes another's horse and leaves him at an inn, and the owner reclaims him, subject to the charge for his keeping. The damages are for the injury suffered, notwithstanding the owner has regained his property. . . . Judgment entered for the plaintiff according to the verdict.

For measure of damages see 18 L. R. A. (N. S.) 250, and briefs and note; see also 18 Ib. 244, and note. See "Trover and Conversion," Century Dig. §§ 263, 277; Decennial and Am. Dig. Key No. Series §§ 46, 58.

WOMBLE v. LEACH, 83 N. C. 84, 86. 1880.

Waiving the Tort in Trover. Jurisdiction in Trover.

[Action in the superior court for damages resulting from the alleged conversion of plaintiff's cotton to defendant's use. Verdict and judgment against defendant, and he appealed. Affirmed.

Only a small part of the opinion is here inserted. In North Carolina a justice of the peace has exclusive jurisdiction of civil actions arising out of contract where the sum demanded does not exceed two hundred dollars, and jurisdiction concurrent with the superior court in actions for damages not exceeding fifty dollars.]

SMITH, C. J. . . . The action is for a tortious taking and withholding of the plaintiff's property, and the damages claimed therefor are for more than fifty dollars, of which the superior court has exclusive jurisdiction. Acts 1876-77, ch. 251. The defendant's counsel argued that, as the value of the property was sought, the obligation of the defendant to account therefor arose out of an implied contract, and under the authority of *Winslow v. Weith*, 66 N. C. 432, was cognizable only before a justice of the peace. This is a misconception of the principle of law recognized and acted on in that case. The rule is this: When one wrongfully takes the personal property of another and sells it, the owner may waive the tort, affirm the contract of sale, and sue for the proceeds as money received to his use, and this would be an action upon an implied contract. . . .

Where property is tortiously converted by a sale made by the wrongdoer, the owner may waive the tortious conversion and sue, upon an implied contract, for money had and received by the defendant. *Brittain v. Payne*, 118 N. C. 989, 24 S. E. 711, inserted at ch. 4, sec. 1. "It has been said that where there has been a conversion by a sale of the property, the plaintiff may maintain trover, or he may dispense with the wrong and suppose the sale made by his consent, and bring an action for the money for which the property was sold, as money received to his use. *Cooley on Torts*, pp. 92, 93; *Murray v. Burling*, 10 Johns. 172. Both of these remedies could not be sought in the same action. *Polner v. Jarman*, 2 M. & W. 282." *Bixel v. Bixel*, 107 Ind. at p. 536. 8 N. E. 611.

If, under the Code practice, the complaint allege merely a conversion

of *property* by an agent, and fails to allege any misappropriation or conversion of the *proceeds*, there can be no recovery except for the conversion of the *property*, and evidence of a misappropriation or conversion of the *proceeds* will not be admitted. *Bixel v. Bixel*, 107 Ind. 534, 8 N. E. 614. After reading this case, the question arises as to whether we may not modify some of the boastings of those who claim that the subtleties and refinements of the ancient race of special pleaders has been abolished by the Code practice. See "Action," Century Dig. §§ 198-203; Decennial and Am. Dig. Key No. Series § 28.

SEC. 3. TRESPASS VI ET ARMIS AND TRESPASS ON THE CASE FOR INJURIES TO PERSONAL PROPERTY.

DODSON v. MOCK, 20 N. C. 282. 1838.

Trespass and Case Distinguished.

[Trespass vi et armis for killing the plaintiff's dog. Verdict and judgment against the defendant, and he appealed. Reversed.]

There was circumstantial evidence to the effect that the defendant had poisoned the dog either by directly administering the poison; or by placing it where the dog would be likely to eat it; or by placing it where the dog happened to get it. The judge charged that if the defendant had killed the dog *by throwing poison to him, or by putting it down where he knew the dog would pass along and get it*, trespass vi et armis would lie, and the action was properly brought; *but if the defendant had put the poison in the crack of a fence and the dog had casually passed by and got it, the defendant was entitled to a verdict, as, in that event, the action should have been Trespass on the Case and not Trespass vi et armis.*]

GASTON, J. . . . In that part of the charge which relates to the form of the action, we do not entirely concur with his Honor. We hold with him that if the poison had been directly administered (and the throwing it down to the dog mixed up with food is a direct administration of the poison), either by the defendant or by any other person under his direction, the action of trespass was the proper remedy. But we do not assent to the position that "if it were put by the defendant in a place where he knew the dog would pass and get at it, and the dog afterwards passed and swallowed the poison, the action of trespass might also be maintained." The distinction between injuries which are the proper subject of an action of trespass and those which are to be redressed by an action on the case—between injuries immediate, and injuries consequential—is sometimes very subtle and attenuated. But the law makes the distinction, and the ministers of the law must follow it out. Acts which are of themselves invasions upon the person or property (in possession) of another, are of the first class, or immediate injuries. Acts which, by reason only of subsequent occurrences, occasion an injury to the person or property of another, which injury was either foreseen or ought to have been guarded against, are the subject of an action by the party grieved, because of this consequent injury, and come under the second class. One

of the most apt as well as ordinary illustrations of the legal distinction is thus stated: If A throw a log in the highway and it hits B, B may maintain *trespass*; but if B come along afterwards and fall over it, and thereby receives an injury, the remedy is *case*. Nor in the instance last put will it make any difference whether at the time the log was thrown, it was or was not known that B was shortly thereafter to pass along and in all probability would stumble over it. There are indeed some instances where, although the injury be immediate, it may be alleged as a consequence of negligence or inattention, and the action on the case be maintained. But we know of none where the injury is entirely an indirect consequence of a previous act, in which it may be complained of as a trespass with force and arms. For this error we feel ourselves obliged to reverse the judgment rendered below and order a venire de novo. Judgment reversed.

See "Action," Century Dig. §§ 236-255; Decennial and Am. Dig. Key No. Series § 30.

WHITE v. GRIFFIN, 49 N. C. 139. 1856.

Trespass and Case Further Distinguished.

[Action of trespass on the case for seizing and detaining a vessel. In deference to an adverse intimation from the judge, the plaintiff submitted to a nonsuit and appealed. Reversed.]

The vessel belonged to Burgess, but the plaintiff had it in his possession, at the time of the defendant's acts, under a charter to make a voyage to the West Indies. The defendant kept the vessel a week and then returned it to the plaintiff who proceeded on his voyage. The vessel was lost and plaintiff sues for its value, on the ground that there was evidence to the effect that the weather was good during the week the vessel was detained from him, and but for defendant's acts he would not have encountered the storm which destroyed the vessel.]

NASH, C. J. We think there is error in the judge's opinion. He doubtless came to his conclusion, from the belief that the plaintiff could not recover the value of his vessel from the defendant, which he certainly could not (though the detention by him might have been the remote cause of the loss of the vessel), and by not advert- ing to the principle, that, for every tortious act committed as to the property of another the perpetrator is answerable to the owner in damages, either in case or in trespass. If the trespass is committed on property while in possession of the owner, "trespass" is the proper remedy; if while in the possession of another as bailee, the owner having but a reversion of the property, the action is "case." This is an action of the latter character—the vessel being in the actual possession of Burgess at the time the act was committed. The vessel was the property of the plaintiff, and by him chartered to Burgess for a trip to the West Indies. She was loaded with staves, the property of a Mr. Williams, and while lying at the wharf at Elizabeth City and ready to start on her voyage, one Banks, a constable, came on board and levied several executions on

the slaves. In one of these executions the present defendant was the plaintiff, and Banks acted by his direction in making the levy. The executions were all against Burgess; the slaves belonged to Williams. The levy was illegal; in consequence of it, the vessel was detained in port six days; and though the plaintiff is not entitled to ask for damages for the loss of the vessel, yet he is entitled, at least, to nominal damages from the defendant, for his illegal detention, by having his execution improperly and illegally levied. *Venire de novo*.

See "Bailment," Century Dig. § 96; Decennial and Am. Dig. Key No. Series § 21.

SCHUER v. VEEDER, 7 Blackford, 342. 1845.

Trespass and Case Further Distinguished.

DEWEY, J. Case for so negligently managing the defendant's boat, that it violently struck and sunk the plaintiff's boat. General demurrer to the declaration sustained; and final judgment for the defendant. The question here raised is, whether a direct and forcible injury to property, not intentional, but the result of carelessness, may be the subject of an action on the case, or whether trespass is the only remedy. There is no doubt that, at common law, trespass will lie for a direct and violent injury, whether inflicted through negligence or intentionally. *Leame v. Bray*, 3 East, 593. And, since the decision of the case of *Williams v. Holland*, case has also been a legal remedy for such an injury if occasioned by carelessness, but not if wilfully done. 10 Bing. 112. See also *Ogle v. Barnes*, 8 T. R. 188; *Blin v. Campbell*, 14 Johns. 432. The demurrer should have been overruled. Judgment reversed.

See "Action," Century Dig. §§ 236-255; Decennial and Am. Dig. Key No. Series § 30; "Action on the Case," Century Dig. § 32; Decennial and Am. Dig. Key No. Series § 1; "Trespass," Century Dig. § 3; Decennial and Am. Dig. Key No. Series § 2.

NEAL v. WILCOX, 49 N. C. 146. 1856.

Case on the Custom, and Special Action on the Case Against an Inn-keeper.

[Action on the case against an inn-keeper for the loss of plaintiff's mule, while plaintiff was stepping at the inn. Verdict and judgment against plaintiff. Affirmed.]

The plaintiff declared on "the custom" against the defendant as an inn-keeper. The plaintiff was a guest, and his business was that of an itinerant dealer in horses and mules. He put a drove of mules in a lot adjoining the inn premises, and furnished the food for, and attended to, his stock himself though he was assisted in this work by the inn-keeper's servants. While one of these servants was taking one of the plaintiff's mules to water, the mule got away and was lost. The judge charged that if plaintiff was a boarder and not a guest and was himself taking

care of his mules, he could not recover; aliter, if plaintiff was a guest and the mule was in the care of the defendant.]

PEARSON, J. This is an action on the case, on the "custom of the land," against the defendant, as an inn-keeper, for the loss of a mule. In this action, on the ground of public policy, common carriers and inn-keepers are treated as insurers, and are liable, except "for the acts of God, and the enemies of the state," without proof of negligence. In which respect it differs from an ordinary action on the case against a bailee. In our case, there being no proof of negligence, the plaintiff properly declared "on the custom." If he could have made this proof, it would have been most proper to declare on the special case: for a recovery in that action may be made against an inn-keeper who is guilty of negligence, in many instances, where he would not be liable in "case" on the custom: for instance—one takes boarding at an inn, on a special contract and his goods are lost, the inn-keeper is not liable "on the custom:" but he is liable in a special action on the case, if negligence be proved. So, if one leave a trunk or carriage to be kept by an inn-keeper, or if one deliver a flock of sheep, or a drove of mules, or horses, to an inn-keeper to be pastured, he is only liable as bailee, on proof of negligence.

The ground of public policy, on which an action on the case "on the custom" is given against inn-keepers, is that persons who are travelling through the country are under a necessity of putting up at inns for entertainment—*transeuntes causa hospitandi* (from which last word they are called "guests,") without knowing anything about the character of the house: for which reason the law gives an assurance of the safety of their property—that is, the goods and animals (*bona et catalla*) which they have with them for the purposes of their journey. The reason restricts this action to *guests* as distinguished from *boarders*, who sojourn at an inn on a special contract. 3 Bac. Abr. 666, "Inns." It is sometimes difficult to draw the line between guests and boarders. They frequently run into each other, like light and shade. So, the line between a common carrier and a bailee to carry, is sometimes scarcely perceptible; but the law makes the distinction, and it is the province of the judge to draw the line. A transient customer at an inn, although he be not a traveler or a stranger, is considered as a guest: a lodger, who sojourns at an inn, and takes a room for a specified time, and pays for his lodging, on a special agreement—as, by the month or week, is a boarder. *Bennett v. Wilson*, 5 T. R. 273.

So, the reason restricts the action to one who comes for entertainment—*causa hospitandi*. If one peddling merchandise puts up at an inn, and, besides his sleeping apartment, takes a separate room in which to show and sell articles—clocks and watches, for instance—these articles are not within the protection of the rule. *Burgess v. Clements*, 4 M. & S. 306. So, if one having a drove of horses or hogs to sell, puts up at an inn, and, besides entertainment for himself, procures from the landlord a lot in which to keep his animals, for the purpose of showing and selling them,

they are not specially protected; and it makes no difference whether, by the agreement, the landlord has them fed, or whether the drover buys provender of the landlord or a third person, and feeds them himself; for, as Lord Ellenborough says, in the above case, "an inn-keeper is not bound by law to find show-rooms for his guests, but only convenient lodging rooms and lodging." The rule is restricted to such goods and animals as the guest carries with him for the purposes of his journey: "a flock of sheep is not comprehended among the *bona et catalla transeuntis*, which an inn-keeper is bound to receive and protect." *Hanby v. Smith*, 25 Wend. 642. If such articles are received, the inn-keeper is only liable for neglect as a bailee. The policy fixing this special liability of inn-keepers is to encourage traveling and intercourse among the citizens, and does not reach so far as to take in considerations of trade and commerce. So, the reason restricts the action to the things that are in the house and stables—*infra hospitium*, and does not extend to a horse that is put to grass according to an understanding between the inn-keeper and the guest. *Calye's case*, 8 Rep. 32. This applies to horses and mules put into a lot by agreement of the parties.

From these principles, it is clear that the plaintiffs have no right to complain of his honor's charge. The defendant had a right to expect him to be more specific in respect to the distinction between a guest and a boarder—what things are within the protection of the rule, and what are left to the liability of an ordinary bailee, and what place is within the inn—*infra hospitium*. Upon all these points, according to the facts found by the jury, the defendant was entitled to a verdict. Any one of them was sufficient for his purpose. There is no error. Judgment affirmed.

The principal case is approved in *Holstein v. Phillips*, 146 N. C. 366, 59 S. E. 1037, and the liability of inn-keepers to their guests, lodgers and boarders—both at common law and under modern statutes, by which, in many states, such liability has been greatly modified—is clearly explained by Hoke, J., who reviews authorities from several states. See 20 L. R. A. (N. S.) 1027, and note. See "Innkeepers," *Century Dig.* § 19; *Decennial and Am. Dig. Key No. Series* § 11.

GIBBS v. CHASE, 10 Mass. 125. 1813.

Trespass de Bonis Asportatis. Title that Will Sustain the Action. Force.

[*Trespass de bonis asportatis* for taking and carrying away lumber. Verdict and judgment against the plaintiff, who filed exceptions. Upon these exceptions the opinion is written. Reversed.]

The plaintiff was a deputy sheriff in possession of certain lumber by virtue of the levy of an execution. The defendant was a coroner and, as such, took the lumber from plaintiff's possession by virtue of a writ of attachment against the former owner. The lumber was frozen in a dock at the time plaintiff levied on it, so that he could not remove it. He left it there in the custody of one Drinkwater, and it was there when the defendant seized it. The judge charged that under this state of facts the charge that defendant "forcibly took the lumber from plaintiff's hands," was not supported.]

SEWALL, J. The exceptions bring before us these questions: 1. Whether there is any evidence of a trespass in this case—the jury having been instructed that the plaintiff must fail in his action, for want of evidence to prove a forcible taking by Chase, the defendant, of the timber in question.

We think this direction to the jury incorrect. The brief statement admits the taking, and no actual force is necessary to be proved. An owner may admit himself dispossessed and deprived of a personal chattel, for the sake of his remedy. He who interferes with my goods, and, without any delivery by me, and without my consent, undertakes to dispose of them, as having the property, general or special, does it at his peril to answer me the value in trespass or trover; and even a subsequent tender of the goods will not excuse him, if I choose to demand the value; and the return, if accepted, is only evidence in mitigation of damages. Thus, the working of an estray, or a beast distrained, is a trespass *ab initio*; and the owner may declare for an unlawful taking, after he has regained his property.

2. Another question then arises,—whether the evidence establishes a property in the plaintiff sufficient to maintain this action. His title as deputy sheriff, by force of the seizure in execution, is special, depending on his authority by the execution; that is, it is not otherwise insisted on, or maintained, against the owner, or another creditor; but his possession is sufficient authority against a stranger. The plaintiff seized the timber as the property of Robbins, and he had the exclusive possession of it; as much so as the nature of the article and its actual situation at the time permitted, it being bulky, and frozen in the ice. He placed it in the custody of Drinkwater. Notice was given of this to Chase, when he reclaimed it, and proceeded to sell it. This was a possession which the owner, or any person having a general property, or even one who had acquired a special property by a seizure or possession more rightful than that of the plaintiff, had power to remove, without a breach of the peace. Such a possessor might surely disregard this possession of Gibbs; but a mere stranger could not.

New trial.

See note to the principal case in 10 Mass., for valuable information upon the subject of trespass *de bonis asportatis*. See "Trespass," Century Dig. §§ 4, 30, 31; Decennial and Am. Dig. Key No. Series §§ 3, 19; "Attachment," Century Dig. § 605; Decennial and Am. Dig. Key No. Series § 186.

HUME v. TUFTS, 6 Blackf. 136. 1842.

Trespass de Bonis Asportatis. Title and Possession that Will Sustain the Action. Action by Reversioner.

[Trespass *de bonis asportatis* by Tufts against Hume for goods taken by Hume from Jackson, the lessee of Tufts, under an execution against Jackson. Verdict and judgment against Hume, who carried the case to the supreme court by writ of error. Reversed.]

The goods in controversy belonged to Tufts, but he had leased them

to Jackson for one year or until Tufts should demand them. They were in Jackson's possession under this lease when seized by Hume. Tufts had not demanded the goods of Jackson prior to such seizure, nor had the time of the lease then expired. The judge charged that under these circumstances this action would lie.]

DEWEY, J. . . . The propriety of this instruction is the question for our consideration. To maintain trespass, it is essential that the plaintiff should have been in the actual or constructive possession of the property at the time the injury was committed. *Smith v. Miles*, 1 T. R. 480; *Ward v. Macauley*, 4 T. R. 489; or, at least, he must have had a general or special property in the goods in controversy, and a right to the immediate possession of them. *Chinn v. Russell*, 2 Blackford, 172, and note 3.

We do not think that the facts of this case bring the plaintiff within this rule. When the defendant levied the execution against Jackson upon the goods, the latter had, under the lease, a special property in, and the actual and rightful possession of them. The lease had not expired by the lapse of time, nor had it been terminated by a demand of the leased property. It is true that Tufts, the general owner, could, by a demand of the goods, have extinguished the special property of Jackson, and have entitled himself to the immediate possession; but not having taken that step, he could have maintained neither trover nor replevin against Jackson. His right was merely reversionary; for an injury to such right, trespass was not the appropriate remedy. We think, therefore, that the instruction of the circuit court, that the plaintiff could maintain the action, was wrong. . . . Judgment reversed.

See "Trespass," Century Dig. §§ 44-47; Decennial and Am. Dig. Key No. Series § 20.

SETZAR v. BUTLER, 27 N. C. 212. 1844.

When Trespass de Bonis Asportatis Lies Against a Bailee; and When Trespass on the Case and Trover Lie Against a Bailee.

[Trespass vi et armis de bonis asportatis, for taking and carrying away a bed and its furniture, the property of the plaintiff. In deference to an adverse intimation from the judge, the plaintiff submitted to a nonsuit and appealed. Affirmed.]

The bed and its furniture were the property of Mrs. Bowell, who gave them to the plaintiff, but retained the possession of them until her death. Mrs. Bowell resided with Samuel Patterson and kept the bed, etc., at his house. After her death, the defendant, as her executor, took the bed, etc., from Mr. Patterson's house and sold them, against the protest of the plaintiff. The plaintiff was a married woman, and her husband was joined with her in the action.]

DANIEL, J. This is an action of trespass vi et armis de bonis asportatis, in taking and carrying away a bed and its furniture, the property of the plaintiffs. Plea— not guilty. The judge in his charge to the jury assumes that trover would lie for the plaintiffs.

and therefore that the plaintiffs must have had not only the title to the bed, but also the right to the immediate and exclusive use and possession of it. It seems that the mother of Mrs. Setzar was the bailee of the bed, and the defendant, when he took possession of it as her executor, stood in the same relation. The bailor demanded of him the bed, and he refused to give it up. This refusal turned him into a wrong-doer, and was in itself evidence of a conversion. The defendant, however, went on and sold the bed to some third person. Can an action of trespass *de bonis asportatis* be sustained by the bailor for these acts done by the bailee? If a bailee misuses the thing bailed, an action on the case lies. And if the bailee, on demand, refuses to deliver up the thing bailed, or sells it, but does not destroy it, then trover may be brought. But if the bailee destroys the thing bailed, as if sheep or cattle be bailed, and the bailee kills them, then trover or trespass may be maintained by the bailor against the bailee, as the bailment is determined by the act; Co. Lit. 57, (a), 58, 200, (a); 3 Stephens, N. P. 2637. It does not appear from the case, that the bed is destroyed, or out of the reach of the plaintiffs, and trover may often be brought when trespass cannot, 2 Saund. R. 47, p—as if goods are lent or delivered to another to keep and he refuses to return them on demand, *trespass does not lie*, but the proper remedy is trover. The judgment must be affirmed.

See "Bailment," Century Dig. § 117; Decennial and Am. Dig. Key No. Series § 25.

DILTS v. KINNEY, 15 N. J. L. 130. 1835.

Trespass Vi et Armis and Trespass on the Case for Injuries Done by Animals.

[Margaret Kinney sued Dilts and others in *Trespass vi et armis* for "lugging her cattle with a dog—killing one and wounding another." Judgment against Dilts and others, who carried the case to the supreme court by writ of certiorari. Affirmed. The second exception was, that *Trespass vi et armis* would not lie for the injury complained of. The declaration was that Dilts and others, "with their dog," did the injury.]

HORNBLOWER, C. J. . . . The second objection is founded on a supposed misconception of the action, which it is insisted should have been in case, and not in trespass. In *Woodruff v. Clark*, 2 Penn. R. 1045, the court remarked, that the distinction between case and trespass was in many instances so nice that it only served to perplex suitors, and the court considered itself justified in refusing to reverse on the ground of a mistake in that matter. But it is not necessary to rely upon that case, even if we were disposed to adopt it, because in the case before us, the rule is too plain to admit of a doubt. This action was brought against the defendants *for a tort committed by them*; the declaration alleges, "that the defendants *with their dog*" did the injury complained of. Trespass, therefore, was the proper action. If the in-

jury had been done by the dog or other animal of the defendants, in their absence, and without their agency, the remedy would have been by an action on the case. . . . Judgment affirmed.

For the law as to the liability of the owner for injuries caused by vicious and dangerous animals kept by him; when the scienter must be shown; what is sufficient proof of the scienter; measure of damages, etc., see *Cokeram v. Nixon*, 33 N. C. 269; *Meibus v. Dodge*, 38 Wis. 300, 20 Am. Rep. 6. In *Smith v. Pelah*, 2 Strange, 1264, it was ruled that if a dog has *once* bitten a man, and the owner having notice thereof, still keeps the dog and lets him go about or lie at his door, an action will lie against such owner by one bitten by the dog, though it happened by the plaintiff's treading on the dog's toes: "for it was owing to his [the owner's] act *hanging the dog on the first notice*. The safety of the king's subjects ought not afterwards to be endangered. The scienter is the gist of the action." This case is expressly approved in the Wisconsin case; and the North Carolina case, while not referring to it, is to the same general effect. In that case the remedy was "case," because the injury was done by an animal in the *absence* of the owner. See 11 L. R. A. (N. S.) 748, and note. See "Action," Century Dig. § 252; Decennial and Am. Dig. Key No. Series § 30; "Action on the Case," Century Dig. § 33; Decennial and Am. Dig. Key No. Series § 1.

DOOLING v. BUDGET PUB. CO., 144 Mass. 258, 10 N. E. 809. 1887.

Slander and Libel of the Chattels of Another.

[Tort for an alleged libel. The publication was admitted. No proof was offered of any special damage suffered by the plaintiff. For lack of such proof the judge directed a verdict against the plaintiff, and reported the case to the supreme court for determination. If that court approved the judge's ruling, judgment was to be entered against the plaintiff, otherwise the case to stand for a new trial. The ruling below was approved, and judgment rendered against plaintiff.]

The plaintiff was a caterer and acted as such in furnishing a dinner for the Ancient and Honorable Artillery Company, which dinner was thus referred to in a newspaper published by the defendant: "Probably never in the history of the Ancient and Honorable Artillery Company was a more unsatisfactory dinner served than that of Monday last. One would suppose, from the elaborate bill of fare, that a sumptuous dinner would be furnished by the caterer, Dooling, but instead a wretched dinner was served, and in such a way that even hungry barbarians might justly object. The cigars were simply vile, and the wines not much better." (This may recall Sidney Smith's bon mot in giving an account of a dinner which he attended: "Everything was cold except the ice cream, and everything was sour except the vinegar.")]

C. ALLEN, J. The question is whether the language used imports any personal reflection upon the plaintiff in the conduct of his business, or whether it is merely in disparagement of the dinner which he provided. Words relating merely to the quality of articles made, produced, furnished, or sold by a person, though false and malicious, are not actionable without special damage. For example, the condemnation of books, paintings, and other works of art, music, architecture, and, generally, of the product of one's labor, skill, or genius, may be unsparing, but it is not actionable without the averment and proof of special damage unless it

goes further, and attacks the individual. *Gott v. Pulsifer*, 122 Mass. 238; *Swan v. Tappan*, 5 Cush. 104; *Tobias v. Harland*, 4 Wend. 537; *Western Counties Manure Co. v. Lawes Chem. Manure Co.*, L. R. 9 Exch. 218; *Young v. Macrae*, 3 Best & S. 264; *Ingram v. Lawson*, 6 Bing. (N. C.) 212. Disparagement of property may involve an imputation on personal character or conduct, and the question may be nice, in a particular case, whether or not the words extend so far as to be libelous; as in *Bignell v. Buzzard*, 3 Hurl. & N. 217. The old case of *Fen v. Dixe*, W. Jones, 444, is much in point. The plaintiff there was a brewer, and the defendant spoke of his beer in terms of quite as strong disparagement as those used by the present defendants in respect to the plaintiff's dinner, wine, and cigars, but the action failed for want of proof of special damage. In *Evans v. Harlow*, 5 Q. B. 631, Lord DENMAN, C. J., said: "A tradesman offering goods for sale exposes himself to observations of this kind; and it is not by averring them to be false, scandalous, malicious, and defamatory that the plaintiff can found a charge of libel upon them."

In the present case, there was no libel on the plaintiff in the way of his business. Though the language used was somewhat strong, it amounts only to a condemnation of the dinner, and its accompaniments. No lack of good faith, no violation of agreement, no promise that the dinner should be of a particular quality, no habit of providing dinners which the plaintiff knew to be bad, is charged, nor even an excess of price beyond what the dinner was worth; but the charge was, in effect, simply that the plaintiff, being a caterer, on a single occasion provided a very poor dinner, vile cigars, and bad wine. Such a charge is not actionable without proof of a special damage. Judgment on the verdict.

The remedy at common law for such an injury to property, was by special action on the case, see *Swan v. Tappan*, 5 Cush. 104, at p. 109, cited in the principle case. See "Libel and Slander," *Century Dig.* § 1; *Decennial and Am. Dig. Key No. Series* § 1.

There being but one form of action under the Code practice, whether the wrong complained of be one to be redressed, under the common law practice, by Trespass, Trover, or Detinue, will depend upon the record and pleadings in the cause. Even now the plaintiff's recovery will be governed, to an important extent, by the principles governing these common law remedies and actions. *Vinson v. Knight*, 137 N. C. 408, 49 S. E. 891.

CHAPTER VIII.

INJURIES TO RIGHTS GROWING OUT OF CONTRACT.

SEC. 1. ACTION OF COVENANT.

DAVIS v. JUDD, 6 Wis. 85. 1858.

When Covenant Lies.

[Action of Covenant on an alleged covenant of warranty. Plea of non est factum. Jury trial waived, and trial by the judge. Judgment against the defendant, and he appealed. Reversed.]

The alleged covenant was in the usual form of a covenant of warranty, but there was no seal to the instrument in which the covenant was contained. The instrument was in the usual form of a deed of conveyance, and contained the recital that the grantors had thereto "set their hands and seals." The defendant insisted that the action of covenant would not lie upon an instrument not under seal. The judge ruled that the action would lie *under the circumstances of this case.*]

COLE, J. The pleadings in this case were all made up and settled before the code took effect, and while the distinction in common law actions was kept up and observed by the courts. And although it may be difficult to give a very solid or satisfactory reason for the rule, yet we believe the authorities do declare that an action of covenant upon an instrument not under seal, though it may contain the statement "signed, sealed, and delivered," cannot be sustained. The following cases seem to decide that point: *Leroy v. Beard*, 8 How. 451; *Andrews et al. v. Hariot*, 4 Cow. 508. It was insisted upon the argument of the cause, by the counsel for the respondent, that the appellant was estopped from denying that the instrument was sealed, on the ground of having signed, acknowledged, and delivered the same as a deed and having received the respondent's money as part consideration for the land conveyed. We do not know of any case that has carried the doctrine of estoppel to this extent. The doctrine of estoppel is of course familiar to every lawyer, and it is not necessary to go into it. We do not think it can be so applied as to prevent the appellant from insisting that the action should have been assumpsit and not covenant. Again, it was not contended that the court ought to presume that the instrument had a seal when executed, or in other words, presume a fact to exist which the court found did not exist. The court found that the instrument was not sealed, and this finding does away with all presumption to the contrary. . . . Judgment reversed.

See "Covenant, Action of," Century Dig. § 6; Decennial and Am. Dig. Key No. Series § 1.

FINLEY v. SIMPSON, 22 N. J. L. 311, 331. 1850.

Covenant Lies on a Sealed Instrument Only. The Rule and the Exceptions Thereto.

[Covenant upon an alleged covenant on behalf of the defendant *as grantee in a deed poll*, the defendant having *accepted the deed, but never having signed and sealed it*. Defendant pleaded non est factum. Verdict directed against the defendant, subject to the opinion of the supreme court as to whether there was evidence that defendant had made the covenant alleged. Affirmed.]

The evidence was that the plaintiff conveyed the land to the defendant by a deed in the usual form, but containing a recital: That there was a mortgage on the land for a certain sum; that such sum was computed as part of the purchase money for the land; and that defendant "*assumed to pay*" such sum in discharge of the mortgage. This deed was signed and sealed by the plaintiff, grantor, but not by the defendant, grantee, although the defendant accepted the deed and took possession of the land. The defendant having failed to pay the sum due on the mortgage, the plaintiff was forced to pay it. Having paid it, he sued defendant on the clause in the deed above mentioned.

The defendant insisted that this action of *covenant* would not lie, because the instrument upon which the action was brought had never been actually signed and sealed by the defendant or by his authority.]

GREEN, C. J. The general principle, that an action of covenant can only be sustained where the instrument upon which the action is brought has been actually signed and sealed by the party, or by his authority, is abundantly sustained by the authorities cited by the counsel of the defendant. There are, however, exceptions, of which actions upon the custom of London, actions against the king's lessee by patent, and against remaindermen, are admitted instances. The only inquiry is, whether an indenture [deed poll] of bargain and sale, purporting to be inter partes, by which an estate is conveyed to the grantee, if the grantee accept the deed, and the estate therein conveyed, though the indenture be not sealed and delivered by him, is not his deed, as well as the deed of the grantor. The affirmative of this proposition is sustained by the following authorities, cited, with many others, in the brief of the plaintiff's counsel: Co. Lit. 231, a, 230, C, note 1; Shep. Touch. 177; 4 Cruise Dig. 393, "Deed," Tit. 32, c. 25, § 4; 3 Com. Dig. "Covenant," A 1, "Fait," A 2, C 2; Vin. A. C. "Condition," I, a 2; Burnett v. Lynch, 5 Barn. & Cress. 589; Dyer, 13 C. Pl. 66.

A modern elementary writer, of high reputation (Platt on Cov. 18), denies the doctrine deduced from these cases. . . . He admits, however, that the contrary doctrine has been received without scruple by the profession, has been adopted by writers distinguished for their legal attainments, and that, perhaps, it has been too long established to be now reversed. There is, in our judgment, no reason why the doctrine should be reversed.

In the present case the verdict ought not to be disturbed if it can be sustained consistently with legal principles. It is manifestly in accordance with the truth and justice of the case. The objection goes to the form of the remedy, rather than to the sub-

stantial right of the party, or to the title of the plaintiff to redress. The nature of the covenant, moreover, is fully stated upon the face of the declaration. Whether the facts there stated did or did not constitute a covenant on the part of the defendant, was a question of law, which might well have been raised by demurrer. To give the defendant the benefit of the exception *now* may operate utterly to defeat the claim of the plaintiff. It is consistent neither with law nor justice that the defendant should hold the title without paying the price. These considerations cannot affect the legal principle, but if the verdict be in accordance with a doctrine long established, and often recognized, they afford strong reasons why that doctrine should not lightly be disturbed. The rule to show cause must be discharged.

All the authorities agree that the grantee in a deed, who accepts the deed, is *bound* by its conditions and the covenants on his part, whether he signed and sealed it or not; but whether this obligation is one that would have been enforced by an action of *covenant* at common law, or by *assumpsit upon the implied undertaking*, the authorities do not agree. See *Mordecai's L. L.* 841; 11 Cyc. 1045, and notes, 6 L. R. A. (N. S.) 436, and notes. See "Covenant, Action of," Century Dig. § 12; Decennial and Am. Dig. Key No. Series § 6.

PERKINS v. LYMAN, 11 Mass. 76, 82. 1814.
Covenant and Debt, When Concurrent Remedies.

[Debt for a sum certain claimed to be due as liquidated damages for breach of a sealed agreement, which agreement contained a clause binding the defendant to pay to the plaintiff the sum sued for in this action if the defendant violated the other terms thereof. The jury found that the defendant had violated this agreement, and upon this verdict the plaintiff moved for judgment for \$8,000, which was the sum certain which the defendant, by the clause above mentioned, had covenanted to pay as damages for such violation. The defendant prayed a hearing in chancery (pursuant to a statute providing for such practice), upon his contention that the \$8,000 was not liquidated damages but a penalty or forfeiture. Only that portion of the opinion which states when a plaintiff has an election to bring covenant or debt, is here inserted.]

PER CURIAM. . . . If we look to the words themselves, there is a covenant, on the part of the defendant, that he will not, in his own name, etc., directly or indirectly, be interested in any voyage to the northwest coast of America, etc., for the term of seven years. Then he binds himself in the penal sum of 8,000 dollars for his faithfully and strictly adhering to this contract. It is not said, if he does so, contrary to his agreement, then he will pay that sum as a satisfaction. Nor is there any thing expressed, which would conclude the plaintiffs, unless it be their form of action, when the amount of damages should exceed 8,000 dollars, from demanding to the extent of their loss. Lord Mansfield expresses the distinction of liquidated damages, and a penalty to secure the performance of a contract, very closely and accurately, in the case of *Lowe v. Peers* (4 Burr. 2227), referred to

in the argument of the case at bar. There is a difference, says his lordship, between covenants in general and covenants secured by a penalty or forfeiture. In the latter case, the obligee has his election to bring an action for the penalty, after which he cannot resort to the covenant; or to proceed upon the covenant, and recover more or less than the penalty.

Upon the whole, we are of opinion that the demand, in this case, is not for damages ascertained or liquidated by the parties to the contract, but for a penalty or forfeiture annexed to articles of agreement, a breach of which has been found; and therefore, by the statute, the defendant is entitled to a hearing in chancery before judgment shall be rendered.

See *Lowe v. Peers*, 4 Burr. 2225, inserted at § 2 of this chapter.

Covenant is the proper remedy on a sealed obligation to pay a certain sum in *bank notes*, because the plaintiff can only recover damages on such an agreement, for the reason that *bank notes are not money*—they are only called money in common parlance—the damages on the breach of such a covenant being the *value* of the bank notes. *Scott v. Conover*, 6 N. J. L. 222. Where two parties execute a contract and one seals it but the other simply signs without sealing it, it is the deed or covenant of one and the simple contract of the other. Therefore, the one who seals it must be proceeded against in debt or covenant—depending on whether or not the damages are liquidated—while the other who does not seal must be sued in assumpsit. *Brown v. Bostian*, 51 N. C. 1; *Holland v. Clark*, 67 N. C. 104. See “Election of Remedies,” *Century Dig.* § 2; *Decennial and Am. Dig.* Key No. Series § 2.

GYLBERT v. FLETCHER, Croke's Charles I, 179. 1630.

Covenant Against an Infant.

Covenant against an apprentice for departing from his service without license within the time of his apprenticeship. The defendant pleaded, that at the time of making the indenture he was within age; and thereupon it was demurred. It was argued at the bar, that this indenture should bind the infant, because it was for his advantage to be bound apprentice to be instructed in a trade. He is also compellable by the 5 Eliz. c. 4. to be bound out an apprentice.

But all the court resolved, that although an infant may voluntarily bind himself apprentice, and if he continue apprentice for seven years may have the benefit to use his trade, yet neither at the common law, nor by any words of the 5 Eliz. c. 4. shall the covenant or obligation of an infant for his apprenticeship bind him. But if he misbehave himself, the master may correct him in his service, or complain to a justice of the peace to have him punished, according to the statute. But no remedy lieth against an infant upon such covenant; and therefore it was adjudged for the defendant. *Vide* 21 Hen. 6, 31; 21 Ed. 4, 6; 9 Hen. 6, 8.

See “Apprentices,” *Century Dig.* §§ 35, 36. *Decennial and Am. Dig.* No. Series § 19.

SEC. 2. ACTION OF DEBT.

GREGORY v. THOMSON, 31 N. J. L. 166. 1865.

Action of Debt Explained. Collateral Agreements. Negotiable Instruments. Debt, Covenant, or Assumpsit, When the Appropriate Remedy.

[Action of Debt against a *surety* on a sealed contract. Demurrer, for that Debt was not the proper action. The opinion is on the demurrer. Demurrer sustained.]

BEASLEY, C. J. The promise of the defendant, which is declared on in this case is, that he would pay the debt of the tenant if the tenant should make default in payment; and the only question raised by the pleadings is, whether an action of debt is the proper remedy for the breach of such contract.

I have been unable to find any case in which an action of debt has been sustained on a collateral promise to pay the debt of another. At a very early period in the English law, this was the form of action provided for all matters in controversy arising out of mere personal contracts. Thus, Reeves, in his History of the Common Law, vol. 1, p. 159, describing the methods of legal proceeding between the reign of William the Conqueror and that of King John, says: "When they (the parties) were both in court, then it was to be considered how the demand arose. This might be of various kinds, as *ex causa mutui*, upon a borrowing; *ex causa venditionis*, upon a sale; *ex commodato*, upon a lending; *ex locato*, upon an hiring; *ex deposito*, upon a deposit or by some other cause, by which a debt arose; for at this time all matters of personal contract were considered as binding only in the light of debts; and the only means of recovery, in a court, was by this action of debt." In all the above instances it will be noticed that the consideration passed from the party who became the creditor to him who became the debtor, so that the contract of the party receiving such consideration was to pay his own debt and not that of another. Such transactions had no connection, incidentally, with third parties. The debtor was he who received the consideration; he alone owed the debt and this action lay only against him.

Such being the origin of this form of action, it is not difficult to perceive how it was that the doctrine came to prevail that it was not applicable, as a remedy, in case of a breach of promise to pay money which was primarily due from a third party. In the somewhat subtle theory of the times it was deemed that such a promise did not create a debt. The party originally liable remained the debtor; he who made himself surety did not thereby impose upon himself a debt, but a collateral assumption, which could not be enforced by an action of debt. This distinction was adopted at a remote era and appears ever since to have been uniformly recognized and maintained. Thus, in one of the oldest cases upon the subject, 18 Ed. III, 13, it is said: "If A bought of me certain goods for a certain sum, and B at the same time undertook to pay for

them at the day if A did not; if A should not pay for them, debt could not be brought against B, because it would sound in covenant." And again in another case, 9 Hen. V. 14, the law is thus stated: "If C recover ten pounds against A, and B shall say to C that if he will release the ten pounds to A he will be his debtor, and accordingly the ten pounds are released to A, an action of debt will not lie against B, as this sounds in covenant." Other cases to the same purpose will be found collated in 3 Com. Dig. tit. Debt, B. 1, p. 373.

The existence of this ancient rule of law has never been denied, although it has been held that in some instances it has been misapplied. Thus, in an anonymous case reported in *Hardres*, 485, and which is frequently referred to, it was held that an action of debt brought by the payee of a bill of exchange against the acceptor, could not be supported, on the ground that the engagement was collateral, "and that," in the words of the authority, "the custom of merchants does not extend so far as to create a debt; only makes the acceptor *onerabilis* to pay the money." In *Bishop v. Young*, 2 Bos. & P. 78, Lord Eldon reviews this case and seems to consider it rests on solid reasons; and it is also treated with a like respect by Justice Lawrence in *Priddy v. Henbvey*, 1 B. & C. 674. I am aware that the decision in *Hardres* has been overruled in this country, but such reversal has not been rested on grounds which at all affect the point now to be elucidated.

In *Raborg v. Peyton*, 2 Wheat. 385, the supreme court of the United States refused to adopt the rule of law in question in its unlimited application to commercial paper, holding that an action of debt will lie by the payee or endorsee of a bill of exchange against an acceptor, where it is expressed to be for value received. But as the court declared that an acceptance was not a collateral engagement to pay the debt of another, but that, on the contrary, it was an absolute engagement to pay the money to the holder of the bill and that the engagements of all the other parties were merely collateral, it is evident that this case is no authority for the hypothesis that debt will lie on a collateral agreement.

The modern English authorities seem to sustain, with one voice, the ancient rule in question. *Chitty*, vol. 1, p. 116, treating of the action of *assumpsit*, says: "Where a simple contract creates a collateral liability, as for the payment of a debt of a third person, debt not being sustainable, *assumpsit* is the only form of action." To the same effect see the same author, pages 124, 128. The same rule has been recognized by the courts of New York. *Pierce v. Crafts*, 12 Johns. 90; *Wilmarth v. Crawford*, 10 Wend. 341. Nor does it at all affect the principle that the engagement sued on is contained in an instrument under seal. The question in this form was recently subjected to the criticism of the Court of Exchequer. In *Randall v. Rigby*, 4 M. & W. 129, it appeared upon the pleadings that the lands had been conveyed to the defendant and others, to the use that the plaintiff should receive and take the rents; the covenant sued on was to the effect that the defendant

and the other grantees would pay said rents; on these facts the court maintained that such covenant was collateral, and on that account would not support an action of debt. *Harrison v. Matthews*, 10 M. & W. 767, was decided on the same principle.

It has not been unnoticed that in *Bullard v. Bell*, 1 Mason, 292, Fed. Cas. No. 2,121, Judge Story intimated that, in his opinion, it would not be overstraining the old doctrine regulating this form of action, to apply it to all collateral undertakings to pay a sum certain. I confess to an inclination in the same direction, and on this account my examination of the original history of the action has perhaps been more elaborate than would otherwise, from the state of the authorities, have seemed to me requisite. But upon reflection I can see no advantage in extending the form of remedy. The limits of the action, in the nature of things, must be arbitrary; the chief concern being to have those limits definite and stationary. To extend the formula is merely to unsettle its boundaries—a result which would, at least, be attended with the mischief of inconvenience. If the sphere of the action of debt is to be enlarged at this time of day, what legal institute, consisting of a mere mode of proceeding, is to be deemed stable? If this form of action is liable to change, so is every other, and the consequence would be that the lines of demarkation between the several forms would soon become so obscure as not to be easily definable. I think the use of the action should be restricted within the confines of the ancient practice. In my opinion the demurrer should be sustained.

See "Debt, Action of," *Century Dig.* §§ 1-14; *Decennial and Am. Dig.* Key No. Series § 1.

DOZIER v. BRAY, 9 N. C. 57. 1822.

*What Amount Can Be Recovered in Debt?**

[Action of Debt for a penalty under a statute giving a *qui tam* action for double the amount of the loan. The amount lent was \$80, and the penalty sued for was \$160. The verdict was against the defendant for \$155 only. Defendant moved in arrest of judgment, for that the action was *debt* and the verdict was for less than the amount sued for. Motion overruled. Judgment against the defendant, from which he appealed. Affirmed.]

TAYLOR, C. J. The verdict shows that the unlawful contract, set forth in the declaration, had been made, and that the defendant had received the benefit of it usuriously. It was an action of debt *qui tam*, upon the statute of usury, in which the sum borrowed was eighty dollars, and the penalty claimed in the declaration was one hundred and sixty. The verdict of the jury was for one hundred and fifty-five, and for this cause the defendant moves in arrest of judgment. The exception was properly overruled; for the distinction is well settled between an action of debt founded upon a specialty or upon a contract and one founded upon a stat-

ute giving an uncertain sum by way of penalty. In the first case the verdict cannot be for a less sum than is demanded, unless it be found that part of the debt was satisfied; but in the latter case the verdict is good, although a less sum than is demanded is found to be due. The statute in this case gives a penalty of double the sum borrowed, and therefore it is a matter of calculation for the jury, after the amount of the sum borrowed is proved. It is not to be distinguished from cases arising under the 2nd and 3rd Ed. 6, for not setting out tithes, where the penalty given is treble the value of the tithes; yet the jury may find the value of the tithes subtracted to be less than the value alleged in the declaration. Cro. Jac. 498. The judgment must consequently be affirmed.

HENDERSON, J. It is not correct to say that in actions of debt the precise sum demanded must be recovered; all that is required is that the contract stated in the declaration should be proven. The common opinion that the sum demanded and no other can be recovered arose from this: this action is most commonly brought on specialties and judgments which show a certain and precise sum due, and there could not well be a different sum recovered without having proven a contract different from the one laid; the effect was taken as the cause of failure; it was the variance between the evidence and the contract stated, and not the verdict of the jury drawn from that evidence. This is abundantly proven in actions of debt upon the usurious loan of goods, and debt upon simple contract; in this case there is no cause for arresting the judgment, nor is there cause for a new trial, for it does not appear that the evidence proved a different cause of action from the one stated in the declaration. For what cause, when the plaintiff proved a usurious loan of eighty dollars, the jury did not give him one hundred and sixty dollars, to-wit, double the sum loaned, but only one hundred and fifty-five. I am unable to say; but because the jury have given him less than he is entitled to, is no reason that the court or the law should take that from him.

"The rule is not that in Debt the plaintiff must recover the sum demanded or not at all; but that the proofs must agree with his allegations. The plaintiff may recover less." *Waugh v. Chaffin*, 14 N. C. at p. 103. In Debt, the exact sum demanded in the writ need not be found by the jury, when, from the nature of the demand, the amount is uncertain; but when the contract as stated in the declaration fixes the amount due, the verdict must agree with the writ or judgment will be arrested. *Dowd v. Seawell*, 14 N. C. 185, headnotes; see this case inserted post in this section. See "Debt, Action of," *Century Dig.* §§ 42, 47; *Decennial and Am. Dig.* Key No. Series §§ 17, 18.

CLARK v. GOODWIN, 1 Blackf. 73, 74. 1820.

How to Enter Judgment in Debt on a Penal Bond.

[Action of Debt by Goodwin against Clark et al., upon a penal bond for Clark's faithful performance of certain duties as deputy sheriff. The defendants put in a plea to which the plaintiff demurred. The court below overruled the demurrer and rendered a final judgment for the penalty of the bond, instead of rendering an interlocutory judgment for the

penalty of the bond and postponing the final judgment until the damages should be assessed, at a subsequent term, by a jury. Clark et al. carried the case to the supreme court by writ of error. Reversed.]

BLACKFORD, J. . . . By the common law, the obligor was bound to pay the whole penalty if he failed to comply with the condition at the time specified. As a remedy for this evil the statute of 8 and 9 Will. 3. was enacted. We have a similar statute, which points out the practice to be pursued in cases like the one under consideration. The opinion of the court, upon the demurrer, in favor of the plaintiff below, is not called in question; but in immediately rendering an absolute judgment for the penalty of the bond and interest, they committed an error. This was a penal bond conditioned for the performance of covenants. In such cases, when the plaintiff below succeeds on demurrer, the formal entry of final judgment ought to be stayed, until damages are assessed by a jury upon the breaches assigned according to the statute, and the assessment is entered of record. Judgment is then rendered for the penalty of the bond, and the costs of the suit; and the assessment regulates the sum to be levied on the execution. The judgment for the penalty remains as a security for further breaches. Judgment reversed.

In a note to the principal case it is said: "To be relieved from the penalty by the payment of what was justly due, the party, prior to the 8 and 9 Will. 3, had to resort to chancery. The statute remedies that inconvenience, and permits no other recovery at law than the damages which a jury may assess, for the breaches of covenant assigned and proved, with costs. Although the statute is that the plaintiff *may* assign, etc., the decisions have been uniform that he has no choice, but *must* do so in all cases within the act. Drage v. Brand, 2 Wils. 377; Hardy v. Bern, 5 T. R. 636; Roles v. Roswell, *Ibid.* 538; Walcott v. Goulding, 8 T. R. 126; Welch v. Ireland, 6 East, 613. The few cases to which the statute has been held not to apply, are bonds for the payment of a sum of money in gross, 2 W. Saund. 187, n. 2; replevin bonds, where goods are distrained, Middleton v. Bryan, 3 M. & S. 155; bail bonds, Moody v. Pheasant, 2 Bos. & P. 446. . . . The reason the statute does not apply to bail and replevin bonds is, that the court, in the former by statute of 4 Anne, and in the latter by 11 Geo. 2, can afford to the party the necessary relief. Middleton v. Bryan, *supra*.

See Clark v. Barnard, 108 U. S. 436, 2 Sup. Ct. 878, which distinguishes between the penalty in a bond to secure the performance of conditions, and a *statutory penalty* secured by bond. In the one case, damages only are recoverable; in the other, the whole penalty of the bond is recoverable. The interlocutory judgment for the penalty of the bond—such judgment to be discharged upon the payment of such damages as may thereafter be assessed—if properly docketed, becomes a lien for the full amount of the penalty. This lien is in no wise impaired by the fact that the amount of the judgment may be reduced by the further action of the court: until such further action, it stands for the full amount. Darden v. Blount, 126 N. C. at p. 249, 35 S. E. 479, citing Rothgerter v. Wonderly, 66 Ill. 390. See note to Carmichael v. Moore, 88 N. C. 29, inserted post in this section. See "Bonds," Century Dig. §§ 244, 247; Decennial and Am. Dig. Key No. Series §§ 136, 138.

LOWE v. PEERS, 4 Burrows, 2225, 2228. 1768.

When Debt and Covenant are Concurrent Remedies.

[Covenant by Catherine Lowe on a contract signed and sealed by the defendant, in which contract was this clause: "I do hereby promise Mrs. Catherine Lowe that I will not marry any person besides herself. If I do, I agree to pay to her 1,000 pounds within three months next after I shall marry anybody else." This bond was made in 1757, and in 1767 defendant married another woman. Verdict for 1,000 pounds against the defendant. Many points were made which came up for discussion on a motion for a new trial. The judgment was arrested upon a point not material to the subject under consideration. In the course of the discussion on these various points, Lord Mansfield said:]

This is not an action brought against him for not marrying her [the plaintiff], or for his marrying any one else: the non-payment of the 1,000 pounds is the ground of this action—"that he did not, when requested, pay the 1,000 pounds." The money was payable upon a contingency; and the contingency has happened. Therefore it ought to be paid.

There is a difference between covenants in general, and covenants secured by a penalty or forfeiture. In the latter case, the obligee has his election. He may either bring an action of debt for the penalty, and recover the penalty (after which recovery of the penalty, he cannot resort to the covenant; because the penalty is to be a satisfaction for the whole); or, if he does not choose to go for the penalty, he may proceed upon the covenant, and recover more or less than the penalty, *toties quoties*. And upon this distinction they proceed in courts of equity. They will relieve against a penalty, upon a compensation; but where the covenant is "to pay a particular liquidated sum," a court of equity cannot make a new covenant for a man; nor is there any room for compensation or relief. As in leases containing a covenant against plowing up a meadow; if the covenant be "not to plow," and there be a penalty, a court of equity will relieve against the penalty, or will even go further than that (to preserve the substance of the agreement): but if it is worded, "to pay five pounds an acre for every acre plowed up," there is no alternative, no room for any relief against it—no compensation—it is the substance of the agreement. Here, the specified sum of 1,000 pounds is found in damages: it is the particular liquidated sum fixed and agreed upon between the parties, and is therefore the proper quantum of the damages.

See *Perkins v. Lyman*, 11 Mass. 76, inserted at § 1, ante, of this chapter. See "Election of Remedies," Century Dig. § 2; Decennial and Am. Dig. Key No. Series § 2.

FRASER v. LITTLE, 13 Mich. 195, 198-202. 1865.

Can the Recovery Exceed the Penalty of the Bond?

[Action of Debt brought by Little et al. against Fraser et al., upon a replevin bond in the penal sum of \$800. Judgment against Fraser et al., who carried the case to the supreme court by writ of error. Reversed.]

The judgment below was for the penalty of the bond and interest on

such penalty, making a total of \$1,010.31. The interest was allowed as damages. At the conclusion of the opinion of Martin, C. J., it is said: "I think the judgment should have been for the sum of \$800 only, and that the judgment of the circuit court should be reversed and a new trial ordered."]

CAMPBELL, J. The only question in this case is, whether judgment can be given on a replevin bond for more than the penalty and costs. The action was an action of debt on a bond in the penalty of \$800, and judgment was rendered for an additional sum of \$210.31, by way of damages for its detention, in addition to costs of suit.

I think there is no foundation for any such judgment. Where a bond or specialty is given in the amount actually due, and not in a penalty, there is no reason and no rule which will prevent a recovery of interest on the actual debt, for which the bond is only evidence under seal. But where an undertaking or condition is secured by a penal bond, which is not supposed to represent the actual debt by its penalty, such penalty never became the actual debt, except by way of forfeiture, and upon such a forfeiture interest was never allowed to run by the common law or by statute. And the cases cited on the argument, from Massachusetts and Kentucky, which assume that interest runs merely from the fact that the penalty became the debt upon forfeiture, are entirely unsupported and would probably never have been made had not the actual debt in these cases equalled or exceeded the penal sum. As authorities, they are based upon a false assumption, and cannot be maintained on any such principle. In England, the rule of liability upon bonds in a penalty has been almost entirely uniform, and the only cases extending it beyond the penalty and costs have been overruled and disregarded. The cases are collected in Hurlestone on Bonds, 107, 108, and the rule is there laid down in conformity with the prevailing authorities. . . .

It cannot be said that under the English common law decisions there is any room for controversy on the subject. It is only where a suit is brought on some judgment already rendered on a bond, as in *Blackmore v. Flemyng*, 7 T. R. 442, and *McClure v. Dunkin*, 1 E. 436, or where an action is brought upon some distinct covenant in a bond, or other obligation, that the penalty becomes unimportant; but even in such cases, the penalty is not made the debt on which interest runs. The right to a decree in equity, beyond the penalty of a bond, is denied as clearly and consistently as at law. Where a debt is secured as such by other securities besides a bond, the fact that a bond has been taken will not usually affect the remedy on the other obligations. But there is no authority for allowing any recovery or account beyond the penalty, when the bond becomes material. The only cases where a different result has been reached are where the bond debtor has resorted to equity to obtain relief from legal proceedings; and then it has been held that, as he who seeks equity must do equity, he might be compelled, after submitting his case to the jurisdiction of equity, to

do what was just under the circumstances, and not to reap advantage from a delay which he has compelled his adversary to undergo. These rules, and this class of exceptions, will be found well settled by the decisions. *Mackworth v. Thomas*, 5 Ves. 329; *Tue v. Winterton*, 3 Brown, Ch. 489; *Knight v. McLean*, 3 Brown, Ch. 496; *Hughes v. Wynne*, 1 M. & K. 20; *Clarke v. Seton*, 6 Ves. 411; *Clarke v. Lord Abingdon*, 17 Ves. 106; *Pulteney v. Warren*, 6 Ves. 92; *Grant v. Grant*, 3 Russ. 598; s. c., 3 Sim. 341; *Jewdine v. Agate*, 3 Sim. 129; *Walters v. Meredith*, 3 Y. & Coll. 264; see also *Cooper's Cases in Chancery (Practice)*, 200 et seq.

In *Mower v. Kip*, 6 Paige 91, the case was the same as in *Clarke v. Lord Abingdon*, and the decree was manifestly correct, because the mortgage was conditioned to secure the debt, and not the penalty. If designed to go further, the case is not sustained by the authorities; but it should be understood with reference to the facts presented. In *Farrar v. U. S.*, 5 Pet. 372, which was an action on a revenue bond, it was held that no judgment could be given beyond the penalty, and judgment below was reversed on that ground. In *U. S. v. Arnold*, 1 Gal. 348, Fed. Cas. No. 14,469, although interest was awarded on a penalty, yet the question of such allowance was not discussed, and is not mentioned on the appeal, which was upon an entirely different question. *Arnold v. U. S.*, 9 Cr. 104.

In New York, in *Clark v. Bush*, 3 Cow. 151, and *Fairlie v. Lawson*, 5 Cow. 424, it was held, after an elaborate comparison of cases, that a surety on a bond could not be held beyond the penalty, whether the principal could be or not. Where the bond is joint, no distinction could be taken between principal and surety, and the cases generally make no discrimination between them where they are sued in debt on bond, although some cases, denying the universal effect of the penalty, admit it as to sureties. In *Brainard v. Jones*, 18 N. Y. 35, it was held that, in a case like the present, interest might be recovered on the penalty. The reasons for the decision are not new, nor such as any mind of ordinary capacity could overlook. It is in direct conflict with the mass of decisions, and in conflict with *the principle which underlies them all, that a penalty is not to be enlarged under any circumstances, and will not be enforced beyond its letter*. With great respect for the author of the decision, I prefer to rest upon the known and settled rules of the law, which, in all such cases as the present, must be more in accordance with the understanding of the parties than any other. When the statute requires a bond in double the value of property, as fixed by sworn and disinterested appraisers, it must be presumed that neither the law nor the sureties could anticipate the necessity of any larger margin, to meet the possible views of another body of appraisers in the jury box. I think the settled rule is a just one and should be adhered to. I therefore concur in the views of the chief justice.

The ruling in this case is sustained in *New Home Sewing Machine Co. v. Seago*, 128 N. C. 158, 38 S. E. 805. The contrary view is ably presented

in the dissenting opinion of Clark, C. J., p. 162, where the authorities for his position are cited. See also *State v. Ford*, 5 Blackford, 392, where it is said by Blackford, J.: "By the common law, the penalty of the bond was, on a breach of the condition, always recovered in a suit at law, no matter whether the damages sustained were more or less than the penalty. According to the statute of Will. 3, when the damages are less than the penalty, the amount of the damages is all that can be recovered even at law; and that is the only change in the law made by the statute. If the damages exceed the penalty, the common law governs, and the penalty is the debt. That is all that the obligor, in any event, has bound himself to pay, and all, of course, that can be recovered, except the costs of suit." See "Replevin," *Century Dig.* § 497; *Decennial and Am. Dig. Key No. Series* § 124.

DOWD v. SEAWELL, 14 N. C. 185. 1831.

Debt for a Penalty Given by Statute. What Amount Can Be Recovered in Debt.

[Action of Debt to recover the penalty given by statute for violation of the regulations to be observed in celebrating a marriage. Plea, nil debet. Verdict against defendant. Judgment arrested on defendant's motion. Plaintiff appealed. Affirmed.]

The writ of Debt demanded "fifty pounds which the defendant owes and unjustly detains to plaintiff's damage one hundred dollars." The verdict was "that the defendant does owe the sum of fifty pounds reduced by the scale to twenty-four pounds, ten shillings."]

RUFFIN, J. We think the decision of the superior court right, and that the judgment must be arrested. It is an action of debt for the penalty for marrying a couple without a license. The sum demanded is one hundred dollars; and the verdict is for twenty-four pounds, ten shillings. The act of 1778 (Rev. c. 134), gives a penalty of fifty pounds; which, when scaled, amounts to the sum found by the jury—twenty-four pounds, ten shillings.

It was formerly thought that the action of debt, being for an entire thing, could not be maintained unless the exact sum—neither more nor less—was recovered. This is not now so considered, nor has been for a long time. And the rule is, that in actions, where from the nature of the demand the true debt is uncertain, it may be alleged to be large enough to cover the real debt, and there shall be a verdict according to the truth, and judgment thereon. Hence, in debt on simple contract, the declaration is good although the sums demanded in several counts do not amount to or exceed the sum demanded in the writ, or the recital of it in the beginning of the declaration. *McQuillin v. Cox*, 1 H. Bl. 249; *Lord v. Houston*, 11 East, 62. And in *Aylett v. Lowe*, 2 Bl. R. 1221, it was held, that upon a verdict for one hundred pounds in debt for two hundred pounds, on a mutatus, there should be judgment for the plaintiff. And so too in debt on a specialty, if the deed does not of itself show the certainty of the whole demand, but the extent is matter of proof aliunde, the verdict may be according to the truth, and if it be within the sum demanded, there shall be judgment for the plaintiff. . . .

The same principles apply to actions of debt for penalties given by statute. As in every case, the declaration must set out the matter, whether of contract or law, whereby the demand arises; so in these actions the plaintiff must show a statute giving the penalty demanded by him, and charge the acts which show the defendant to be guilty of the offense within the statute. These allegations are indispensable to enable the defendant to know for what he is sued, and to protect himself by plea to another action for the same matter. Anciently the statute was set out at full length. This was relaxed, and stating it by its title was then allowed. Afterwards a general reference to it by alleging the particular penalties given thereby, and concluding "against the form of the statute" was held sufficient, upon the grounds that the court was bound to take notice of all public laws, and that the particular statute was sufficiently identified by the statement of the penalty and of the acts forbidden by it. But certainly there must be some description of it; and if there be no reference to it the declaration is bad. *Seroter v. Harrington*, 8 N. C. 192; *Myddleton v. Wynn*, Willes, 599.

If, however, the statute itself gives an uncertain penalty, or a penalty to be measured by reference to some uncertain thing, then the sum demanded is not conclusive on the plaintiff, but he may recover according to the certainty made by his proof, because he can do no more towards a more definite description of the statute or of the debt. In an action, therefore, for subtracting tithes against the statute 2 and 3 Ed. 6, which gives the treble value, the judgment shall be according to the verdict, though different from the sum demanded. *Pemberton v. Skelton*, Cro. Jac. 498. The court say there that the variance is no objection, because the statute gives no certain sum, but only so much in reference to the value; and the value cannot be positively estimated until it is done by the jury themselves. And the judges distinguish that case from an action grounded on a specialty in which the certainty of the debt appears, and from an action grounded on a statute which gives a sum certain; in both which the precise sum must be demanded. This last position is, to be sure, but a dictum in that case, but it is the point of the decision in *Cunningham v. Bennett*, 1 Geo. 1, C. B., stated by Mr. Justice Buller in his *Nisi Prius*, a book of much authority. There it was held that a penal action could not be for less than the penalty given by the statute; and though the plaintiff had a verdict, judgment was arrested. I conclude, therefore, that wherever a statute gives a certain sum *in numero*, that exact sum must be demanded, else it cannot be taken to be the penalty given by the statute. Here the declaration conforms neither to the act of 1741 nor that of 1778. The former gives fifty pounds proclamation money to the use of the parish, or, by the act of 1777, to the use of the county. The latter gives fifty pounds, scaled to 24.10 pounds, one-half to the informer and the other to the county. Consequently the judgment must be arrested for this reason.

The other objection, that damages are demanded, is not a good one. They cannot be recovered, but it is not error to demand them. The case of *Frederick v. Lookup*, 4 Burrows, 2018, shows this; for the judgment was reversed only as to the damages assessed, and affirmed for the debt, which was the penalty. Judgment affirmed.

See *Dozier v. Bray*, 9 N. C. 57, inserted ante in this section. That Debt is the proper remedy on a judgment, domestic or foreign, of a court of record or not of record, see *Cole v. Driskell*, 1 Blackford, 16. See "Debt, Action of," *Century Dig.* §§ 42, 47; *Decennial and Am. Dig. Key No. Series* §§ 17, 18.

FARNHAM v. HAY, 3 Blackf. 167. 1833.

Debt on Bond, etc., Payable in Installments. Joinder of Debt and Assumpsit in the Same Action.

[Action of Debt upon a sealed contract to pay the plaintiff \$220—one-half in one year and the other half in two years. The action is for the first half, \$110, it being the only amount due when this action was commenced. The defendant demurred on the ground that Debt would not lie until both installments were due. Demurrer sustained, and judgment against the plaintiff, who carried the case to the supreme court by writ of error. Affirmed on this point. There were three counts in the declaration, two in Debt and one in Assumpsit. The third count, in Assumpsit, being good, the judgment below was reversed under the rule, that if one of several counts be good, a demurrer to the whole declaration must be overruled.]

MCKINNEY, J. This is an action of debt. The declaration contains three counts. The first demands \$110, and is founded upon a writing obligatory, by which the defendant promised to pay the plaintiff the sum of \$220, one-half to be paid in one year, and the other half in two years from the date, with interest. The sum thus demanded is the amount agreed to be paid in one year, it only having become due. The second is for the same amount, the half of \$220 borrowed of the plaintiff, and agreed to be paid in one and two years. The sum claimed in this count is also the amount agreed to be paid in one year, it being then due. The third count is for \$110 advanced, laid out, and expended for the defendant, at his special request, and agreed to be repaid to the plaintiff, with lawful interest, in one year. The defendant, on oyer, demurred to the declaration. The demurrer was sustained and judgment rendered in his favor. The correctness of this judgment is questioned by the plaintiff in error. If either of the counts be good, the demurrer should have been overruled.

The first two counts are for the recovery of the half of a sum of money agreed to be paid by installments, in one and two years, the whole debt not having become due. *The law appears to be settled, that debt cannot be sustained for money payable by installments, till the whole debt is due, unless the payment be secured by penalty.* 1 Chit. Pl. 106; *Rudder v. Price*, 1 H. Bl. 547; 2 Saund. 303, n. 6. Only one installment of the sum agreed to be

paid was due at the time this suit was instituted, consequently the action of debt was not appropriate. We cannot perceive that the operation of this rule can prove injurious; for if the contract be under seal, upon non-payment of the installments as they respectively become due, the party has his remedy by action of covenant; or, if by parol, by that of assumpsit. *Tucker v. Randall*, 2 Mass. 283; *Bac. Abr. debt, b*; *Com. Dig. action, f*; *Co. Lit. 292*; 1 *Chit. Pl.* 93, 113. From this view the first two counts must be regarded as defective.

The third count, however, is not liable to the same objection; but as it is urged that it is insufficient, we will examine it and notice the defects that are suggested. This count is on the simple contract, and may be joined in the same action with debt on bond, or other specialty, or with debt on judgment. 1 *Chit. Pl.* 196; *Bac. Abr. action, c*; *Com. Dig. action, g*; 13 *Johns.* 462. *Chitty* (in 1 vol. on *Pl.* 397), speaking of different counts for the same cause of action, says: "Though both counts are in the same declaration, yet they are as distinct as if they were in separate declarations, and consequently they must independently contain all necessary allegations, or the latter count must expressly refer to the former." The rule is certainly more positive, requiring entire independence and sufficiency in counts, when in the same declaration are joined different causes of action, and whether a plaintiff whose declaration contains more than one count, claims a recovery upon a right of action only, or upon several, cannot appear except in evidence. *Gould's Pl.* 171. When counts are thus joined, they must be considered as constituting distinct causes of action, and a defect in one does not attach to the other. In an action thus brought, the defective count should be demurred to; but if, instead of a defective count, there is a misjoinder, the declaration would be bad on general demurrer. The third count may therefore contain a good cause of action, and, if the objection taken be not available, the circuit court erred in rendering judgment in favor of the defendants. . . . We are of opinion that the third count is good, and that the demurrer, being to the whole declaration, should have been overruled. Judgment reversed.

As to actions on installments, see *Jarrett v. Self*, 90 N. C. 478, and *Smith v. Lumber Co.*, 142 N. C. 26, 54 S. E. 788 (inserted supra ch. 6, § 3, a), which hold that a judgment on one installment is *res judicata* as to all other installments due when the action was commenced, if such matured installments were not then sued on; but such an action is no bar to installments not then due. See further, as to actions on installments, *Nesbit v. Riverside Ind. Dist.*, 144 U. S. 610, 12 Sup. Ct. 746; *Blackwell v. Dibbrell*, 103 N. C. 270, 9 S. E. 192; *McPhail v. Johnson*, 109 N. C. 571, 13 S. E. 799; *Morden's L. L.* 130-131; *McIntosh Cont.* 586; 24 *Am. & Eng. Enc. L.* 790; 13 *Cyc.* 411. See "Debt, Action of," *Century Dig.* § 24; *Decennial and Am. Dig. Key No. Series* § 7; "Actions," *Century Dig.* § 336; *Decennial and Am. Dig. Key No. Series* § 41.

HARTSFIELD v. JONES, 49 N. C. 309, 311. 1857.

Debt Preferable to Covenant or Assumpsit Where Plaintiff Has His Election to Adopt Either. Judgment by Default in Debt.

[Assumpsit brought in a justice's court on an account for medical services. The justice gave judgment for the plaintiff, and the defendant appealed to the county court, where he made default and judgment final was rendered against him for the amount of the justice's judgment, without ascertaining the damages by inquiry before a jury. Defendant then carried the case to the superior court by certiorari. In the superior court the defendant asked that the judgment final entered in the county court should be reversed and an interlocutory judgment should be entered, to inquire as to the plaintiff's damages to be recovered. The superior court refused to disturb the judgment of the county court, and the defendant appealed. Reversed.]

BATTLE, J. . . . The suit commenced before a single justice, by a warrant on a medical account for twenty-five dollars. The justice gave a judgment for seven, and the defendant appealed to the county court, giving bond with two sureties, for the appeal. The principal defendant did not enter any pleas in that court, and the plaintiff took judgment by default final for seven dollars. The defendant contends that the plaintiff had no right to take a final judgment, but was entitled to an interlocutory judgment only, upon which he could not have final judgment until he had his damages ascertained upon a writ of inquiry. In this we think he is right. The warrant which stands for a declaration is clearly in assumpsit. Upon a default in that action, which sounds in damages, the judgment is necessarily interlocutory, and no final judgment can be had until the damages have been ascertained upon a writ of inquiry. Stop. Pl. 105; 1 Ch. Pl. 122. In treating of the "election of actions," Mr. Chitty says: "The action of debt is frequently preferable to assumpsit or covenant, because the judgment in debt upon a *nil dicit*, etc., is, in general, final, and execution may be taken out immediately, without the expense and delay of a writ of inquiry, which is usually necessary in assumpsit or covenant, in case of judgment by default." See page 242. The act of 1808 (1 Rev. Stat. ch. 31, s. 96, Rev. Code, ch. 31, s. 91) obviated this difficulty in suits upon bills of exchange, promissory notes, and signed accounts, by authorizing the clerk to ascertain the interest which might have accrued thereon, without a writ of inquiry, and directing the amount thus ascertained to be included in the final judgment of the court. The 105th section of the same chapter of the Revised Code has a provision (which is not to be found in the Revised Statutes), having in view the same object in the case of appeals from the judgment of a justice to the county, or the superior court. After enacting that, in the case of an issue, it shall be tried at the first term, it proceeds to declare that "when the defendant shall make default, the plaintiff, on such demands as are mentioned in section 91 of this chapter, shall have judgment in the manner therein provided, and, in other cases, may have his inquiry of damages executed forthwith by a jury." The last par-

agraph clearly recognizes the necessity of such a writ in those actions which sound in damages, such as covenant and assumpsit.

Our opinion is that the judgment of the superior court is erroneous and must be reversed, and this must be certified as the law directs, to the end that the judgment of the county court may be reversed, and that an interlocutory judgment, that the plaintiff recover, be entered, upon which he may have his writ of inquiry executed preparatory to his final judgment. Judgment reversed.

See "Assumpsit, Action of," Century Dig. § 171; Decennial and Am. Dig. Key No. Series § 32; "Justices of the Peace," Century Dig. § 723; Decennial and Am. Dig. Key No. Series § 188.

CARMICHAEL v. MOORE, 88 N. C. 29. 1883.

Debt on Official Bond in Which the State is the Obligee. "State ex rel."

[Action on the bond of a superior court clerk in which, by law, the state was the obligee. *The action was not brought in the name of the state upon the relation of Carmichael, but simply in the name of Carmichael. Upon this ground the defendant demurred. Demurrer overruled and defendant appealed. Reversed.*]

RUFFIN, J. This appeal is taken from a judgment of the superior court overruling a demurrer to the complaint, and but a single point need be considered.

The plaintiffs sue upon the official bond given by the defendant, Moore, as clerk of the superior court of Robeson county, with the other defendants as his sureties—the breach assigned being his failure to pay over certain money which came to his hands for the plaintiffs. The bond is made payable to the state, but the action is brought, and the complaint filed, in the names of the parties interested, and this is one of the grounds of demurrer.

The bond sued on is the property of the state, and the only authority the plaintiffs have for putting it in suit is that which is specially given in the statute and which in terms is limited to a suit brought *in the name of the state*. Bat. Rev. ch. 80, s. 11. Such is the plain provision of the law, long recognized, and supported by the uniform practice of the courts. The statute, though an ancient one, has been reenacted since the adoption of the Code, and the court would therefore feel themselves bound by it, as the latest declaration of the law, even in case of a conflict in the provisions of the two instruments. But in fact there is no such conflict in this particular. The requirement of the Code that "every action must be brought in the name of the real party in interest," was never intended to be applied to actions upon official bonds, made payable to, and held by the state, and intended to be sued upon by every person injured by the neglect of the officer, and as many as might be injured, until the whole penalty should be exhausted—and all, not by reason of any property in the bond itself, but by virtue of the authority specially granted by the statute. As the right to sue upon the bond is wholly derived from

the statute, it must be exercised in the manner there provided and in no other way. As reported, the case of *Little v. Richardson*, 51 N. C. 305, seems to furnish the plaintiffs with a precedent; but upon looking to the original papers, we find that the action was in fact brought in the name of the state. So far as our investigations go, there is not a single authority which supports the manner of bringing this action.

The judgment of the court below overruling the demurrer is therefore reversed, and judgment will be entered here dismissing the action. Reversed.

If the state is not made a party—if the action is not "State ex rel."—the objection must be taken in apt time or it is deemed to be waived. *Brown v. McKee*, 108 N. C. 387, 13 S. E. 8; *Mann v. Baker*, 142 N. C. 235, 55 S. E. 102. Such defect may be cured by amendment, which may be allowed even in the supreme court after the case has reached that court upon an appeal. *Grant v. Rogers*, 94 N. C. at p. 760; *Wilson v. Pearson*, 102 N. C. 290, 9 S. E. 707; *Joyner v. Roberts*, 112 N. C. at p. 115, 16 S. E. 917. The penalty of the bond fixes the jurisdiction regardless of the "sum demanded" as damages for the breach; the penalty is the "sum demanded." *Fell v. Porter*, 69 N. C. 140; *Joyner v. Roberts*, 112 N. C. 111, 16 S. E. 917, but see *Washburn v. Payne*, 2 Blackford, 216, contra, inserted at ch. 12, post. In such actions the judgment is for the penalty of the bond, the judgment to be discharged by the payment of the damages ascertained. *Clark v. Goodwin*, 1 Blackford, at p. 75, inserted, ante, in this section. *Darden v. Blount*, 126 N. C. 247, 35 S. E. 479.

For forms of Declarations in Debt on bonds in which the state is obligee—actions of "State ex rel."—and for authorities that, in North Carolina prior to the adoption of the Code practice, the appropriate remedy for a breach of such bonds was Debt, see *Eaton's Forms*, pp. 120-127. See "Officers," *Century Dig.* § 243; *Decennial and Am. Dig. Key No. Series* § 140.

WORTH v. COX, 89 N. C. 44, 47-50. 1883.

Summary Remedy on Official Bonds.

[Summary proceeding, pursuant to a statute, against a sheriff and the sureties on his official bond. The judgment was entered by the clerk of the superior court without any notice to the defendants. An appeal being refused by the clerk, the defendants carried the case to the superior court by a petition for certiorari. The plaintiff demurred to the petition. Demurrer sustained, and judgment against defendants dismissing their petition, from which they appealed. Affirmed.]

SMITH, C. J. . . . We proceed to examine the validity of the defenses set up in behalf of the sureties who appeal.

1. The regularity and efficacy of the summary judgment rendered without previous actual notice. In looking into the legislation which introduced this summary process against public agents, we find that in 1793 an act was passed authorizing the attorney-general, on motion, to take judgment against receivers having public moneys in their hands and failing to pay over, and that their own delinquencies should be sufficient notice of the motion therefor. The compatibility of the enactment with the constitution was brought in question, in an anonymous case reported in

1 Haywood, 29 (Battle, Ed. 38), the very next year, and elaborately argued before Judges Williams, Ashe, and Macay, by the attorney-general, Haywood. The former, who first heard the motion, adhered to the opinion he then expressed, that the act was repugnant to the constitution; while the other judges granted the motion, Judge Ashe remarking "that while he had considerable doubts, Judge Macay was so clear in his opinion that the judgment might be taken, and had given such strong reasons, that his own objections had been vanquished."

The same summary remedy, given against delinquent sheriffs to the counties by the act of 1808, came before the court in the case of Oates v. Darden, 5 N. C. 500, and Hall, J., delivering the opinion, sustains the policy of such legislation, and says that "it does not alter the rights of the sheriff," but only "the mode of proceeding against him, and that the legislature had the right to do this." Such acts, in his own words, "are beneficial, and should be liberally construed." In this case the judgment was rendered after the sheriff had gone out of office.

A similar law to that under which the present proceeding was authorized, so far as we know, has been in uninterrupted force and acted on since the well-considered conclusion, in the anonymous case first cited, was announced: nor does the consistency of this summary and efficient remedy against delinquent collectors of public money, with the provisions of the organic law, seem to have been drawn in question since, unless in *Prairie v. Jenkins*, 75 N. C. 545, wherein RODMAN, J., thus disposes of the two objections made for the appellant: "1. The first ground on which the plaintiffs put their claim to relief is, that the judgment was taken before the clerk of the superior court and not before the judge in term time. This objection to the judgment is answered by the act of 1872-73 (Bat. Rev. ch. 102, s. 38), which expressly directs the proceeding complained of. 2. That the judgment was taken without notice to them. This also is directed by the act cited."

This summary mode of enforcing the collection of taxes may be necessary in carrying on the operations of government, which would be often seriously interfered with if the state were forced to pursue the ordinary action upon the bond and subject its recovery to the delays incident thereto, and with an unlimited right of appeal on the part of the delinquent and his sureties. The office is accepted and the bond given under the known conditions of the law that permits this direct and expeditious remedy in case of default, and these may be said to enter as elements into the contract itself. But it is enough to say that if any law can be deemed settled and not longer to admit of controversy, the practice under this, or a similar enactment for near a century past, has established its validity.

It is suggested in argument for the appellants that the present constitution, essentially different from its predecessor, delegates to the general assembly all the power it possesses, and is not a mere limitation upon general legislative power, and hence there is no

warrant for the enactment. We do not see any material difference between them in this respect, in their declaration of personal rights and immunities, which the act may be supposed to invade; and as it is a part of the machinery for the collection of public taxes and their payment into the treasury, the act, as incident thereto, is necessarily involved in the power to levy and collect taxes for the support of the government. . . . Affirmed.

To like effect, see *Murray's Lessee v. Hoboken L. & I. Co.*, 18 Howard (U. S.) 272. See "Constitutional Law," Century Dig. § 948; Decennial and Am. Dig. Key No. Series § 306.

SEC. 3. ACTION OF ASSUMPSIT.

(a) There Must Be a Contract, Either Express or Implied.

BARTHOLOMEW v. JACKSON, 20 Johnson (N. Y.) 28. 1822.
Gratuitous Service. Services Without Request, or Promise of Remuneration.

[Jackson sued Bartholomew in assumpsit, before a justice, for work and labor done. Plea, non assumpsit. Bartholomew had a stack of wheat in Jackson's field, and Jackson sent him word to remove it by a certain time so that he could burn the stubble. As it was not removed, Jackson set fire to the stubble and then removed the wheat to keep it from burning. He sued in this action for the value of the services of himself and his servants in saving the wheat. Bartholomew had not requested him to move the wheat, nor promised to pay him for the work. Verdict and judgment for fifty cents against Bartholomew, who carried the case to the supreme court by writ of certiorari. Reversed.]

PLATT, J. I should be very glad to affirm this judgment; for though the plaintiff was not legally entitled to sue for damages, yet to bring a certiorari on such a judgment was most unworthy. The plaintiff performed the service without the privity or request of the defendant, and there was, in fact, no promise express or implied. If a man humanely bestows his labor, and even risks his life, in voluntarily aiding to preserve his neighbor's house from destruction by fire, the law considers the service rendered as gratuitous, and it, therefore, forms no ground of action. The judgment must be reversed.

For a review of the law as to when a contract will or will not be implied by law, see *Force v. Haines*, 17 N. J. L. 385; *Woods v. Ayers*, 39 Mich. at p. 351; *Haywood v. Long*, 27 N. C. 438; *Jones v. Allen*, *Ibid.* 473; *University v. McNair*, 37 N. C. 605; *Prince v. McRae*, 84 N. C. 674; *Everitt v. Walker*, 109 N. C. 129, 13 S. E. 860; *Richardson v. Strong*, 35 N. C. at p. 108; *Mordecai's L. L.* 107-114; *McIntosh Cont.* 8-19. See "Work and Labor," Century Dig. § 2, Decennial and Am. Dig. Key No. Series § 2.

THOMAS v. SHOOTING CLUB, 121 N. C. 238, 28 S. E. 293. 1897.

Where There Was No Intention to Charge.

[Action for services rendered and accepted. Verdict and judgment against defendant, who appealed. Affirmed. The facts appear in the beginning of the opinion.]

FAIRCLOTH, C. J. This action is brought to recover for services rendered in procuring hunting ground leases at the instance of defendant, which were accepted and received by the defendant. The plaintiff testified that when he got up the leases he did not expect to charge for the work, if they should pay balance on his house, which has been paid, and should pay him to take charge of their business at lucrative wages. The defendant's president testified that: "The consideration for getting up the leases was that we were to buy his property, and make him steward of the club at a salary. This was not a contract. It was our intention. . . . Did not employ him as steward because we had a falling out about the house. . . . I told him to get up the leases before we bought the house." So that there was no contract as to the leases, because the construction of a contract does not depend upon what either party expected, but upon what both agreed. *Brunhild v. Freeman*, 77 N. C. 128. If A. agrees to render services to B., and it is agreed by both that the services are gratuitous, and not to be charged for, then A. cannot recover. If A. renders services to B., and the work is accepted, the law implies a promise by B. to pay the value of the work. This is too familiar to need citation of authority. There was evidence as to the value of the services and the house, and the jury rendered a verdict in favor of the plaintiff for \$160. In apt time, the defendant asked the court to instruct the jury that if the plaintiff, when he got up the leases, expected to make no charge, but expected remuneration afterwards by employment from the defendant, he could not recover for getting up the leases. This prayer was refused, but in lieu thereof his honor charged that: "If Thomas did not intend at the time to charge for getting up the leases, and this was known to the defendant, then he could not charge and recover for the same; but, if it was not known to the defendant that Thomas did not intend to charge, then Thomas could afterwards sue for and recover for his services in getting up the leases. (Exception.)" We see nothing prejudicial to the defendant in the charge as given, which included, in substance, the defendant's prayer, or so much thereof as he was entitled to. When the law implies a promise to pay for work done and accepted, and there is no agreed price, the laborer may recover the reasonable value of his services, unless there be some agreement or understanding that nothing is to be paid. A physician makes no charge for professional services on his books, and payment is resisted on the ground that the services were intended to be gratuitous, and the jury find that the services were rendered without any agreement to pay a definite sum. Held, that the law implies a promise to pay what they were reasonably worth. *Prince v. McRae*, 84 N. C. 674. Here, as the implied promise is not met by any agreement that there should be nothing paid, the plaintiff is entitled to recover. Affirmed.

That one cannot do an act of charity and afterwards charge for it, see *University v. McNair*, 37 N. C. 605; *Everitt v. Walker*, 109 N. C. 139, 13 S. E. 860. For the right of recovery for services when there is no in-

tention to charge, see *Williams v. Barnes*, 14 N. C. 348; *Hudson v. Lutz*, 59 N. C. 217; *Hauser v. Sain*, 74 N. C. 552; *Miller v. Lash*, 85 N. C. 51; *Dodson v. McAdams*, 96 N. C. 149, 2 S. E. 453; *Young v. Herman*, 97 N. C. 280, 1 S. E. 792; *Callahan v. Wood*, 118 N. C. 752, 24 S. E. 542; *Avitt v. Smith*, 120 N. C. 392, 27 S. E. 91; *Hicks v. Barnes*, 132 N. C. 146, 43 S. E. 604; *Stallings v. Ellis*, 136 N. C. 69, 48 S. E. 548; *Dunn v. Currie*, 141 N. C. 123, 53 S. E. 533; *Winkler v. Killian*, 141 N. C. 575, 54 S. E. 540; *Henderson v. McLain*, 146 N. C. 329, 59 S. E. 873; *Mordecai's L. L.* 107-114; 15 Am. & Eng. Enc. L. 1083; 21 Ib. 1061; 2 Page Cont. §§ 778-784; 9 Cyc. 273-275; *McIntosh Cont.* 12-16. It will be seen from the above cases that there has been a good deal of conflict and confusion on this point. See "Work and Labor," *Century Dig.* §§ 8-10; *Decennial and Am. Dig.* Key No. Series § 5.

DAY v. CATON, 119 Mass. 513. 1876.

When a Contract to Pay for Services May Be Inferred from the Conduct of the One Benefited Thereby.

[Action ex contractu to recover the value of one half of a party wall erected by the plaintiff with the knowledge, and without the objection, of the defendant, the defendant knowing that the plaintiff expected to be paid for his services. Verdict against defendant, who alleged exceptions. Exceptions overruled.]

The defendant requested the judge to charge that there could be no recovery in the absence of an express contract on his part; and that if the defendant knew the work was going on, he would not be rendered liable by such knowledge, and by his silence and subsequent use of the wall. The judge refused to so instruct the jury, but did charge that while the building of the wall by the plaintiff with defendant's knowledge and defendant's using it, would not, per se, render the defendant liable to pay for it, still a promise to pay might be inferred from the defendant's conduct; and that if defendant knew or had reason to know that the plaintiff was doing the work and expected to be paid for it, and yet the defendant allowed him to proceed without objection, then the jury might infer that the defendant promised to pay the plaintiff for his work.]

DEVENS, J. The ruling that a promise to pay for the wall would not be implied from the fact that the plaintiff, with the defendant's knowledge, built the wall, and that the defendant used it, was substantially in accordance with the request of the defendant, and is conceded to have been correct. *Chit. Cont.* (11th Am. ed.) 86; *Wells v. Bannister*, 4 Mass. 514; *Knowlton v. Plantation No. 4*, 14 Maine, 20; *Davis v. School District in Bradford*, 24 Maine, 349. The defendant contends, however, that the presiding judge incorrectly ruled that such promise might be inferred from the fact that the plaintiff undertook and completed the building of the wall with the expectation that the defendant would pay him for it, the defendant having reason to know that the plaintiff was acting with that expectation, and allowed him thus to act without objection.

The fact that the plaintiff expected to be paid for the work would certainly not be sufficient of itself to establish the existence of a contract, when the question between the parties was whether one was made. *Taft v. Dickinson*, 6 Allen, 553. It must be shown that, in some manner, the party sought to be charged assented to

it. If a party, however, voluntarily accepts and avails himself of valuable services rendered for his benefit, when he has the option whether to accept or reject them, even if there is no distinct proof that they were rendered by his authority or request, a promise to pay for them may be inferred. His knowledge that they were valuable, and his exercise of his option to avail himself of them, justify this inference. *Abbot v. Hermon*, 7 Greenl. 118; *Hayden v. Madison*, 7 Greenl. 76. And when one stands by in silence and sees valuable services rendered upon his real estate by the erection of a structure (of which he must necessarily avail himself afterwards in his proper use thereof), such silence, accompanied with the knowledge on his part that the party rendering the services expects payment therefor, may fairly be treated as evidence of an acceptance of it, and as tending to show an agreement to pay for it.

The maxim, *qui tacet consentire videtur*, is to be construed indeed as applying only to those cases where the circumstances are such that a party is fairly called upon either to deny or admit his liability. But if silence may be interpreted as assent where a proposition is made to one which he is bound to deny or admit, so also it may be if he is silent in the face of facts which fairly call upon him to speak. *Lamb v. Bunce*, 4 M. & S. 275; *Conner v. Hackley*, 2 Met. 613. *Preston v. American Linen Co.*, 119 Mass. 400. If a person saw day after day a laborer at work in his field doing services which must of necessity enure to his benefit, knowing that the laborer expected pay for his work, when it was perfectly easy to notify him if his services were not wanted, even if a request were not expressly proved, such a request, either previous to or contemporaneous with the performance of the services, might fairly be inferred. But if the fact was merely brought to his attention upon a single occasion and casually, if he had little opportunity to notify the other that he did not desire the work and should not pay for it, or could only do so at the expense of much time and trouble, the same inference might not be made. The circumstances of each case would necessarily determine whether silence with a knowledge that another was doing valuable work for his benefit, and with the expectation of payment, indicated that consent which would give rise to the inference of a contract. The question would be one for the jury, and to them it was properly submitted in the case before us by the presiding judge. Exceptions overruled.

See also *Bailey v. Rutjes*, 86 N. C. 517; *Blount v. Guthrie*, 99 N. C. 92, 5 S. E. 890. See "Party Walls," *Century Dig.* § 60; *Decennial and Am. Dig.* Key No. Series § 10.

PATTON v. BRITTAIN, 32 N. C. 8 (1848).

Using Goods Not Ordered

[Assumpsit for hides delivered to the defendant upon the order of his agent, but contrary to the agent's instructions from the defendant. Defendant had knowledge of his agent's disobedience of orders before he

had received the hides and settled with his agent. Defendant kept the hides but refused to pay for them, because he had given his agent the money with which to pay cash for them, which money the agent misapplied and bought the hides on defendant's credit. Verdict and judgment against the defendant, and he appealed. Affirmed.]

BATTLE, J. The question presented for our determination in this case is one of some practical importance, but not of much difficulty. There is no doubt that the defendant was not bound by the contract for the purchase of the hides made by his agent, because the agent had exceeded his authority in purchasing upon credit instead of paying cash, as he was expressly directed. This is fully established by the authorities referred to and relied upon by the defendant's counsel. 1 Chit. Pl. 40; Com. on Cont. 223. The principal, then, had a perfect right to repudiate the contract and refuse to receive the articles, but not having done so, it is equally clear that, by receiving the hides and appropriating them to his own use, after notice from the plaintiff that they had been purchased for him and upon his credit, he ratified the contract made on his behalf, and became bound to pay for them. And this result would have been the same whether Bates acted contrary to his authority, exceeded it, or had none at all. It is the simple case of the goods of one man coming to the use of another, which he knows are not intended as a gift, but are sent to him upon the expectation that he will receive them and pay for them. He may refuse them if they have been sent without his request; but if he receive them, he must pay for them. But it is contended that the defendant received the goods before notice that they were sent upon his credit, at Hamberg, by the delivery to the commission merchants, or at least to the wagoner, who carried them to his place of residence in Henderson county. That cannot be so, for there is no evidence that the commission merchants or the wagoner were his special agents to receive the goods for him. There was, therefore, no delivery of them to the defendant until they were carried to him in Henderson. Until that time they were merely in transitu, in the hands of common carriers, and he had the option to receive them or reject them. Having done the former, it is but common justice that he should pay for them. The dishonesty of his agent in embezzling his money must fall upon himself and not upon an innocent person, who never trusted the agent.

In coming to the conclusion that the defendant is responsible for the price of the hides, we have not been at all influenced by the consideration that he had notice that he was looked to for payment before he had the settlement with his agent. That circumstance did not in any manner affect the plaintiff's right to recover, provided the notice that credit was given to him reached his hands before the goods were received by him, because the plaintiff had done nothing to change the relation between him and his agent before that time. The judgment must be affirmed.

See "Principal and Agent," Century Dig. § 649; Decennial and Am. Dig. Key No. Series § 171.

RICHARDSON v. STRONG, 35 N. C. 106. 1851.

Services Rendered to One Who is Insensible, or Wholly Incapable of Taking Care of Himself at the Time.

[Assumpsit for services in caring for the defendant, at the request of his relatives, while defendant was insane—so much so as to attempt to injure himself and destroy his property. Verdict and judgment against defendant, and he appealed. Affirmed.]

Defendant pleaded that he was insane when the services were rendered, and also that they were unnecessary. The judge charged that, if defendant was in the condition above stated, the services were necessary, and if necessary, the defendant was liable.]

RUFFIN, C. J. The contracts of a lunatic are not all absolutely void; but it is held that contracts fairly made with them for necessities or things suitable to their condition or habits of life, are to be sustained. The leading case on the subject in England is that of *Baxter v. Earl of Portsmouth*, 5 B. & C. 107; and in *Tally v. Tally*, 22 N. C. 385, the same opinion was expressed by this court. There is, therefore, no absurdity in the case of lunatics more than in that of infants in implying a request to one rendering necessary services or supplying necessary articles, and implying also a promise to pay for them. Indeed, with whatever propriety the ancient maxim that no one ought to be allowed to stultify himself is denied in modern law, its application in a case of this kind seems to be entirely just. The urgency of the case demands instant help, and leaves no opportunity for a previous application to a court having the ordering of the estates to fix an allowance; and in such an instance as this, in which, as far as is seen, there was a recovery before a commission issued, there could be no subsequent allowance, however assiduous and effective the attentions to the party might have been. Therefore, there is no middle ground between leaving an unhappy person thus afflicted destitute of those services and things indispensable to his proper restraint and recovery, or however rich, dependent for them on gratuitous benevolence, on the one hand; or on the other of implying a promise to pay for them what they may reasonably be worth. It is as if a physician administered to a man deprived of his senses by a dangerous blow, when the loss of life might result from delay. He would certainly be bound to make reasonable remuneration, though incapable at the time of making an actual request. The reason extends to medical services to a madman, and to those of a nurse for him, or of a guard to protect him from a propensity to destroy himself, or his property. In the case before the court the plaintiff acted at the instance of the defendant's medical adviser and his nearest friend and relative, not insisting, however disagreeable the duty, on any stipulation for high wages, but content with a quantum meruit. His conduct was, therefore, as fair as it could be.

Upon the other point there is no doubt. What the plaintiff did certainly falls within the class of necessities as defined in the law. Judgment affirmed.

See *Kansas v. Huff*, 90 Pac. 279, 12 L. R. A. (N. S.) 1090, and note; and in this connection see 4 Ib. at p. 63. See "Insane Persons," Century Dig. §§ 128, 129; Decennial and Am. Dig. Key No. Series § 75.

CRANMER v. GRAHAM, 1 Blackf. 406, 1825.

Express Contract and Quantum Meruit or Quantum Valebat.

[Cranmer brought assumpsit against Graham and declared in two counts: 1. On an express contract for twelve months' services at \$9.25 per month; 2. General indebitatus assumpsit for work and labor. The evidence disclosed an express contract by which the defendant hired the plaintiff for ten months for \$92.50—an entire contract. The first count set up an *entire* express contract for *twelve months at \$9.25 per month*, while the proof was that of an *entire* contract for *ten months at \$92.50*. Judgment against the plaintiff, Cranmer, who carried the case to the supreme court by writ of error. Affirmed.]

The case was heard below on a demurrer to plaintiff's evidence, the substance of which is given above.]

HOLMAN, J. . . . So far as the testimony proves anything, it proves a hiring for ten months for \$92.50, a contract very different from a hiring at \$9.25 per month. In *McMillan v. Vanderlip*, 12 Johns. 165, a hiring to spin for twelve months, at three cents per run, was considered as an entire contract for twelve months, and the plaintiff was not permitted to recover by the run, after spinning a part of the time. The principle on which that case was decided is applicable, in its utmost strength, to the case before us. Here is a hiring to ordinary labor on a farm for ten months, commencing in the winter season, for the sum of \$92.50; and if the plaintiff is permitted to recover, as for a hiring at \$9.25 per month, he would have the same right to recover for a part of the time as for the whole. But it is well known that the labor of a man on a farm is far more valuable in the spring and summer than in the winter months. And it would be contrary to every principle of justice, to permit a man under such a contract to labor through the winter months, and recover of his employer for that time as for monthly wages, when in all probability the employer would not have hired him during those months, but in consideration of his services the balance of the term. The contract proved is certainly very different from the contract set forth in the first count of the declaration; and the necessity of a correspondence, in every material part, between the allegations and the proof, cannot now be disputed. See *Sebastian v. Thompkins*, 1 Marsh. 63; *Thorpe v. White*, 13 Johns. 53; and the various authorities cited in 1 Esp. N. P. 263.

It is equally clear, and equally well settled, that, where there is a special agreement, it must be declared on; and cannot be given in evidence under general counts. This rule prevails when the special contract remains in full force; but, where the contract has been rescinded by agreement of the parties, or has been performed in a manner somewhat different from the terms of the contract,

or the performance has been prevented by the opposite party, a recovery may be had on a general count. This doctrine runs through a variety of cases. See *Linningdale v. Livingston*, 10 Johns. 36; *Raymond v. Bearnard*, 12 Johns. 274; *Jennings v. Camp*, 13 Johns. 94; 1 Esp. N. P. 249; 2 Phil. Ev. 83, and the various authorities cited in the text and note. Here the special agreement was still open and in full force; and a recovery, if to be had at all, must be had under that agreement, and not on a general indebitatus assumpsit. Judgment affirmed.

"We take it to be incontrovertibly settled, that indebitatus assumpsit will lie to recover the stipulated price due on a special contract, not under seal, where the contract has been completely executed [performed by the plaintiff]; and that it is not necessary, in such case, to declare upon the special agreement." *Bank of Columbia v. Patterson*, 7 Cranch, 303; see other cases cited in a note to the principal case, and in 1 *Rose's Notes*, 522. In North Carolina a recovery may be had on a quantum meruit although the complaint sets up a special contract only, if the plaintiff prove the performance of services, their acceptance and value, and fail to prove a special contract; and this he can do without amending his complaint. *Stokes v. Taylor*, 104 N. C. 394, headnote 3, 10 S. E. 566. See further on this subject of recovery on a quantum meruit or valebat, when there is an express contract, *Chamblee v. Baker*, 95 N. C. at p. 100, inserted at ch. 6, § 3, a, ante; *Hoagland v. Moore*, 2 Blackford, at p. 170; *Byerly v. Kepley*, 46 N. C. 35; *Madden v. Porterfield*, 53 N. C. 166; and cases and authorities cited in *Stokes v. Taylor*, supra; *McIntosh Cont.* 540-544. The principal case is said to be overruled by several subsequent cases in the Indiana reports. See notes to the principal case and note at p. 70 of 3 Indiana. See the next succeeding case in this section. See "Work and Labor," *Century Dig.* §§ 23-33; *Decennial and Am. Dig.* Key No. Series §§ 8-14; "Assumpsit, Action of," *Century Dig.* § 15; *Decennial and Am. Dig.* Key No. Series § 5.

KERSTETTER v. RAYMOND, 10 Ind. 199, 202-205. 1858.

Express Contract and Quantum Meruit or Quantum Valebat.

[Raymond sued Kerstetter for the value of goods sold and delivered as per an account filed with his complaint. Verdict and judgment against Kerstetter, and he appealed. Reversed.]

After the evidence was closed and the case argued to the jury, Raymond was permitted to amend his complaint by adding a paragraph setting up a written contract and giving its terms. The defendant objected. No proof of the express contract was offered, but such a contract was alleged in the amendment to the complaint. Plaintiff made no attempt to show what were the terms of the express written contract, or that he had complied with its terms, etc. The further facts concerning the proof appear in the opinion. The discussions as to the propriety of allowing the amendment, and of the Indiana statute governing the filing of original contracts, etc., upon which an action is based, are omitted.]

HANNA, J. . . . The new pleading having been improperly filed, the next question is as to its effect. The parties appear to have acted, in this case, upon the presumption that it is obligatory upon one who resorts to a suit, to seek his remedy upon the written contract or agreement, where one exists, in reference to

the subject-matter embraced in the controversy. This is evident from the fact that, after the evidence disclosed the existence of a written contract, the plaintiff sought and obtained leave to file the additional paragraph to his complaint, and from the further fact that the defendant asked certain instructions to the jury, directed to that point. Should the written contract have been made the foundation of the suit? A copy of it is not given. The paragraph professes to set forth its terms and stipulations. No proof was given as to its terms, etc. There could be no doubt, from the evidence, about the plaintiff's having parted with his property on some kind of contract, either express or implied, with defendant. The evidence is conflicting as to whether the defendant was acting for himself or for others, in making the purchase. It was a question for the jury.

Several instances are given in which general assumpsit might be brought, under the old form of pleading, where there has been a special contract—the following among others: 1. "Where the whole of such contract has been executed on the part of the plaintiff, and the time of payment on the other side is past, a suit may be brought on the special contract, or a general assumpsit may be maintained; and in the last case, the measure of damages will be the rate of recompense fixed by the special contract." 2 *Smith's Leading Cases*, 41; *Bank of Columbia v. Patterson*, 7 *Cranch*, 299, 2 *Curtis*, 540; 1 *Bac. Abr.* 380; *Chesapeake and Ohio Canal Co. v. Knapp*, 9 *Pet.* 541, 11 *Curtis*, 476.

2. "If there has been a special contract which has been altered or deviated from in particulars, by common consent, general assumpsit will lie," etc. 2 *Smith's Leading Cases*, 42; *Dubois v. The Delaware and Hudson Canal Co.*, 4 *Wend.* 285; *Jones v. Woodbury*, 11 *B. Mon.* 169.

3. "If there has been a special contract, and the plaintiff has performed a part of it according to its terms, and been prevented by the act or consent of the defendant, or by the act of the law, from performing the residue, he may in general assumpsit recover compensation for the work actually performed, and the defendant cannot set up the special contract to defeat him." 2 *Smith's Leading Cases*, 43, and cases cited; *Scobey v. Ross*, 5 *Ind.* 446.

4. Under the decisions in this state, the following principle is also established, to-wit: "That when one party to a special entire contract has not complied with its terms, but professing to act under it, has done for, or delivered to, the other party something of value to him which he has accepted," etc., and the time for performance of the contract is past, an implied promise arises to the extent of the value, etc. *Lomax v. Bailey*, 7 *Blackf.* 603; 3 *Ind.* 73.

If the defendant, in the case at bar, had desired to avail himself of any supposed benefit to him, arising out of the written contract, either to defeat the action, or to fix the measure of damages, he could have done so by pleading it in answer and producing it in evidence upon the trial. The mere filing the additional para-

graph, without receiving evidence to sustain it, could not have produced any injury to the defendant.

The last error assigned—that the verdict is not sustained by the evidence—we think is well taken. In the absence of evidence that the parties had entered into a special written contract concerning the matters in controversy, the plaintiff had, by the testimony introduced, so far made out a case as to leave it a question for the jury whether he had a right to recover; but after there was evidence given that such written contract existed, the plaintiff did not attempt to show what its stipulations were, or that he had complied upon his part, or been prevented from complying; nor did he show that, for any reason, he was in a condition to disregard the written contract, and recover for the property delivered; nor was it given in evidence or its contents proved by the defendant. It is insisted that, evidence upon this point should come from the defendant under these circumstances. We think not. Suppose it was true that the plaintiff had complied with all the stipulations upon his part; still he would have to produce the contract to show that the day of payment had arrived, and that the defendant was in default; so if the special contract had been departed from by mutual consent, or if the plaintiff had been prevented from performing, etc., or if the time for the performance of the contract was past and it was no longer open. There was no evidence upon any of these points. *Epperly v. Bailey*, 3 Ind. 73; *Wheatly v. Miscal*, 5 Ind. 142; *Lomax v. Bailey*, 7 Blackf. 599. A late writer on evidence holds the following language: "Where in a suit for the price of work and labor performed, it appears that work was commenced under an agreement in writing, the agreement must be produced; and even if the claim be for extra work, the plaintiff must still produce the written agreement; for it may furnish evidence, not only that the work was over and beyond the original contract, but also of the rate at which it was to be paid for." 1 Greenl. s. 87. The judgment is reversed with costs.

See "Assumpsit, Action of," Century Dig. § 153; Decennial and Am. Dig. Key No. Series § 25; "Contracts," Century Dig. §§ 1726, 1754, 1772; Decennial and Am. Dig. Key No. Series §§ 346, 348.

WEBB v. CHAMBERS, 25 N. C. 374. 1843.

Assumpsit on Account Stated.

[Assumpsit to recover the amount of a store account. Verdict and judgment against the defendant, and he appealed. Affirmed.]

There was evidence that plaintiff and defendant had a conversation about the amount due to plaintiff by the defendant on a store account; that the defendant had the account in his hands during such conversation, but whether or not he read it over, did not appear; that the defendant promised, during this conversation, to close the account by his bond. The judge charged that upon this evidence, if believed by them, the jury could find for the plaintiff.]

RUTTEN, C. J. There can be no doubt of the correctness of the opinion given to the jury. It is the ordinary evidence of the justice of a merchant's account, when he renders it to his customer and the latter keeps it without objection to any of its items. Without a denial of it in toto or of some part of it, the jury may infer an admission of its correctness and a promise to pay the balance. Upon that part of the case alone, therefore, the court might have left it to the jury on both points, that is, as proof of the delivery of the articles and of a mere promise to pay. But in addition to those inferences, here the defendant, with the account in his hand, and after perusing it or opportunity of perusing it, expressly promised to settle the account and pay it. A promise could not be more direct or precise, for there was nothing left to uncertainty, as the account fixed the debt, which the defendant agreed to pay. Judgment affirmed.

See ch. 4, § 2. (c). See to the same effect as the principal case, *Daniel v. Whitfield*, 44 N. C. at p. 297; *Hawkins v. Long*, 74 N. C. 781; 23 L. R. A. (N. S.) 478. In an action on an account stated it is not necessary to state the items constituting the debt. *Dunn v. Johnson*, 115 N. C. at p. 259, 20 S. E. 390, citing *Selwyn's Nisi Prius*, 68. See "Account Stated," Century Dig. §§ 30-40; Decennial and Am. Dig. Key No. Series § 6.

JONES v. HOAR, 5 Pickering, 285. 1827.

Waiving the Tort and Suing in Assumpsit.

[Assumpsit for goods sold and delivered and for money had and received. The basis of the action was, that the defendant had entered upon the plaintiff's land and had cut and carried off a quantity of timber. The defendant insisted, that upon these facts the plaintiff could not maintain this action—that he could not waive the tort and sue in assumpsit, unless the defendant had sold the timber, and this was not shown. Judgment against the plaintiff, and he appealed. Affirmed.]

PARKER, C. J. The plaintiff declares in assumpsit, and one count is for goods sold and delivered. By the agreement it appears, that the only ground for supporting this count is, that the defendant cut and took away certain trees from land claimed by the plaintiff, and, for the purpose of the argument, actually owned by him. The proper action would undoubtedly be trespass for the injury to the land, or trover for the trees. But the plaintiff contends that he has a right to waive the tort, and charge the defendant with the trees as sold to him. Upon examination of the authorities cited, which are well summed up and commented upon by STRONG, J., in the opinion of the court of common pleas, we are satisfied that the plaintiff cannot maintain this position. There is no contract express or implied between the parties, and therefore an action *ex contractu* will not lie. The whole extent of the doctrine, as gathered from the books, seems to be, that one whose goods have been taken from him or detained unlawfully, whereby he has a right to an action of trespass or

trover, may, if the wrong-doer *sell* the goods and *receive* the money, waive the tort, affirm the sale, and have an action for money had and received for the proceeds. No case can be shown where assumpsit as for goods sold lay in such case, except it be against the executor of the wrong-doer, the tort being extinguished by the death, and no other remedy but assumpsit against the executor remaining. Such was the case of *Hambly v. Trott*, Cowp. 371, referred to in Judge Strong's opinion.

The opinion of Judge Strong referred to in the principal case is printed in the second edition of *Pickering's Reports*, 1864, and is a very instructive exposition of the point involved. In it many English cases are cited and distinguished. In *Bullinger v. Marshall*, 70 N. C. 520, inserted at ch. 4, sec. 1, it is said: "There are cases where a party is allowed to waive the tort and sue in contract, as if one takes my horse and sells it and receives the money, I may waive the tort and sue for money had and received to my use, . . . but if the money be not received, my remedy is for the tort." This case is approved in *Timber & Land Co. v. Brooks*, 109 N. C. 698, 14 S. E. 315, which, in turn, is approved in *Manning v. Fountain*, 147 N. C. 18, 60 S. E. 645, inserted in subsection b, post. See the next succeeding case for a more liberal doctrine than that announced in the principal case. For a full discussion of both lines of authority, see 4 Cyc. 332-334; Page on Cont. secs. 840-843; Clark on Cont. pp. 537, 549. In *Glasscock v. Hazell*, 109 N. C. 145, 13 S. E. 789, it is held that to sustain assumpsit in such cases there must be proof not only that the defendant had sold the goods but of the amount he received therefor. See "Action," Century Dig. §§ 196-215; Decennial and Am. Dig. Key No. Series § 28; "Assumpsit, Action of," Century Dig. §§ 42-54.

COOPER v. HELSABECK, 5 Blackford, 14. 1838.

Same Point as in Preceding Case.

[Action of assumpsit for goods sold and delivered. The proof was, that the defendant took the plaintiff's wagon and converted it to his own use; but there was no proof that the defendant had sold the wagon. Judgment against the plaintiff, and he appealed. Reversed.]

SULLIVAN, J. . . . The only question in this case is, whether the action of assumpsit for goods sold and delivered can be maintained.

Where there is no contract of sale, assumpsit is not generally the appropriate form of remedy, yet it sometimes lies for the value of goods obtained tortiously. There are many cases reported, in which it has been held that a plaintiff may waive a tort, and sue for goods sold, etc. In the case of *Hill v. Perroti*, 3 Taunt. 274, where the defendant had by fraud procured the plaintiff to sell to an insolvent person a quantity of goods, and which the defendant had gotten into his own possession, the court held that the law would imply a contract to pay for the goods from the circumstance of their having been the plaintiff's property, and having come to the defendant's possession unaccounted for; and he could not be permitted to account for the possession by setting up the sale to the insolvent person which he himself

had procured by fraud, because no man may take advantage of his own fraud; therefore indebitatus assumpsit lay for the goods.

In *Lee v. Shore et al.*, 1 B. & C. 94, which was an action for goods sold and delivered, the plaintiff proved the possession of the goods by himself and their removal by the defendants, but it appeared that the goods consisted of spar lying on the lands of one Hurd, and that the plaintiff claimed under Hurd by a written agreement not produced. It was held that the plaintiff could not recover, because he claimed to hold the land on which the goods lay by virtue of a written contract which was not given in evidence. ABBOTT, C. J. said: "Where the owner of property which has been taken away by another waives the tort, and elects to bring an action of assumpsit for the value, it is incumbent upon him to show a clear and indisputable right to the property." The only difficulty in the way of the plaintiff's recovery was, that he did not produce on the trial the proper evidence of his right to the property, and which would have explained those acts of ownership he had exercised over it.

In another case, the plaintiff contracted to underpin the defendant's house with hewn stone, and the stone were furnished for that purpose by the plaintiff. The stone were not used for the purpose intended, but were left by the plaintiff near the defendant's house until autumn, when the defendant built a dairy and put into it the same stone. There was no contract for the sale of the stone; on the contrary, it was proven that the plaintiff said they were taken without leave. The court held that the tort might be waived, and assumpsit supported for the price of the stone, although there was no contract. *Hill v. Davis*, 3 N. H. 384.

In *Lightly v. Clouston*, 1 Taunt. 112, where an apprentice was seduced from the service of his master, it was held that the tort might be waived and assumpsit maintained for the wages of the apprentice; and the court said that the defendant would not be permitted to say that he obtained the services of the apprentice not by contract but by fraud.

Morton on Vendors, at page 245, says: "As the defendant cannot take advantage of his own wrong, the plaintiff may in general waive the tort, when the goods have come wrongfully into the defendant's possession, and sue for goods sold." Starkie, in his *Treatise on Evidence*, part 4, title "goods sold and delivered," says "the plaintiff may in this as in other cases waive a tort, and in some instances treat the defendant, who has fraudulently possessed himself of the goods, as the purchaser."

From the authorities above noticed, we think the plaintiff may recover in the present form of action. The facts in this case are spread upon the record by a demurrer to the evidence. They fully sustain the plaintiff's case, and the judgment of the circuit court ought to have been for the plaintiff and not for the defendant. Judgment reversed with costs.

See "Action," Century Dig. §§ 196-215; Decennial and Am. Dig. Key No. Series § 28; "Assumpsit, Action of," Century Dig. §§ 42-54.

(b) Money Had and Received.

MOSES v. MACFERLAN, 2 Burrows, 1005, 1008, 1012. 1760.

Basis and Gist of Assumpsit for Money Had and Received.

[Moses indorsed some notes to Macferlan under an agreement that, while it should not so appear in the indorsements, Moses should in reality, as between him and Macferlan, occupy the position of indorser without recourse. By resorting to means not necessary to mention, Macferlan collected the amount of the notes from Moses on the strength of his indorsement. Thereupon Moses brought this action to recover back the amount thus improperly extorted from him. The action was based on the implied promise of Macferlan to return the money improperly collected from Moses, and not upon the express promise that Moses should incur no liability to Macferlan by indorsing the notes. Verdict against the defendant subject to the opinion of the court as to whether the plaintiff could recover in this action of assumpsit for money had and received to his use. Defendant moved to nonsuit the plaintiff. Motion overruled and judgment against the defendant. Only extracts from the opinion—which was written on the motion to nonsuit—are here inserted.]

LORD MANSFIELD, C. J. There was no doubt at the trial, but that upon the merits the plaintiff was entitled to the money; and the jury accordingly found a verdict for the six pounds, subject to the opinion of the court upon this question, "Whether the money might be recovered by this form of action, or must be by an action upon the special agreement only." . . .

This kind of equitable action, to recover back money, which ought not in justice to be kept, is very beneficial, and therefore much encouraged. It lies only for money which *ex aequo et bono*, the defendant ought to refund: it does not lie for money paid by the plaintiff, which is claimed of him as payable in point of honor and honesty, although it could not have been recovered from him by any course of law; as in payment of a debt barred by the statute of limitations, or contracted during his infancy, or to the extent of principal and legal interest, upon an usurious contract, or for money fairly lost at play; because in all these cases, the defendant may retain it with a safe conscience, though by positive law he was barred from recovering. But it lies for money paid by mistake, or upon a consideration which happens to fail; or for money got through imposition (express or implied); or extortion; or oppression; or an undue advantage taken of the plaintiff's situation, contrary to laws made for the protection of persons under those circumstances. In one word, the gist of this kind of action is, that the defendant, upon the circumstances of the case, is obliged by the ties of natural justice and equity to refund the money.

Therefore we are all of us of opinion, that the plaintiff might . . . bring this action to recover the six pounds which the defendant got and kept from him iniquitously.

See "Money Received," Century Dig. § 1; Decennial and Am. Dig. Key No. Series § 1.

SERGEANT AND HARRIS v. STRYKER, 16 N. J. L. 464. 1838.

Assumpsit for Money Had and Received. When the Action Will Lie and When it Will Not Lie. Priority, Express or Implied.

[Stryker sued Sergeant and Harris, before a justice of the peace, for money had and received by them to his use. The justice rendered judgment against the defendants, and they appealed to the court of common pleas, which again rendered judgment against them. They then carried the case to the supreme court by certiorari. Reversed.]

A sheriff offered a reward for the arrest of an escaped prisoner. Stryker arrested the man, but Sergeant and Harris, falsely representing to the sheriff that they had apprehended the prisoner, induced him to pay the reward to them. The payment was not made to them for Stryker, nor on his account, but it was paid to Sergeant and Harris because they claimed it as their own, and because the sheriff supposed, from their statements, that they were entitled to it. Stryker brought this action to recover the money from Sergeant and Harris, and the question is: Could Stryker recover, under the circumstances stated, for money had and received to his use?]

HORNBLOWER, C. J. . . . Whether the plaintiff, under the facts in this case, is entitled to recover in this action, is the question.

That Stryker, upon the evidence in this case, was alone entitled to the reward, there cannot, I think, be a reasonable doubt; and if he had sued Sheriff Jones, nothing in my opinion could have prevented his recovery. He has thought proper, however, to pursue the money in the hands of the defendants, as money received by them to his use; and whether he can recover, remains to be seen; I fear he cannot.

The action of assumpsit for money had and received is undoubtedly a favored and highly beneficial one. It is justly compared to a bill in equity: because it lets in both parties, plaintiff and defendant, to all the grounds of complaint on the one side, and of excuse and allowance on the other, which are consistent with the principles of equity and good conscience—nevertheless, we must not extend it to cases, where a court of equity itself, if the plaintiff was at liberty to go there, would not entertain a bill and give the relief sought for. *Straton v. Rastall*, 2 T. R. 370, per BULLER, J. Broad and extensive as this action is, it has its limits, beyond which it ought not to go; and the great difficulty is to prescribe those limits, and make them out by such specific and perceptible lines, as leaves the mind in no doubt or perplexity. To say that it lies to “recover back money which ought not to be kept”—“for money which, *ex aequo et bono*, the defendant ought to refund”—or “for money which the defendant, upon the circumstances of the case, is obliged by the ties of natural justice and equity to refund,” or “for money got through imposition,” or “extortion,” or “oppression,” or “by mistake,” or “by an undue advantage taken of the plaintiff’s situation,” is, after all, dealing in generalities which afford us no specific rule by which to test any particular case. Notwithstanding the universality of the expressions used in the books on this subject, there is an

must be in truth and justice a limit to this action. It cannot be that every person having a legal demand and a right of action against a third person, is at liberty to abandon his suit against such person, and by a suit against me for money had and received, compel me to litigate with him and establish my right to money which I may have received from his debtor. . . .

The defendants, instead of receiving the money as the money of the plaintiff, or for his use, claimed and received it as their own, and wholly deny the plaintiff's right to it. It will not do to rely upon the sweeping expressions used in many of the cases upon this subject. In *Johnson v. Johnson*, 3 Bos. & Pul 169, Lord Alvanley says: "In the case of *Moses v. McFerlan*, some principles were laid down, which are certainly too large—such as that, wherever one man has money which another ought to have, an action for money had and received may be maintained; or that wherever a man has an equitable claim, he has also a legal action." In short, *there must be some privity existing between the parties, in relation to the money sought to be recovered in this action*. This privity may be either express or implied. It is express, where the defendant has received the money as agent or bailiff for the plaintiff, or where he consents or agrees to appropriate money in his hands belonging to another, to the payment of the plaintiff, at the owner's request. But it can be implied only where the defendant has received money *of the plaintiff*, or money *belonging to the plaintiff*, by mistake, or fraud, or duress, or has come into possession of it mala fide, or on a consideration which has failed, or has tortiously converted the plaintiff's property into money. In other words, the money sought to be recovered in this action upon an implied promise, must either be identically the money of the plaintiff, of which the defendant has improperly possessed himself; or the proceeds of some property, or issuing out of some fund or emoluments belonging to the plaintiff; and I think every well considered case will be found to arrange itself under one or the other of these heads. In *Lamine v. Dorrell*, 2 Ld. Raym. 1216, the action was by a rightful administrator, to recover the proceeds of certain debentures which belonged to the estate of the intestate, and which the defendant, or wrongful administrator, had sold. The case of *Howard v. Wood*, 2 Lev. 245, Sir T. Jones, 126, and many others of the same kind, were brought by a rightful officer to recover the fees of office that had been received by one who had held the office wrongfully; and these cases, it will be perceived, are like those mentioned by Lord Mansfield, in *Moses v. McFerlan*, where the defendant has received money from third persons in opposition to the plaintiff's right, and which by law the defendant had authority to receive. But then it must be remembered that the rightful officer had a right to those specific fees, and he could not recover them of the persons who had paid them to the officer de facto; for the officer de facto, while he continued to be such, had a right to demand, and lawful authority to receive, the emoluments of office.

The case of *Masen v. Waite*, 17 Mass. 560, was cited by the defendant's counsel. But far as that case goes, it does not help the defendant. There the identical money of the plaintiff was found in the possession of the defendant, who had got it unlawfully out of the hands of the plaintiff's agent. The case of *Hasser v. Wallis*, 1 Salk. 28, was also cited by the defendant's counsel; but it does not sustain him. Hasser, the plaintiff, being a feme sole, married Wallis, the defendant; he made a lease of her land, and received the rent. She then discovered that Wallis had a former wife, and thereupon sued him in assumpsit for the money he had received. It was insisted that Wallis having no right to receive, the tenant was not discharged; that therefore an action lay against the tenant, who might have his remedy over against Wallis. But the court held, that Wallis was visibly a husband, and the tenant discharged; at least the recovery against Wallis by the plaintiff would be a satisfaction to her, and discharge the tenant. It is plain that this case has no analogy to the one before us. Sergeant and Harris were not visibly entitled to the reward—payment to them was in no sense payment to Stryker; but the sheriff remained as much bound to him, as if he had thrown so much money into the fire. He did not pay them Stryker's money, but his own; and Stryker was neither bound to go after them for it, nor had he any more right to do so, than he would have had, if they had found Jones's pocket book in the street, with fifty dollars in it. If a man goes to my debtor and personates me; and my debtor pays him, supposing he is paying me, it is clearly money paid to my use; and in such case I may at my election sue my debtor, or proceed against the impostor; for the money was paid him for me, and he received it as mine. But, my debtor cannot give me a right of action against a third person, by paying him money which he claims a right to in opposition to me; and thus put it in my power to compel such third person to establish his rights as against the debtor, in a suit between me and such third person.

There is still another view which may be taken of this case, which I think is conclusive. It is admitted that Jones, the sheriff, may sustain assumpsit against the defendants for so much money had and received to his use; and this, in virtue of his general or absolute right of property in the money in question. If Stryker can maintain this action, it must be in virtue of his general right of property therein. Now, a right of action for the same property, as well on contract as tort, may exist in distinct persons at the same time; but must it not be, where the contract is only implied, by virtue of some *special* right of property in the one, and *general* right in the other? An agent having some beneficial interest in the performance of a contract (as for commissions, etc.) may sue upon it; as a factor, broker, warehouseman, carrier and others, and so may the principal, 1 Chit. Pl. 5; but they do not sue in the same right. It requires no argument to prove that an absolute and exclusive right to the same property cannot exist

in distinct persons at one and the same time, by virtue of an implied contract: if this be so, how can a right of action grounded upon such an absolute and exclusive right exist in distinct persons at the same time? It cannot be. If Jones, the sheriff, can sue for this money, Stryker cannot.

Upon the whole, I am of opinion that the judgments below must be reversed. Stryker cannot maintain this suit against the defendants below: they have got what does not belong to them; but that is no wrong to him. His right to the reward at the hands of the sheriff is as perfect as it ever was; and if he has released it, it is his own fault or misfortune. I see nothing to prevent the sheriff from recovering the money he has paid the defendants, if in fact they did not retake the prisoner. . . . Judgment reversed.

This form of action lies to recover money paid on a total failure of consideration, *Barickman v. Kuykendall*, 6 Blackford, 21; *Manning v. Fountain*, 147 N. C. 18, 60 S. E. 645, inserted, post, in this subsection. Money must have been received by the defendant, or such a state of facts must be shown as will raise a presumption that money was received. *Helvey v. Bd. Comrs.*, 6 Blackf. at p. 318; *Hicks v. Critcher*, 61 N. C. 353; or some equivalent which was treated as money, *Rowland v. Barnes*, 81 N. C. at p. 240. This action lies for money placed in the hands of A to be paid to B. *Peacock v. Williams*, 98 N. C. at p. 328, 4 S. E. 550, which case shows the limits of this doctrine; also for money paid by the plaintiff to the defendant through mistake, *Houser v. McGinnas*, 108 N. C. 631, 13 S. E. 139. As to privity, see the next succeeding case and *Hardy v. Williams*, 31 N. C. 177; *Bryant v. Peebles*, 92 N. C. 176; *Peacock v. Williams*, supra; *Coffey v. Shuler*, 112 N. C. at p. 625, 16 S. E. 912; *Woodcock v. Bostic*, 118 N. C. 822, 24 S. E. 362; *Keller v. Ashford*, 133 U. S. 610, 621, 10 Sup. Ct. 494. For sundry rulings as to when the action for money had and received will and will not lie, see 2 L. R. A. (N. S.) 563, and note (money deposited in lieu of bail by one illegally detained); 4 Ib. 1198, and note (money paid to a labor union to avoid a boycott); 4 Ib. 363, and note (by an agent for money of his principal paid out by the agent through mistake; for overpayments); 11 Ib. 234, and note (money paid in settlement of life policy under the erroneous impression that the assured is dead); 10 Ib. 49, and elaborate note (right of drawee of forged check or draft to recover money paid thereon); 11 Ib. 1104, and note (taxes illegally exacted); 22 Ib. 862, 872, and notes (license fees unlawfully exacted under color of authority); 13 Ib. 267, and note (money deposited with an agent, stakeholder, etc., for an illegal purpose); 23 Ib. 553, and note (for money paid to an agent upon a contract which the principal repudiates); 23 Ib. 1092, and note (by a bank for money paid on customer's check through mistake—cannot recover). See note at the end of ch. 14, post. See "Money Received," *Century Dig.* §§ 14-20; *Decennial* and *Am. Dig. Key No. Series* § 5.

NORWOOD v. O'NEAL, 112 N. C. 127, 16 S. E. 759. 1893.

Privity. Agreement Express or Implied.

[Action for money had and received to plaintiff's use. Verdict and judgment against defendant, and he appealed. Reversed.]

Plaintiffs were entitled, as next of kin, to a share in their grandmother's personal estate. Their father received such share—not for the children, but for himself, he and the administrator of the grandmother

being under the erroneous impression that it belonged to him as his own. The judge refused to charge that plaintiffs could not recover the money so received by their father.]

BURWELL, J. It appears from the case on appeal that the administrator of one Elizabeth Perry paid to the defendant a certain sum of money on December 27, 1867, thinking that he was entitled to receive it as a distributee of that estate. His wife, a daughter of Elizabeth Perry, had died before the death of her mother, and the plaintiffs are his children. When the defendant received this money he gave the administrator a receipt for the same "in full of his interest in said estate," in which he stipulated that, "should any lawful claim come against said estate," he would "refund his proportionate part of said lawful claim." The promise of the defendant was to the administrator of Elizabeth Perry, and no one but him or his successor can enforce that promise. The money was not received by defendant under any agreement, express or implied, that he would hold it for the plaintiffs. On the contrary, it was received expressly for his own use; and, whatever may be the rights of the plaintiffs against the administrator, who has failed to pay to them the money they may be entitled to from their grandmother's estate, it seems very clear that they have no cause of action against the defendant, and his honor should have charged the jury, as requested, that upon the evidence and the admissions the plaintiffs could not recover. Error.

See "Money Received," Century Dig. §§ 14-20; Decennial and Am. Dig. Key No. Series § 5; "Executors and Administrators," Century Dig. § 1326; Decennial and Am. Dig. Key No. Series § 318.

MANNING v. FOUNTAIN, 147 N. C. 18, 19, 60 S. E. 645. 1908.

Waiving Tort and Suing in Assumpsit, and Waiving Contract and Suing in Tort. Total Failure of Consideration. Receipt of the Money by Defendant.

[Action in a justice's court to recover \$175, as money had and received to plaintiff's use, upon an entire failure of consideration. The case was taken to the superior court by appeal and in that court judgment was rendered against the plaintiff, and he appealed. Reversed.]

The controversy arose out of a transaction in which Webb gave his negotiable note to Fountain for a horse furnished to Manning on approval. The horse was returned to Fountain, because unsatisfactory; but Fountain had negotiated the note and, consequently, Webb was forced to pay it. Having paid this note, Webb brought this action to recover from Fountain the money so paid. Manning was joined as coplaintiff. The judge ruled that the action was necessarily in tort and, hence, the justice had no jurisdiction.]

BROWN, J. . . . We think that his honor erred in assuming that the action was in tort, and that the justice had no jurisdiction. When the defendant solicited and accepted the negotiable note, he took it as so much cash, and upon an implied con-

tract that he would return it in case the trade with the tenant was not effected. The plaintiff does not allege a fraudulent intent or a knowingly false representation upon the part of the defendant. He sues for money had and received upon the allegation that there has been an entire failure of consideration. The plaintiff, even if a tort had been committed growing out of a fraudulent and false representation, had a right to waive it, and sue for money had and received. Such an action is *ex contractu* and not *ex delicto*. *Winslow v. Weith*, 66 N. C. 432; *Bullinger v. Marshall*, 70 N. C. 526. Upon this theory it has been held that where defendant wrongfully took into his possession timber logs of plaintiff, sold them, and received the money, the plaintiff might waive the tort, and sue for the money. *Land Co. v. Brooks*, 109 N. C. 700, 14 S. E. 315. E converso it has been held when the breach of contract involves a tort that the complaining party may waive the contract and recover damages for the tortious injury. *Bowers v. Railroad*, 107 N. C. 722, 12 S. E. 452.

The judgment of the superior court is reversed, and the cause remanded for trial. Error.

See *McIntosh Cont.* 18. See "Action," *Century Dig.* §§ 196-215; *Decennial and Am. Dig.* Key No. Series § 28; "Justices of the Peace," *Century Dig.* § 115; *Decennial and Am. Dig.* Key No. Series § 37.

(c) *Money Paid to Another's Use.*

CONKLIN v. SMITH, 3 Indiana, 284. 1852.

Assumpsit for Money Paid to Defendant's Use Distinguished from Assumpsit for Money Had and Received to Plaintiff's Use. Gist and Essentials of Assumpsit for Money Paid, etc.

[Smith brought assumpsit for money paid to the use of Conklin. Judgment against Conklin, who carried the case to the supreme court by writ of error. The declaration was for money paid, laid out, and expended by Smith to the use of Conklin. The facts are stated in the beginning of the opinion.]

BLACKFORD, J. . . . There was evidence tending to prove that certain rent due to Smith, the plaintiff, from a tenant who had occupied certain real estate of Smith's, had been improperly received from the tenant by Conklin, the defendant. But if it be admitted that Smith has a legal claim against Conklin for the money received by Conklin, it cannot be recovered in this action for money paid. The proper form of action in such case would be for money had and received.

The plaintiff contends that there is evidence tending to show that he paid the money to the defendant under a mistake of facts. But if there is such evidence, it only tends to show the plaintiff's right to recover under a count for money had and received—not for money paid. To sustain a count for money paid, laid out, and expended there must have been a payment of money by the plain-

tiff to a third party, at the request of the defendant, express or implied, on a promise, express or implied, to repay the amount. 2 Saund. Pl. and Ev. 402 Judgment reversed.

While a request is essential, still a subsequent ratification or recognition of the payment is sufficient, as the request may be express or implied. *Taylor v. Cotton*, 28 N. C. 69. Giving his own non-negotiable note for the debt to which he is surety, will not sustain the action of the surety against his principal, because giving such note is not a payment of the money. *Pitzer v. Hermon*, 8 Blackford, 112. See "Money Paid," Century Dig. §§ 1, 21; Decennial and Am. Dig. Key No. Series §§ 1, 6; "Payment," Century Dig. § 291; Decennial and Am. Dig. Key No. Series § 89.

MEADOWS v. SMITH, 34 N. C. 18. 1851.

Officious Payment.

[Assumpsit for money paid to the use of the defendant. Verdict and judgment against defendant, and he appealed. Reversed.]

Meadows, acting as Smith's agent, employed R. and H. to build a flat boat for Smith at a specified price—the boat to be finished by a fixed date. Smith refused to accept and pay for the boat, because not finished in time. Meadows brought an action against Smith in the names of R. and H. for the price of the boat, but that action ended in a nonsuit. Meadows then paid R. and H. without being forced so to do and without being requested or authorized by Smith to make such payment. The judge charged that upon these facts the plaintiff, Meadows, could recover of the defendant the amount paid to R. and H.]

PEARSON, J. We can see nothing to distinguish this case from the ordinary one of an agent, who engages work to be done for and in the name of his principal, whose name and residence he discloses. The agent is under no legal obligation to pay for the work, and if he does pay for it, he will not be able to make good the necessary allegation, that he "paid the money for the use of his principal and at his instance and request."

In this case, the defendant had, on demand made by the builders of the flat, expressly refused to pay. Whether his refusal was upon sufficient cause is not material: he had expressly refused to pay, and a suit was pending against him at the time the plaintiff alleges he paid the money for him; but the idea, that he paid it at his instance and request, is out of the question, in the absence of any prior legal obligation to do so; and the defendant had cause to complain, that thereby the matter which he saw proper to contest with the builders of the flat was, without his consent, put an end to by the officious interference of the plaintiff, who now seeks to make him pay for the flat, without any inquiry as to the merits of the defense, upon which he was relying in the action brought by the builders. . . . Venire de novo.

The principal case is approved in *Osborne v. McCoy*, 107 N. C. 726, 12 S. E. 383. See *Cowles v. Cowles*, 121 N. C. at p. 276, 28 S. E. 476, for officious payments. See "Principal and Agent," Century Dig. § 77; Decennial and Am. Dig. Key No. Series § 77.

NICHOLS v. BUCKNAM, 117 Mass. 488. 1875.

Payments Not Official.

[Action by Nichols to recover from Bucknam money paid to the use of Bucknam without any express request from him to do so. Judgment against defendant, who alleged exceptions. Affirmed.]

Nichols employed Scott to build some houses. Scott sublet the contract for the plastering and brick work to the defendant. The defendant employed laborers on the buildings and did not pay them, whereupon they filed liens against the plaintiff's property, pursuant to a law giving them such a right. They also brought an action against Nichols, the plaintiff, to subject his property to the satisfaction of such liens. Nichols resisted the claims, but judgment was rendered against him and, *in order to prevent a sale of his property to satisfy such judgment and liens, he paid them off.* He brought this action against Bucknam to recover the amount so paid. There was no direction or express request by the defendant that Nichols should make the payments above mentioned; nor did the defendant ever promise to reimburse Nichols. The judge ruled that, upon the foregoing facts, the law implied a promise by the defendant to repay Nichols.]

AMES, J. It appears upon this report that the plaintiff, in order to save his property from being sold on legal process, has been compelled to pay a debt which was really due from the defendant. Under such circumstances, the law implies a request on the defendant's part, and a promise to repay; and the plaintiff has the same right of action as if he had paid the money at the defendant's express request. *Exall v. Partridge*, 8 T. R. 308; 1 Smith's Lead. Cas. 15th Am. ed. 70, a. 73; *Hale v. Huse*, 10 Gray, 99. . . . Exceptions overruled.

See also *Railroad v. Railroad*, 147 N. C. at pp. 385, 386, 61 S. E. 185, and *Cowles v. Cowles*, 121 N. C. at p. 276, 28 S. E. 476, citing 15 Am. & Eng. Enc. Law, 826, 827 (now pp. 1099, 1100 in 2d ed.). See "Money Paid," Century Dig. § 2; Decennial and Am. Dig. Key No. Series § 1.

(d) *Assumpsit for Goods Bargained and Sold, and for Goods Sold and Delivered.*

STEARNS v. WASHBURN, 7 Gray (Mass.), 187. 1856.

Assumpsit for Goods Bargained and Sold Distinguished from Assumpsit for Goods Sold and Delivered. The Common Counts.

[Action on contract for the price of the unsevered grass on a lot, which grass the plaintiff claimed to have been purchased from him by the defendant. Verdict and judgment against the defendant, and he appealed. Reversed.]

The declaration was upon an account annexed thereto, which was as follows: "Mr. David Washburn to Joshua Stearns, Dr. For grass on lot No. 8, Winter Hill, \$7.00." There was proof of an oral sale and purchase of the unsevered grass on the lot, which the defendant was to cut and remove; but defendant did not cut the grass nor use it in any way, although there was nothing to prevent his doing so. Defendant derived no benefit from the grass. The defendant insisted that the plaintiff could not recover in this form of action. The judge ruled otherwise, and the defendant excepted.]

MURRAY, J. As we understand the practice act of 1852, c. 312, s. 2, which has changed the form of declaring in personal actions, it allows a count on an account annexed to be used only when one at least of the items of the account "would be correctly described by some one of the common counts, according to the natural import of its terms." The "common counts" we understand to be those which were formerly termed counts in *indebitatus assumpsit*; as for money had and received, for money lent, for money paid, for goods sold and delivered, for goods bargained and sold, etc. In the schedule of forms prescribed by that statute, the count on an account annexed is required to be thus: "And the plaintiff says the defendant owes him — dollars, according to the account hereto annexed." In the present case, this form is adopted, and the account annexed is "for grass on lot No. 8, Winter Hill, \$7.00."

The evidence, at the trial, was of a contract of sale, from the plaintiff to the defendant, of the grass growing on the said lot, which grass was to be and might have been cut and carried away by the defendant, but which he omitted to cut and carry away. Now if any of the common counts would have correctly described the plaintiff's claim, it must have been either that for goods sold and delivered, or that for goods bargained and sold. If he could not have maintained either of these counts, on the evidence, then he cannot maintain this count on the account annexed. We are of opinion that the evidence would not have supported either of those counts. The contract of the parties was an executory contract of sale, to be completed by the defendant's severing the grass from the land. Until severed, the grass was not personalty, not goods or chattels, but was part of the realty, and remained the property of the plaintiff. *Claffin v. Carpenter*, 4 Met. 582, 583; *Lewis v. Culbertson*, 11 S. & R. 48; *Waddington v. Bristow*, 2 Bos. & Pul. 455, by HEATH, J.; *Crosby v. Wadsworth*, 6 East, 610, by Lord ELLENBOROUGH; *Evans v. Roberts*, 5 B. & C. 832, by BAYLEY, J.; *Whitmarsh v. Walker*, 1 Met. 315, by WILDE, J.; *Miller v. Baker*, 1 Met. 33, by DEWEY, J. But if the grass could be regarded as goods, yet there was no such delivery of it to the defendant as is necessary to entitle the plaintiff to maintain a count for goods sold and delivered. To maintain that count, it is essential that the goods should have been delivered to the defendant or his agent, etc., or that something equivalent to a delivery should have occurred; and if not delivered, but still on the premises of the vendor, though packed in boxes furnished by the purchaser, the plaintiff will be nonsuited, if he has declared only for goods sold and delivered; for he should have declared for goods bargained and sold, or in a special count. And if there has been no delivery of the goods, even the count for goods bargained and sold (not showing a delivery) cannot be maintained, unless it appear that there has been a complete sale, and the property in the goods has become vested in the defendant, by virtue of the sale, and an actual acceptance of the commodity by the defend-

ant. These positions are laid down in 1 Chit. Pl. (12th Am. ed.) 345, 347, as the result of the latest decisions of the English courts, combined with the earlier decisions cited in the previous editions of that work.

The conclusion of the matter seems clearly to be this, namely, that the plaintiff, on the evidence stated in these exceptions, could not maintain an action on any of the common counts, and therefore cannot maintain this action on a count upon the annexed account; but that he should have declared specially on the contract of sale, and the breach of it by the defendant.

The action, in its present form, might have been maintained, if the defendant had taken the grass from the land, according to his agreement, and had not paid for it; for then, as he would have been liable on the common count for goods sold and delivered, he would have been liable also on the count adopted in this suit. See *Bragg v. Cole*, 6 Moore, 114; 2 Saund. Pl. and Ev. (2d ed.) 91. The verdict must be set aside, and a new trial granted. On the new trial, the plaintiff will undoubtedly obtain leave to amend his declaration.

See "Sales," Century Dig. § 936; Decennial and Am. Dig. Key No. Series § 340; "Account, Action on," Century Dig. § 2; Decennial and Am. Dig. Key No. Series § 2.

McRAE v. MORRISON, 35 N. C. 46, 49. 1851.

Assumpsit for Goods Sold and Delivered for Cash or on Credit; When Purchaser Fails to Give a Note, etc., for the Price, or Otherwise Fails to Comply with the Terms of sale. Written and Oral Contracts of Sale.

[Assumpsit for bacon sold and delivered. The contract of sale had been reduced to writing and the writing was lost. The proof was, of the sale and the delivery and that the price was to be paid twelve months thereafter, which period had expired when this action was brought. The written contract was not negotiable, nor was it under seal. The plaintiff declared in assumpsit for goods sold and delivered, and not upon the lost written contract. Verdict and judgment against the defendant, and he appealed. Affirmed. Only so much of the opinion as bears upon the action of assumpsit is inserted here.]

PEARSON, J. . . . It is further objected that the plaintiff ought to have declared specially upon the written contract, and could not maintain assumpsit for goods sold and delivered. There is no distinction between a parol and a written contract, unless the latter is under seal, when covenant is the proper action. If a promissory note be given for the price, the original cause of action is not merged; assumpsit for goods sold and delivered will lie, and the note may be used as evidence. *Stedman v. Goode*, 1 Esp. N. P. c. 5.

It is said by the counsel for the defendant that assumpsit for goods sold and delivered lies only when the price is due at the time of the delivery, and if by the agreement the price is to be

paid at a future day, the plaintiff must declare on the special contract. This distinction is unsupported by authority. The only difference between a sale for cash and a sale on time is that in the former case assumpsit may be brought forthwith; in the latter it cannot be brought until after the time of credit has expired. *Haskins v. Dupervy*, 9 East, 498. In *Helps v. Winterbottom*, B. & Ad. 431, it is held, if a sale is made on time and a note and security are not given as agreed on, assumpsit will lie at the end of the time, or the party may sue before the expiration of the time, when he must declare specially for the omission to give the note and security. In the present case the action is brought after the day of payment, and there is no reason for requiring the plaintiff to declare specially upon the written contract. Judgment affirmed.

See "Sales," Century Dig. §§ 927-942; Decennial and Am. Dig. Key No. Series § 340.

HANNA v. MILLS and HOOKER, 21 Wend. (N. Y.) 90. 1839.

Assumpsit for Goods Sold and Delivered on Credit, Where the Purchaser Fails to Give the Note, etc., Pursuant to the Terms.

[Action of assumpsit for goods sold and delivered. Mills and Hooker were the plaintiffs and Hanna the defendant. The judgment was against Hanna who carried the case to the supreme court by writ of error. The judgment was reversed on a point immaterial to the matter here considered.]

Mills and Hooker sold a lot of goods to Hanna upon a credit of six months, with the understanding and stipulation, as part of the terms of sale, that Hanna was to give a satisfactory note for the price. Hanna failed to give the note. The sale was made in March, 1836, and this action was brought in April, 1836. The note stipulated for was to mature six months from the sale. One of the points made was, that the sellers could not sue until the six months had elapsed. The sellers declared on the special contract which stipulated that the note should be given, and claimed damages for the purchaser's failure to comply with such contract. Only so much of the opinion as discusses this question, is here inserted.]

BRONSON, J. . . . When goods are sold to be paid for by a note or bill payable at a future day, and the note or bill is not given, the vendor cannot maintain assumpsit on the general count for goods sold and delivered, until the credit has expired; but he can sue immediately for a breach of the special agreement. 4 East, 147; 3 Bos. & Pul. 582; 9 East, 498; 3 Camp. 329. In such an action he will be entitled to recover as damages the whole value of the goods, unless, perhaps, there should be a rebate of interest during the stipulated credit. The cases referred to by the counsel for the plaintiff in error give no countenance to the argument in favor of a different rule of damages. The right of action is as perfect on a neglect or refusal to give the note or bill, as it can be after the credit has expired. The only difference between suing at one time or the other, relates to the form of the remedy; in the

one case the plaintiff must declare specially, in the other he may declare generally. The remedy itself is the same in both cases. The damages are the price of the goods. The party cannot have two actions for one breach of a single contract; and the contract is no more broken after the credit expires than it was the moment the note or bill was wrongfully withheld. . . . Judgment reversed.

That an action will lie for *damages for breach of contract*, before the expiration of the stipulated time of credit, if the purchaser fail to give a note or mortgage, or to do other acts stipulated for as terms of sale, see *Tiffany on Sales* (2d ed. Hornbook Series), 345; *Bishop on Cont.* (1st ed.) §§ 690-692; *Wolf v. Marsh*, 54 Cal. 228, which quotes *Bishop on Cont.* supra, with approval. See 3 L. R. A. (N. S.) 908, 12 Ib. 180, and notes, for this rule, and for what actions will not lie. See also on the general subject of the effect of one party's refusal to abide by a contract of sale and purchase, *Benjamin on Sales* (Bennett's Ed.), 596, n. 4; 3 L. R. A. (N. S.) 1042, and note.

Here attention may be called to the following points connected with actions on accounts for goods sold and delivered: Ordinarily a judgment by default final cannot be entered in an action for goods sold and delivered—it should be by default and inquiry. *Witt v. Long*, 93 N. C. at p. 391; *Jeffries v. Aaron*, 120 N. C. 167, 26 S. E. 696, which inquiry should be made by a jury at the term next after the appearance term. It cannot be had sooner if resisted. *Witt v. Long*, 93 N. C. at p. 391; *Brown v. Rhinehart*, 112 N. C. 772, 16 S. E. 840. But if the complaint alleges an express promise to pay absolutely a certain sum of money, particularly specified in the complaint, judgment by default final may be entered although the action be to recover for goods sold and delivered on an open account, provided the complaint be verified. *Hartman v. Farrior*, 95 N. C. 177; *Skinner v. Terry*, 107 N. C. at p. 108, 12 S. E. 118; *Williams v. Lumber Co.*, 118 N. C. at p. 936, 24 S. E. 800. See "Sales," *Century Dig.* § 1091; *Decennial and Am. Dig. Key No. Series* § 374.

BOYLE v. ROBBINS, 71 N. C. 130. 1874.

Splitting Accounts in Assumpsit for Goods Sold, etc.

[Action before a justice of the peace to recover a balance claimed under a contract for building, etc., for which a mechanic's lien had been filed. Judgment for plaintiff in the justice's court. The defendant appealed to the superior court. There the judge reversed the judgment of the justice and gave judgment for the defendant, from which the plaintiff appealed. Reversed.]

The original debt due to plaintiff was \$346.43. He filed his lien for that amount and then assigned all of the claim except \$137 to a third person. The defendant settled the amount so assigned by giving a note and mortgage before this action was brought. This action is brought for the \$137. The defendant insisted that the justice not having jurisdiction of amounts over \$200, the plaintiff could not confer jurisdiction by dividing his claim as above indicated. The judge so ruled.]

RODMAN, J. As to the jurisdiction of the justice as affected by the original amount of the debt. The general rule is plain and familiar. A creditor whose demand against his debtor consists of an account of several items, either for goods sold or for labor done, at different times, each of which is less than \$200, although

the aggregate amount of the account exceeds \$200, may sue before a justice for any number of such items not exceeding \$200. Each item is, in fact, a separate debt, and there is nothing to forbid a separate action on each. It is true that if a plaintiff wantonly or maliciously should bring a great number of actions on separate items which might have been consolidated, the court will compel him to consolidate them at his cost. If, however, the debt, whether it be proved by a written or an oral contract, is an entire one, consisting of but one item, and exceeds \$200, it cannot be divided so as to give a justice jurisdiction. For example, a seller of a horse for \$300 cannot divide his account and have two actions before a justice. Neither can a carpenter who has built a house upon contract for an entire sum over \$200, nor a material man who has furnished materials upon an entire contract.

In this case, although it was stated expressly in order that the question of jurisdiction might be raised for decision, the character of the plaintiff's demand is not stated. We can only presume it, by considering on which party the duty fell of setting forth its character. The demand was on the face of the warrant within the jurisdiction. It lay on the defendant to allege matter to defeat it as he might have done *prima facie* by showing that the debt was an entire and indivisible one. Not having done so, the presumption is that it was composed of several separable items. This presumption from the course of pleading is sustained as a fact by the ratification by the defendant of the assignment of a part of the original account to Amyett.

Even if the original debt had been entire, a consent by the defendant to the assignment of a part of it, if given at or before the assignment, would have been evidence of promises to pay the debts thus severed, and a subsequent ratification is certainly evidence of an assent to the severance for the purpose of jurisdiction. Our conclusion is that the jurisdiction of the justice is not defeated by this objection. . . . Judgment reversed.

See "Action." Century Dig. §§ 552, 604; Decennial and Am. Dig. Key No. Series § 53; "Justices of the Peace," Century Dig. §§ 168, 169; Decennial and Am. Dig. Key No. Series § 44.

MAGRUDER v. RANDOLPH, 77 N. C. 79. 1877.

Splitting Accounts in Assumpsit for Goods Sold and Delivered.

[Action before a justice of the peace for goods sold and delivered. The plaintiff sold goods to defendants at one sale to the amount of \$526.25, made up of twenty items. The plaintiff brought several actions, each for a part of this claim. The defendants insisted that, as the whole transaction took place at once, the plaintiffs could not split up the claim into several causes of action; and, as the justice had no jurisdiction of the whole amount, jurisdiction could not be conferred upon him by this division of a cause of action indivisible in law. On an appeal to the superior court, the judge, being of opinion with the defendants, dismissed the action, and the plaintiffs appealed. Affirmed. The facts appear in the beginning of the opinion.]

FAIRCLOTH, J. One of the defendants went into the plaintiffs' store and purchased goods, going through the building from floor to floor, selecting and agreeing on the price of each item as he went, for example, "twenty-six pair of men's brogans, \$1.75 per pair, \$45.50," and so on through the whole purchase. He went through the building continuously, not leaving it until his purchases were completed, and not until the bill was made and furnished to him, consisting of twenty items similar to the one above given, aggregating \$526.25. The bill was marked "Terms, 4 months, interest charged after maturity."

After maturity and non-payment, the plaintiffs divided said account into three parts, taking the first ten items aggregating \$196.80, as one part, on which the present action was commenced before a justice of the peace, and the defendants deny the jurisdiction of the justice. When an account consists of divers and separate dealings, and at different times, or is a running account from year to year, either for goods sold, work done or materials furnished, it is well settled that the creditors may "split it up," and proceed on each separate item before a justice. This was the class of cases considered in *Waldo v. Jolly*, 49 N. C. 173; *Caldwell v. Beatty*, 69 N. C. 365, and other similar cases. But we think the case before us is not embraced by the principle of those cases.

Here the dealing was continuous and nothing appears on the face of it, or in the account rendered, indicating that either party intended that each item should constitute a separate transaction and cause of action which could have been easily done, and we are to presume would have been done, if so intended. Suppose the parties at the time of the purchase had divided the account as the plaintiffs have now done, and promissory notes had been given for each part, maturing at two, four, and six months respectively; no one would doubt that they intended three separate causes of action, and that it would be so decided. And suppose on the contrary that one promissory note had been given for the aggregate sum, \$526.25, on four months time with interest after maturity; would this differ from the account rendered with an express oral promise to pay it, except in the kind of evidence of the debt and of the promise to pay? Again, suppose the time occupied in making the purchase was one hour and the defendants relied upon the statute of limitations, and upon a minute examination the fact should be disclosed that three years immediately preceding the precise moment when the summons issued would include the latter part of the account and exclude the first part; or suppose the plaintiffs had brought suit for the aggregate amount in the superior court and had insisted that the first item became due one hour before the last and claimed interest on it accordingly, and so on with the other items. It is very clear that the court would not entertain such propositions, and yet we do not see how it could avoid doing so, if each item is a distinct cause of action contracted at different times, on the well understood principle that

one portion of an open account may be barred by the statute, while the other is not. . . . Judgment affirmed.

See "Action," Century Dig. §§ 552, 604; Decennial and Am. Dig. Key No. Series § 53; "Justices of the Peace," Century Dig. §§ 168, 169; Decennial and Am. Dig. Key No. Series § 44.

MARKS v. BALLANCE, 113 N. C. 28, 18 S. E. 75. 1893.

Splitting Up Accounts in Assumpsit for Goods Sold, etc.

[Action upon an account for goods sold and delivered, brought before a justice of the peace and carried by appeal to the superior court. Judgment against defendant, and he appealed. Reversed.]

Plaintiff sold and delivered to the defendant two bills of goods: one in May, 1891, amounting to \$95.98; and one in October, 1891, amounting to \$210.67, which was reduced by a payment to \$142.67. After both bills were due, plaintiff rendered a consolidated statement of account to defendant, showing \$238.65 as the balance due to plaintiff. Defendant made no objection to this statement of account. Some time after rendering this account plaintiff brought two actions against the defendant—one for the bill sold in May, and the other for bill sold in October. The defendant insisted that the accounts having been consolidated by the account stated could not be separated again.]

BURWELL, J. We think that the matter involved in this appeal is determined by the case of Hawkins v. Long, 74 N. C. 781.

The plaintiffs having seen fit to consolidate the items of their account against the defendant and to deduct therefrom the items of credit, and having rendered to the defendant a statement in which they struck a balance, and claimed that round sum as a debt, are bound thereby unless the defendant has objected to such statement; and this he has not done. On the contrary, he has assented to the rendered account, impliedly by his failure to object thereto, and expressly by his pleas in the two actions brought against him, thus making himself bound with the plaintiffs by this account stated. Upon the facts agreed, the two actions should have been dismissed, and it is so ordered. Error. Reversed.

See further on the subject of splitting up accounts, Jarrett v. Self, 90 N. C. 478; Simpson v. Elwood, 114 N. C. 528, 19 S. E. 598; Copland v. Tel. Co., 136 N. C. at p. 12, 48 S. E. 501; McIntosh Cont. 586. If the consolidated account be objected to when rendered, the plaintiff is remitted to his former right to treat the accounts as separate and distinct—and hence, to split the account into its original component parts. Copland v. Tel. Co., supra. See also on splitting accounts, 13 L. R. A. (N. S.) 529, and note. See "Account Stated," Century Dig. § 41; Decennial and Am. Dig. Key No. Series § 7.

SEC. 4. REMEDIES ON NEGOTIABLE INSTRUMENTS.

STORY v. ATKINS, 2 Strange, 719, 721, 725. 1727.

Assumpsit at Common Law and Under Statute of 4 Anne, c. 9.

[Action on the case upon several promises. The plaintiff declared: (1) On a promissory note; (2) Upon an indebitatus assumpsit for money lent; (3) For money paid and laid out to defendant's use. There were pleas, replication, and demurrer to the replication.]

Blencowe for the plaintiff: "At common law the party that was possessed of a promissory note had no other remedy to recover upon it, but by declaring upon an indebitatus assumpsit, in which action he might give the note in evidence, but was obliged to prove the consideration. The stat. 4 Ann. c. 9. gives the party the liberty of declaring upon the note itself; and since the making of that statute, the note has been held to be sufficient evidence to maintain such action, without giving any further proof of the consideration: in this respect therefore these notes are altered by the statute, but in no other: for their lien is made no stronger than it was before; they are still only simple contracts, and the nature of their security is not changed, as was adjudged in the case of *Cumber v. Wane*, Pasch. 7 Geo. in B. R., where in an action upon the case for money lent, the defendant pleaded a promissory note given in satisfaction, and it was held to be no bar. And if this is all the alteration which the statute hath made in respect to those notes, how can it be supposed, that it hath taken from the party what was his former and ancient remedy of declaring upon an indebitatus assumpsit? The statute only gives him an additional and more easy method of recovering upon his note, but does not take from him his election of pursuing his former method, if he thinks it more proper for his case. And what proves this still more strongly, is the case of *Bromwich v. Lloyd*, in Lutw. 1585, where it is expressly held, that upon an indebitatus assumpsit a bill of exchange may be given in evidence; and by the same reason a promissory note may be given in evidence on the like declaration; for the statute 3 and 4 Ann. puts promissory notes upon the same footing as bills of exchange were before the making of that law. Therefore since the plaintiff might have given this note in evidence upon his declaration in the court below, it would be a strange conclusion to say that the two actions are different in their nature, or to intend the cause of them to be different, when the same evidence will support both the actions."

RAYMOND, C. J. The actions in the two counts are of such a nature, that they may be averred to be the same; for the statute 3 and 4 Ann. only gives an additional remedy upon promissory notes, but does not take away the old one; and I think this note might have been given in evidence upon the indebitatus assumpsit, for the note imports the drawer's having so much money of the other's in his hands; and though it may not perhaps be allowed in evidence in such case as a promissory note, without proof of the consideration; yet it may undoubtedly be given in evidence on an indebitatus assumpsit, as a paper or writing to prove the defendant's receipt of so much money from the plaintiff. *Hard's case*, Salk. 23.

See "Bills and Notes," Century Dig. §§ 1332-1336½; Decennial and Am. Dig. Key No. Series § 448.

GARDNER v. CLARK, 5 N. C. 283, 286. 1809.

Action of Debt on Negotiable Instruments.

[Action of Debt upon a negotiable promissory note. "The case was referred to the supreme court upon the question: Whether an action of debt can be maintained on this note?" Judgment was entered for the plaintiff.]

TAYLOR, J. In *Hardress*, 485, it was held that an action of debt will not lie against the acceptor of a bill of exchange; but the reasons given for that determination tend strongly to demonstrate that an action of debt will lie by the payee against the maker of a promissory note. It was said in that case, that the acceptance does not create a duty any more than a promise made by a stranger to pay the debt of a third person, if the creditor will forbear his debt; and he that drew the bill continues the debtor, notwithstanding the acceptance makes the acceptor liable to pay it. But the making of a promissory note does manifestly create a duty, if a consideration be expressed, and raises an original obligation in the maker, for which an action of debt is a proper remedy, according to the general description of that action to be found in all the elementary writers. Blackstone, 3 vol. 155, says, an action of debt will lie whenever a sum of money is due by certain and express agreement, where the quantity is fixed and certain, and does not depend on any subsequent valuation to settle. Comyns says, debt lies upon every express contract to pay a sum of money.—Dig. tit. Debt. And in *Woodeson*, 3 vol. 95, it is laid down, that the action of debt may be brought whenever a determinate sum is claimed as due, whether the contract on which it arises is special or simple.

The action of debt on simple contract has grown much into disuse, in consequence of the defendant's being permitted to wage his law, and of the necessity imposed upon the plaintiff of proving his whole debt, or being precluded from recovering any part. This latter rule has been much relaxed in modern times, as appears in 2 Bl. R. 1221; Doug. 6, 2 T. R. 129; 1 H. Bl. 149; and it is not now understood to be necessary that the plaintiff should recover the exact sum demanded. From this disuse of the action, a belief seems to have prevailed, that it could not be sustained; and assumpsit has been the usual remedy on promissory notes. But no decision is recollected to have been made in this state against the action of debt in such cases, and there is a great modern authority in favor of it in precisely such a case as that before the court. 2 H. Bl. 78. Judgment for the plaintiff.

Indebitatus assumpsit will lie upon a negotiable instrument, and a recovery may be had upon either of these several counts: Upon the instrument itself; for money paid, laid out, and expended by the plaintiff to the defendant's use; for money lent and advanced; or for money had and received by defendant to plaintiff's use. The action will lie by and against not only the original parties to the instrument—such as payee and maker—but also by and against those secondarily connected therewith—such as indorser and indorsee, etc. In all counts and between all

parties to the instrument, the instrument is evidence to sustain the action of assumpsit—but it is only presumptive evidence which the defendant may rebut by contrary proof. *Banking Co. v. Myer*, 12 N. J. L. 141, reviewing and reconciling a great number of English cases decided before 1831.

It is not necessary to allege and prove a consideration in an action on a negotiable instrument, because the law presumes such consideration; but if the defendant introduces evidence tending to rebut this presumption, then the burden is on the plaintiff to show a valid consideration. *Campbell v. McCormac*, 90 N. C. at p. 492; see also § 5, post, of this chapter. See "Bills and Notes," *Century Dig.* §§ 1330, 1331; *Decennial and Am. Dig. Key No. Series* § 448.

MORROW v. ALLMAN, 65 N. C. 508. 1871.

Practice in Actions on Negotiable Instruments. Production of the Instrument at the Trial.

[Action on a negotiable instrument. The defendant answered admitting the execution of the instrument and setting up sundry credits. Upon the trial the plaintiff insisted that, upon the admissions in the answer, it was not necessary that he should produce the instrument, and hence, declined so to do. Defendant demanded that it be produced, and plaintiff still refused. The defendant requested the court to charge that the plaintiff could not recover because of his failure to produce the instrument and offer it in evidence. The judge refused to charge this, but on the contrary instructed the jury that the execution of the instrument being admitted by the answer, the plaintiff was entitled to recover without producing it. Verdict and judgment against the defendant, and he appealed. Reversed.]

READE, J. The only question necessary to consider in this case is, whether, in an action on a negotiable instrument, the execution of which is not denied by the answer, it is necessary to produce the instrument on trial or account for its loss?

We think it is necessary to produce and file the instrument, in this case, a bond. It is the practice to do it, and there is much propriety in it. Being negotiable, how can it otherwise be known whether it has not been transferred? Or if kept back it may be subsequently transferred, and although such subsequent transfer would not subject the maker to its payment, yet he ought not to be kept in jeopardy of another suit. And furthermore, there may be, as was alleged in this case, payments endorsed upon the bond, of which the defendant ought to have the benefit. It was competent on the trial to require the plaintiff or his counsel to produce the paper, the same being admitted to be in their possession and in court; and in a proper case they might have been put under a rule. The usual way, however, is to notify the plaintiff to produce the paper; and upon his failure to do so, having the power, to nonsuit him. *Rev. Code*, ch. 31, § 82. Error.

The principal case is approved in *Shields v. Whitaker*, 82 N. C. at p. 518, and in *Raisin v. Thomas*, 88 N. C. 148; but a failure to file the instrument at the time the judgment is entered does not invalidate the judgment, as the filing may be done subsequently, *nunc pro tunc*. *Bank v. Cotton Mills*, 115 N. C. at p. 522, 20 S. E. 765. The section of the *Re-*

vised Code referred to in the opinion is now sec. 1656 of the Revisal and refers to the production of documents generally. See "Bills and Notes," Century Dig. §§ 1584, 1585; Decennial and Am. Dig. Key No. Series § 488.

MCCORMICK v. JERNIGAN, 110 N. C. 406, 14 S. E. 971. 1892.

Action on Lost Negotiable Instrument.

[This was a proceeding before the clerk of the superior court to have a lost will admitted to probate. In the course of the opinion it is said:]

CLARK, J. . . . The setting up a lost deed is in the court of equity not because from the nature of the evidence it must be proven in that court, but because a decree was requisite for a reconveyance, or to enjoin a recovery by the grantor, and the like. Hence a bill for the re-execution of a deed lost or destroyed in the hands of a grantee cannot be sustained unless there are some additional grounds for relief. *Hoddy v. Hoard*, 2 Cart. (Ind.) 474. This is pointed out by Adams on Equity, 167. He also points out that the jurisdiction to set up a lost bond is in equity only because the obligor had a right to demand profert of the bond, and, when this could not be had, the remedy at law was gone, and plaintiff was compelled to go into equity to recover on the bond. He says that, after profert was dispensed with, equity courts held on to their acquired jurisdiction, though the reason for it had ceased. The jurisdiction as to negotiable instruments arose from the *right to require indemnity* from liability of the paper sued on, and alleged to be lost turning up in the hands of another party, but as to bills or notes not negotiable, this reasoning did not apply, and hence an action to recover upon them could be maintained at law though lost, and proof of their loss could be made in such action. *Id.* 168.

In *Moffit v. Maness*, 102 N. C. 457, 9 S. E. 399, a judgment was rendered for the plaintiff on a bond. The case being carried to the supreme court by the appeal of the defendant, the court say, at p. 464: "It is doubtful, from the record, whether any exception was made to the rendition of the judgment without accounting for the absence of the bond. It is, however, insisted upon here, and to avoid any possible injustice it is ordered that the judgment be set aside, so that, if it appears that the bond has not been destroyed, and was negotiable, and cannot be produced, *a proper indemnity may be required by the court.*" *Dan. Neg. Instr.* vol. 2, § 1481." See also *Dan. Neg. Inst.* §§ 1475-1485. A justice of the peace has jurisdiction of an action on a lost instrument for the payment of money, where the sum demanded is within his jurisdiction. As the requiring of an indemnity is merely incidental to the main relief sought, the justice may afford such relief. *Fisher v. Webb*, 84 N. C. 44; see *Lutz v. Thompson*, 87 N. C. at p. 337, inserted at ch. 12, post. See "Lost Instruments," Century Dig. §§ 27-29; Decennial and Am. Dig. Key No. Series § 14; "Wills," Century Dig. § 589.

ROBINSON v. BARBOUR, 5 Blackford, 468. 1840.

When the Allegation of a Consideration is, or is Not, Necessary.

SULLIVAN, J. Assumpsit by Barbour against Robinson. The declaration contains three counts. The first count states that the defendant on, etc., by his certain instrument in writing assigned to the plaintiff the sum of \$136, being part of a certain claim then in suit in the Jennings county circuit court against A. W. Dunn, and by said writing directed his attorneys to pay said amount to the plaintiff when it should be collected; and that the defendant did further, by said instrument of writing, guaranty that the said sum of money should be collected within one year from the date thereof. The second count avers that the defendant, by his certain instrument of writing, promised and guarantied that he would pay, or cause his attorneys or the clerk of the Jennings county circuit court to pay, to the plaintiff the sum of \$136 within one year from the date thereof. The third count states that the defendant on, etc., by his certain instrument in writing, guarantied and undertook that S. and B., his attorneys, or the clerk of the Jennings circuit court, should, within one year from the date of said writing, pay to the plaintiff the sum of \$136 out of the claim of said defendant against one A. W. Dunn then in suit in the Jennings circuit court, or, in default thereof, that he would pay the same himself. The defendant demurred to the first count, and pleaded the general issue to the second and third counts. The demurrer was overruled, and, by consent of parties, the court assessed the damages on the first count, and tried the issues on the second and third. Judgment for the plaintiff.

The first count is defective in not showing a consideration for the defendant's promise. A valid consideration for the promise upon which a party is charged, is essential to a contract not under seal, and must exist although the contract be reduced to writing, otherwise the promise is void. Chit. Cont. 6. In declaring upon such a contract, it is necessary to disclose a sufficient consideration, or the promise will appear to be nudum pactum, and the declaration will consequently be insufficient. 1 Chit. Pl. 321. There are exceptions to this rule of pleading in the case of bills of exchange and promissory notes, and some other legal liabilities, but the exception does not apply to such a promise as is laid in the count under examination. Ibid. As the count shows no consideration for the promise either of benefit to the defendant, or trouble or prejudice to the plaintiff, the demurrer to it should have been sustained. 3 Johns. 104; 4 Johns. 236, 280; 1 Saund. 211, n. 2; 4 Blackf. 173.

The second and third counts are defective for the same reason, and the only question to be decided with regard to those counts is, whether the defect is fatal after verdict. We are of opinion that the defect is not cured by the verdict. A promise without a consideration is void, and no action will lie upon it. In Rann v. Hughes, 7 T. R. 346, n. (a), the declaration alleged that the de-

defendant was liable as executor to pay the plaintiff the sum of 983 pounds, and being so liable he personally promised to pay the same. After verdict, the judgment was arrested, because no additional or sufficient consideration was shown for the enlarged responsibility of the defendant. In *Courtney v. Strong*, 1 Salk. 364, the judgment was arrested because there was no consideration for the promise laid in the declaration. So in the case of *Beauchamp et al v. Bosworth*, 3 Bibb. 115, the judgment of the circuit court upon a writ of inquiry was reversed for the same defect. Chitty, in his *Treatise on Pleading*, p. 329, says, when no consideration is stated in the declaration, or when that which is stated is clearly insufficient or illegal, the defendant may either demur, or move in arrest of judgment, or support a writ of error. Judgment reversed.

See *Campbell v. McCormac*, 90 N. C. at p. 492, cited in note to *Gardner v. Clark*, 5 N. C. 283, inserted supra. In *Farlow v. Kemp*, 7 Blackford, 544, it is ruled that, to maintain assumpsit, it must be shown that the consideration moved from the plaintiff. See "Contracts," *Century Dig.* § 1661; *Decennial and Am. Dig. Key No. Series* § 334; "Bills and Notes," *Century Dig.* § 1477; *Decennial and Am. Dig. Key No. Series* § 465.

SEC. 5. PERFORMANCE OF CONDITIONS, WHEN IT MUST BE ALLEGED.

BRYAN v. FISHER, 3 Blackford, 316, 319, 320. 1833.

Dependent and Independent Covenants.

[Covenant on a lease in which Bryan demised certain premises to Fisher and covenanted in the lease to make certain improvements and supply some articles of furniture. Fisher, by the terms of the lease, agreed "to pay to said Bryan \$65 for each year he occupies said premises, to be paid at the expiration of each year, and to take good care of the property." Among other things, the defendant pleaded that the plaintiff had not performed those things which, by the terms of the lease, he had covenanted to do. After discussing the form of this plea, the opinion proceeds:]

McKINNEY, J. . . . The plea assumes that the agreement contains covenants to be performed by the plaintiff, the performance of which is essential to a recovery against the defendant, and that, therefore, the non-performance of such covenants, regarded as conditions precedent, would be a bar to the action. It is correct, as a general rule, that if there be in an agreement a condition precedent, its performance is necessary to entitle a party to recover. It is, therefore, material to inquire, whether the articles of agreement upon which this action is brought, contain a condition precedent or not.

In determining whether covenants are independent or dependent, certain rules have been laid down, enabling courts to reach the intention and meaning of the parties, when the instrument in its terms is vague and obscure: (1) If a day be appointed for the

payment of money or a part of it, or for doing any other act, and the day is to happen, or may happen, before the thing which is the consideration of the money or other act, is to be performed, an action may be brought for the money, or for not doing such other act before performance: for it appears that the party relied upon his remedy, and did not intend to make the performance a condition precedent; and so it is where no time is fixed for the performance of that which is the consideration of the money or other act: (2) When a covenant goes only to part of the consideration on both sides, and a breach of such covenant may be paid for in damages, it is an independent covenant, and an action may be maintained for a breach of the covenant on the part of the defendant, without averring performance in the declaration. The cases of *Boone v. Eyre*, 1 H. Bl. 273, note, and *Campbell v. Jones*, 6 T. R. 570, are cited as illustrations of the latter rule. From these cases, with which *Harden v. Hayden*, 2 Marsh. 359, and *Payne v. Bettisworth*, *Ibid.* 427, are accordant, it is settled "that where a party has received a part of the consideration for which he entered into the agreement, it would be unjust that because he has not had the whole, he should therefore be permitted to enjoy that part, without either paying or doing anything for it; and moreover, as remarked in *Campbell v. Jones*, the damages sustained by the parties would be unequal, if such covenant were held to be a condition precedent." The law thus settled does not in its operation leave the party, who is compelled to perform his agreement, without a remedy, for he can recover damages for a loss in not having received the whole consideration.

Applying either of the rules to the agreement in this case, it is demonstrable that the covenants must be regarded as independent, and the plea consequently bad. Here, the giving of the possession of the house and lots was the principal covenant on the part of the plaintiff; it stands distinct; the inducement to the covenant of the defendant, and the furnishing the kitchen, crane, etc., is a part only of the consideration of the defendant's contract, contributing certainly to the enjoyment of the premises, but without which the premises are of value. The defendant was to have possession on the 1st day of June, and the plaintiff was to furnish a kitchen, etc., but at what time is not mentioned; the law would require within a reasonable time. If that time be protracted unreasonably and injuriously to the interests of the defendant, he has his remedy by action. It would form only a part of the consideration of the defendant's contract, and not operate, as contended, as a bar to the plaintiff's action. Suppose the crane not to have been furnished, or either of the tables mentioned, should the defendant have the enjoyment of the premises two years and not be liable for rent? Such a conclusion is palpably repugnant to the feelings, and surely in conflict with the intention and meaning of the parties. If these secondary objects, promotive of the enjoyment of the defendant, were not provided, when, in the interval between the execution of the articles of agreement and the

1st of June ensuing, time sufficient may have been afforded, why take possession unless he looked to his remedy by action, or why continue in possession two years as admitted?

By either of the rules for expounding contracts, the defendant is concluded. By the first, from his covenant to pay \$65 rent, annually, during the term of five years, he continuing in the possession of the premises; and by the second, because the plaintiff's undertaking to furnish the kitchen, etc., constituted only a part of the consideration of the defendant's contract. The plea being insufficient, we are of opinion that the demurrer should have been sustained, and the pending issues tried. Judgment reversed.

See the note to the principal case, 3 Blackf. at pp. 321, 322. See "Landlord and Tenant," Century Dig. §§ 770-783; Decennial and Am. Dig. Key No. Series §§ 187-192.

VANKIRK v. TALBOT, 4 Blackford, 367. 1837.

Dependent and Independent Covenants.

BLACKFORD, J. This was an action of covenant against Talbot for not delivering, agreeably to his contract, a certain number of hogs to Vankirk. The declaration states that the defendant had bound himself, by an agreement under seal, to deliver to the plaintiff 600 head of hogs of a certain description; and that the hogs were to be delivered at the defendant's own house in Putnam county, and at the house of some person in the neighborhood of George Piercy's in the same county, between the first and fifth days of November, 1835; and that the plaintiff did, at the same time, bind himself to pay to the defendant \$2.50 a hundred for the hogs, to be paid for on delivery at the pen. It is then averred that, at the time of the agreement, the plaintiff paid to the defendant \$100 in part performance of the agreement; and that he has at all times been ready and willing to perform his agreement according to the true intent and meaning thereof. The breach assigned is, that the defendant has failed and refused to keep and perform his covenant in this, viz., that he did not, at his own house in Putnam county, nor did he at the house of any person in the neighborhood of George Piercy's in said county, between the first and fifth days of November, 1835, deliver to the plaintiff the hogs mentioned in the agreement, nor has he at any time delivered them to the plaintiff as he was bound to do; but the defendant, although often requested, has hitherto wholly refused to perform his covenant.

The defendant demurred specially to the declaration, and assigned as a cause of demurrer, that the plaintiff does not allege a readiness to pay the price of the hogs at the time and place of delivery. The circuit court gave judgment on the demurrer for the defendant.

In this case, there were covenants to be performed by each party at the same time and at the same place; and to enable one

of them to sue the other for a breach of the contract, the party who sues must show that he has performed or offered to perform his part, or that there is some legal excuse for his not doing so. The contract alleged in this declaration is very imperfectly expressed. The following may be considered its legal construction. It was agreed that Talbot, on the last convenient hour of the 4th of November, 1835, or, if he should so appoint, on the last convenient hour of the 2nd or 3rd of that month, would deliver to Vankirk 600 hogs. The hogs were to be delivered at the defendant's own house, and at the house of some other person in Piercy's neighborhood—such part of them at one place, and such part at the other, as Talbot might choose. The house in Piercy's neighborhood was to be designated by Talbot, and notice thereof was to be given by him to Vankirk. The price of the hogs, except the \$100 advanced, was to be paid to Talbot upon the delivery of the hogs at the pen.

It was for Vankirk, in declaring upon this contract, to show that he had performed or offered to perform his part of it; or, if he had been prevented from doing so by the default of Talbot, that default should have been set out in the declaration. It would have been a sufficient excuse for the want of an averment, in this case, of the plaintiff's performance of his part of the contract, if the declaration had stated that the defendant did not inform the plaintiff at what house in Piercy's neighborhood a part of the hogs would be delivered; or how many of them would be delivered there, and how many at the defendant's own house; that the plaintiff, therefore, was not ready, as he otherwise would have been, at the proper time and places to receive and pay for the hogs; and that the defendant had not delivered the hogs as he was bound to do.

The declaration, however, contains no averment of facts, showing that the plaintiff had performed or offered to perform his part of the contract, nor does he show any legal cause for the omission of such averment. It is consequently bad on a general demurrer. Judgment affirmed.

See McIntosh Cont. 548-552; Revisal, § 498. See 21 L. R. A. (N. S.) 691. See "Contracts," Century Dig. § 1664; Decennial and Am. Dig. Key No. Series § 335.

SEC. 6. SUMMARY PROCEEDINGS TO COLLECT THE PURCHASE MONEY DUE ON PROPERTY PURCHASED AT JUDICIAL SALE.

TOWNSHEND v. SIMON, 38 N. J. L. 239. 1876.

Separate Action at Law. Summary Proceedings in the Cause. Order of Resale. Concurrent Remedies.

[Action at law by a sheriff to recover the price of a parcel of land sold by him under a decree of foreclosure rendered by the court of chancery, and for damages resulting from the defendant's having refused to comply with his purchase. Judgment of nonsuit. Plaintiff moved to set aside the nonsuit. Reversed.]

DEPUE, J. The nonsuit in the court below was ordered on the ground that the remedy was not in an action at law, but by a proceeding in chancery in the foreclosure suit to compel the defendant, as a purchaser under a sale by virtue of process out of the court of chancery, to take a conveyance and comply with the conditions of sale.

It may be assumed, as an established doctrine of the court of chancery, that a purchaser under a decree by the act of purchase, submits himself to the jurisdiction of the court as to all matters connected with the sale which relate to him in the character of purchaser. *Casamajor v. Strode*, 1 Sim. & Stu. 381; *Requa v. Rea*, 2 Paige, 339; *Shann v. Jones*, 4 C. E. Green, 251. The sale may be set aside by an order in the original cause, without a new bill being filed. *Brown v. Frost*, 10 Paige, 243; *Wetzler v. Schumann*, 9 C. E. Green, 60. And the purchaser may appeal from such order, though he be not a party to the cause. *Bailey v. Maule*, 7 Cl. & Fin. 121; note cited in *National Bank of Metropolis v. Sprague*, 6 C. E. Green, 462. It has also been held, that the purchaser may be compelled to complete the purchase, by a summary order in the original cause. *Lansdown v. Elderton*, 14 Ves. 512; *Wood v. Mason*, 3 Sumner, 318; *Cazet v. Hubbell*, 36 N. Y. 677; *Siver v. Campbell*, 10 C. E. Green, 465.

The modern practice of the English courts is, by an order to direct the premises to be re-sold, and the purchaser to pay the costs and expenses of the sale, and also the deficiency (if any) in the price at the second sale. 2 Dan. Ch. Prac. 1282. This practice seems to have originated with Lord Eldon in 1811, in *Gray v. Gray*, reported in 1 Beavan, 199; and the note to *Harding v. Harding*, 4 M. & Craig, 514.

But if it be conceded that the court of chancery may compel a purchaser, by summary process, to complete his purchase, that is no reason for holding its jurisdiction exclusive. It is only where the right, as well as the remedy, is the creature of equity, without any legal obligation for its foundation, that the jurisdiction of the courts of equity is exclusive. On the ordinary agreement to purchase, chancery may decree specific performance, and upon a sale under foreclosure the purchaser may be put in possession by writ of assistance, and yet it has never been contended that the power of the court to grant relief according to its own peculiar proceeding excluded the jurisdiction of the courts of law. The parties may sue at law for damages arising from the non-performance of the agreement to sell, and the purchaser at a foreclosure sale may recover possession by an action of ejectment, notwithstanding another remedy is attainable in a court of equity.

A stipulation for a re-sale in case of default of the purchaser to comply, and for his liability for the expenses and loss on the second sale, has long been in use as one of the usual conditions of sale. Sir Edward Sugden recommends that it never be omitted. 1 Sugden on V. & P. 57 (39). It has always been regarded as a substantial security for the fulfillment of the agreement to pur-

chase, on which an action at law is maintainable. In such action the measure of damages is the difference between the defendant's bid at the first sale, and the sum realized at the second sale, together with the costs and expenses incident to the re-sale. *Ocken-den v. Henly*, E. B. & E. 485; *Cobb v. Wood*, 8 Cush. 228; *Webster v. Hoban*, 7 Cranch, 399. The difference in price on the re-sale is, in law, so far regarded as a liquidated debt as to be provable as such in bankruptcy. *Ex parte Hunter*, 6 Ves. 94.

The only cases I have been able to find in which the right of an officer, selling under judicial proceedings, to sue the purchaser at law on a condition of this kind, has been questioned, are *Wood v. Mann*, 1 Sumner, 319, and *Miller v. Collyer*, 36 Barb. 250. In *Wood v. Mann*, Justice Story expresses the opinion that a court of law would not entertain jurisdiction of such a suit, where the sale was made under a decree of a court of equity. The subject under consideration was the power of a court of equity to enforce, by summary process, a security voluntarily given in a court by a person who, on his own application, was substituted in the place of the purchaser, on which an order was made that the person so substituted pay the purchase money within a specified time. The opinion on this head was merely obiter, and was founded on the supposed inability of a court of law to ascertain and measure the extent of the damages. The apprehension that an adequate remedy could not be afforded in a court of law, on the agreement to purchase, is entirely without foundation. A court of law will give as damages in such a suit precisely the same measure of redress as by the modern practice is attainable in equity. In *Miller v. Collyer*, the court held that a memorandum at the foot of the conditions of a sale, made by a sheriff, under foreclosure proceedings, stating that the party had bought at a certain price, and that he agreed to comply with the conditions, and signed by him, was a mere submission to the authority of the court in which the decree was had, and not a contract, either with the sheriff or the plaintiff in the suit, and that, therefore, no action could be maintained upon it. The argument by which this conclusion was reached, was that the memorandum lacked the essential elements of a contract, not only in parties, but also in mutuality and consideration. Inasmuch as the legal results of a purchase at a sheriff's sale are an obligation on the part of the officer to convey, and on the part of the purchaser to accept a conveyance and pay the purchase money, it is difficult to perceive wherein the undertaking is deficient in either mutuality or consideration. The duty of the officer to make conveyance of the lands on his acceptance of the bid of the successful bidder, and his power to transfer to the purchaser the title he is selling, are as much a consideration as his ability to pass the property in chattels on the sale of personal property. The only difference is, that the property in chattels passes by the sale, whereas on a sale of lands a deed is necessary to convey the legal title. The rights of the buyer, in both instances, are fixed when the bid is accepted. Whatever else is

necessary to complete the transaction is merely a compliance with the terms of passing the title to lands. Each party, it is admitted, may compel performance by the other by the intervention of the court out of which the process issued. A more decided illustration of consideration and mutuality in a contract can scarcely be found. The same elements of mutuality and consideration are present in a sale by an officer having power to sell, and ability to make conveyance, as attend a sale by an owner at public auction.

The practice of the court of chancery, by summary process, to compel the purchaser to complete the purchase, is founded on the assumption of a contract on his part to that effect. This is apparent from the observations of Lord Cottenham, in *Harding v. Harding*, 4 M. & Craig, 514. The notion that the contract is with the court, is too fanciful to merit much consideration. It is regarded as such a contract as may be made the ground for a bill for specific performance in the name of the officer. *Ely v. Perrine*, 1 Green's Ch. 396; *Browne v. Ritter*, 11 C. E. Green, 456. In *Michener v. Lloyd*, 1 C. E. Green, 41, Chancellor Green treats a claim against a purchaser at a sale by commissioners in partition, selling under an order of the court for a deficiency at a second sale, as a claim for damages sustained by the breach of the contract contained in the conditions of sale. He also held that the contract was with the commissioners; that they alone had the right to enforce it, and that the remedy was properly in a court of law by action on the contract. In *Shinn v. Roberts*, *Spencer*, 435, the action was at law, by commissioners in partition against a purchaser not complying with the conditions of sale, to recover the difference in the price at the first sale and the second. The case was contested by able and experienced counsel. No point was made on the argument as to the ability of the commissioners to sue, and CARPENTER, J., in the opinion of the court, declares that he had no difficulty on the subject of the right of the commissioners to maintain the action. In *Cobb v. Wood*, 8 Cush. 228, it was expressly decided by the supreme court of Massachusetts, that an administrator selling lands under a license of a probate court, might recover at law against a purchaser who bid in the property and signed the memorandum of sale, and then refused to comply; and that the sum recoverable was the difference in the price at the first and second sales. In *Sanborn v. Chamberlin*, 101 Mass. 409, an officer, selling under an execution at law, was allowed to recover of a purchaser on his contract to purchase, the purchase money, the conveyance having been tendered but not accepted. There is no difference between a sale by a sheriff under an execution out of chancery on a foreclosure, and that of an officer or individual selling under any power or authority not coupled with an interest, such as a sheriff selling under an execution at law, auditors in attachment, commissioners in partition, guardians, executors or administrators selling under an order of the court, and executors making sale under a power in a will. To

deny the right to sue at law on the contract of purchase in these enumerated cases would, in many instances, be practically a denial of any remedy against a defaulting purchaser who sees fit to renege from his bargain. In some, if not in all of these cases, there is no power in any court to enforce the purchaser's agreement by summary process. If, in these cases, actions at law may be brought on the conditions of sale, no reason can be suggested why a similar remedy may not be had on the conditions of a sale under the process of the court of chancery.

That relief may be had by another method, and in another court, does not exclude the jurisdiction of courts of law. The remedy in that form, by action, is frequently less expensive, and more convenient than in the court of chancery, and the measure of compensation as indemnity is the same in both courts. In such an action, the defendant is subjected to no inconveniences as to defenses which would not equally lie in the way of a purchase at a sale under common law process. The purchaser cannot complain that there is a more summary method of dealing with him in the premises, and of compelling him to abide by his contract. *Browne v. Ritter*, supra.

The suggestion that the sale to the defendant might have been disapproved of by the chancellor, and that the sheriff, on his own motion, may be prosecuting this suit, is entitled to no weight. If the sale was improperly conducted, to the prejudice of the defendant as purchaser, he might, by summary application to the chancellor, have been discharged from his bid. And if the sheriff is prosecuting this suit for improper purposes, by consent of all those of whose interest he is the representative, it will be stayed by the court. Nor will any embarrassment arise as to the disposition of the money that may be recovered in this action. The sheriff is the representative and trustee of the persons interested in the process under which he makes the sale, the complainant, the other encumbrancers, and the owner whose property he is empowered to sell. So strictly is he regarded as a trustee, that he has no power to relieve a purchaser from a sale which is advantageous to the parties to the suit, or yield any substantial right affecting either the complainants or the defendant. It was so held by Chancellor Zabriskie in *Shann v. Jones*, 4 C. E. Green, 251. The money recovered in this suit will be money made under the process in his hands. It will represent, when taken with the sum obtained at the second sale, what the officer has realized out of the property, and what he would have received immediately, if the defendant had kept his engagement. It was said by CARPENTER, J., in *Shinn v. Roberts*, in speaking of a similar suit by commissioners in partition: "The money recovered, after deducting expenses and a reasonable remuneration, will be the money of the parties in interest, and its payment over would be enforced by the proper tribunal." In *Cobb v. Wood*, the action was held to be maintainable by an administrator selling under an order for the payment of debts, though the amount obtained at the second sale

was sufficient to pay all the debts and the costs of administration; the recovery being for the benefit of the widow and heirs of the deceased. The action was well brought, and the nonsuit should be set aside, and a new trial ordered; costs to abide the event.

In the principal case it will be observed that the sheriff did not sell under an *execution*, but was acting in the capacity of a *commissioner* of the court of chancery. In North Carolina it is held that when a *sheriff sells under execution* and the purchaser fails to pay for the property, the sheriff can maintain a separate action for the price and cannot proceed by motion in the cause; because the court has no privity or connection with the purchaser, as is the case when the court sells through a commissioner. If the sheriff re-sell the property, as he may do, he thereby releases the purchaser at the first sale. *McKee v. Lineberger*, 69 N. C. at pp. 239-241.

When the purchaser at a *judicial sale*—a sale by a commissioner appointed by a court in a civil action or special proceeding—fails to comply with his bid, or to pay a note, etc., given for the whole or a part of the purchase money, the remedy against him is *confined* to a motion in the cause so long as the cause is pending; but after the cause is closed by final judgment, a separate and independent action may be maintained, it seems. So where the bid was raised and at a re-sale the property brought less than at the first sale, a separate action against the person who raised the bid, to recover the difference, was dismissed because the only appropriate remedy was by motion in the cause. *Marsh v. Nimocks*, 122 N. C. 478, 29 S. E. 840; see also *Lord v. Beard*, 79 N. C. 5; *Causey v. Snow*, 120 N. C. 279, 26 S. E. 775, in which last case a separate action was sustained on the ground that final judgment had been entered and the cause ended. That a *re-sale may be ordered* by motion in the cause and the delinquent purchaser held for any loss consequent thereon, and that such re-sale will be ordered at the instance of a surety on the notes given by the original purchaser for the price, is held in *Petillo, ex parte*, 80 N. C. 50; *In re Yates*, 59 N. C. 212. The practice in proceedings by motion in the cause is indicated in these cases. That the remedy by motion in the cause is likewise the proper one in sales under *special proceedings before the clerk*, see *Mauney v. Pemberton*, 75 N. C. 219. For the law in extenso on the subject embraced in this section, see 17 Am. & Eng. Enc. Law 1025; 24 Cyc. 52. As to the writ of assistance, see ch. 3, § 21, ante. That a separate action will not, ordinarily, be allowed in any case when adequate relief may be had by a motion in the cause, see *Herman v. Watts*, 107 N. C. 646, 12 S. E. 437, inserted at ch. 9, § 3, post; *Faison v. McIlwaine*, 72 N. C. 312. See "Judicial Sales," Century Dig. §§ 50-56; Decennial and Am. Dig. Key No. Series §§ 26-29.

SEC. 7. ACTIONS OF DECEIT AND OF DECEIT AND FALSE WARRANTY.

LASSITER v. WARD, 33 N. C. 443. 1850.

Remedies Ex contractu and Ex delicto on False Warranty. Case and Assumpsit on False Warranty. Counts in Deceit and Warranty Joined.

[Action on the Case in tort. Two counts: (1) In deceit for selling plaintiff an unsound horse and knowingly and falsely representing him to be sound; (2) For a false warranty of the soundness of the horse. Plea, not guilty. The proof was, that the horse was warranted to be sound, but was unsound. Upon this the defendant insisted that plaintiff could not recover because there was no proof that the defendant knew that the horse was unsound. The judge ruled that plaintiff could recover on the second count without proving the scienter. Verdict

against defendant, who moved in arrest of judgment. Judgment against defendant, and he appealed. Affirmed.]

RUFFIN, C. J. Though one would expect assumpsit to be brought on a warranty of goods, as well as any other parol contract, yet it is, comparatively, a recent thing that it was brought in such cases. Its propriety seems to have been questioned as late as the case of *Stewart v. Wilkins*, Doug. 18; and it cannot be said to have been judicially settled earlier, though the action had sometimes been brought. It was questioned on the ground, that the action on the case in tort was the established remedy, and therefore the proper one. It was, however, held that *either of the actions would lie upon an express warranty*. Afterwards it was attempted to give another turn to the matter in the opposite direction, namely, by contending that assumpsit was the peculiar remedy on a false warranty, and that the declaration could not be in tort unless it alleged a scienter; which was as much as to say, that the action on the case would not lie on the warranty, but only on the cheat. *Williamson v. Allison*, 2 East, 446. But there were so many precedents of actions in tort for a false warranty, as to show clearly that it had been formerly the common remedy, if not the only one in use, and to induce the judges to sustain it. It was, accordingly, there held that the declaration might be in tort without alleging a scienter, and, if it be alleged in addition to the warranty, that it need not be proved. The doctrine of the case is, that when there is a warranty, that is the gist of the action, and that it is only when there is no warranty that a scienter need be alleged or proved. It is nearly half a century since the decision, and during that period the point has been considered at rest, and many actions have been brought in tort, as well as *ex contractu*, on false warranties. 1 Chit. Pl. 429, 956; 2 Chit. Pl. 279. There is no doubt as to the propriety of joining the two counts; for it is an action on the case, and the counts, being both in tort, are compatible. If it were otherwise, it would not be material in this case, as the evidence applied to the second count, and the instructions to the jury referred to it alone, and therefore the verdict might be amended by entering it on that count only. *West v. Ratlidge*, 15 N. C. 31.

See "Action," Century Dig. § 357; Decennial and Am. Dig. Key No. Series § 41; "Sales," Century Dig. § 1207; Decennial and Am. Dig. Key No. Series § 425.

CARTER v. GLASS, 44 Mich. 154, 6 N. W. 200. 1880.

Trespass on the Case for Deceit, or Assumpsit on the Warranty, at the Option of the Plaintiff. Alleging and proving the Scienter.

[Trespass on the case for damages. Defendant brings error. Affirmed.]

One count in the declaration alleged, in substance, that the plaintiff and the defendant exchanged horses at defendant's special request, "the defendant then and there warranting the horse to be sound and all right

in every way, then and there falsely and fraudulently sold and exchanged the same with the plaintiff. . . . said plaintiff confiding in the said warranty . . . delivered his horse to the defendant. Whereas in truth and in fact at the time of the making of the said false warranty . . . the horse of the defendant was not sound . . . but, on the contrary, then was and still is unsound and hath become of no value; . . . and the plaintiff also by means of the premises hath lost and been defrauded of the use of said horse; . . . and so the said defendant in said sale and exchange falsely and fraudulently deceived and defrauded the plaintiff," etc. The judge held this to be a good count in tort and permitted plaintiff to recover on it as such. His ruling is approved.]

COOLEY, J. But one question is presented by this record, namely, whether the count in the plaintiff's declaration, on which he was permitted to recover in the court below, was a count in tort or upon a warranty.

The court below treated this as a count in tort, and allowed the plaintiff to recover as upon a rescission of the contract. The defendant insists that it is a count in assumpsit, and in affirmance of the contract. It was decided in *Beebe v. Knapp*, 28 Mich. 53, that an action on the case may be maintained for false representations in the sale of property whereby the vendee was deceived and defrauded, even though the vendor was not aware of the falsity of the representations when he made them. But there is no doubt the representations in such a case may be treated as warranties, and assumpsit brought at the option of the vendee. *Hawkins v. Pemberton*, 51 N. Y. 198; *Wheeler v. Read*, 36 Ill. 81; *McGregor v. Penn*, 9 Yerg. 74; *Henshaw v. Robins*, 9 Met. 83; *Burge v. Stenberg*, 42 Ga. 88; *Stone v. Covell*, 29 Mich. 359. As the declaration in either case must set out the facts, there must necessarily be considerable similarity, and this is not the first instance by many in which a count meant to be in case for the deceit has been mistaken for one in assumpsit. But the leading case of *Williamson v. Allison*, 2 East, 446, fully sustains the ruling of the court below. It was there said by Lord Ellenborough that "the warranty is the thing which deceives the buyer, who relies upon it and is thereby put off his guard. Then, if the warranty be the material averment, it is sufficient to prove that broken to establish the deceit, and the form of the action cannot vary the proof in that respect. The same case decides that it is not necessary either to aver or prove the scienter, and to render the case more completely like the present, in principle, the declaration there, as here, failed to aver an offer to return the property, in the sale of which the tort was committed. The doctrine of that case is familiar law in this country. *Baman v. Buck*, 3 Vt. 33; *West v. Emery*, 17 Vt. 583; *Johnson v. McDaniel*, 15 Ark. 109; *Hillman v. Wileox*, 30 Me. 170; *Newell v. Horn*, 45 N. H. 421; *Ives v. Carter*, 24 Conn. 392. An examination of *Ross v. Mather*, 51 N. Y. 108, which questions the soundness of *Williamson v. Allison*, will show that the criticism was based on a misapprehension of the point decided. All the errors relied upon in this case depend upon the one noticed. The judgment was right, and must be affirmed, with costs.

See "Action," Century Dig. § 167; Decennial and Am. Dig. Key No. Series § 27.

HOBBS v. BLAND, 124 N. C. 284, 287, 32 S. E. 683. 1899.

Joinder of Deceit and False Warranty Under the Code Practice. The Scienter, When Material. When Deceit and False Warranty May Be Set Up as a Counterclaim.

[Action by the mortgagee of chattels to recover the mortgaged property from the mortgagor. The defendant pleaded, by way of counterclaim or recoupment, that the mortgage was given to secure the price of a horse which he bought from the plaintiff and which the plaintiff warranted to be sound, but which was unsound, and for that reason had been returned by the defendant to the plaintiff. Judgment against the plaintiff, and he appealed. Reversed on a point immaterial to the question now under consideration. Only a part of the opinion is here inserted.]

FURCHES, J. . . . The defendant, by his answer, alleges a breach of warranty, and deceit. The allegation of deceit is not very distinctly stated, but we will treat it as sufficiently stated to be used as a ground of defense, if established. These defenses—false warranty and deceit—are both *ex delicto*, but they might be joined in one action; and, as they might be joined in one action (*Bullinger v. Marshall*, 70 N. C. 520), they may be joined in the defendant's answer, which is but a cross action. To entitle the defendant to damages upon the allegation of false warranty, it is not necessary that he should show the scienter. It is sufficient if he shows a warranty, and breach of the warranty. If there was no warranty, and defendant relies on the allegation of deceit, he must then show the scienter. As these defenses are *ex delicto*, and not on contract, they could not be set up by way of counterclaim, or recoupment, if they had not originated out of the same transaction, or cause of action upon which defendant is sued; but, growing out of the transaction upon which the action is based, they may be so pleaded and set up. *Benton v. Collins*, 118 N. C. 196, 24 S. E. 122. . . .

See "Sales," Century Dig. §§ 1214, 1215; Decennial and Am. Dig. Key No. Series § 428.

INGE v. BOND et al., 10 N. C. 101. 1824.

Pure Deceit Distinguished from False Warranty.

[Action on the Case for damages resulting from the sale of an unsound slave to the plaintiff by the defendant. The substance of the declaration appears in the beginning of the opinion. The judge charged that the plaintiff must satisfy the jury that the defendants knew of the unsoundness of the slave and failed to disclose it at the time of the sale. Verdict against one of the defendants, Bond, and a judgment against him, from which he appealed. Affirmed.]

TAYLOR C. J. The first count in the declaration charges that the defendants knowing the slave to be unsound, by a false af-

firmation of his soundness procured a sale of the slave to the plaintiff. The second charges that the defendants advised the plaintiff to buy the slave, and, falsely affirming him to be sound, procured the plaintiff to buy him, whereas they knew the slave to be unsound. In both counts the false affirmation is stated to be the means by which the plaintiff was induced to make the bargain, and the making that affirmation *with a knowledge to the contrary*, whereby the plaintiff was injured, constitutes the cause of action. The action is clearly conceived in case, on tort, and the declaration as strongly marked with those features, as in the case of *Pasley v. Freeman*, 3 T. R. 51, the foundation of which is fraud and deceit in the defendant and damage to the plaintiff. The affirmation, as stated in the declaration, is not laid in the way of a contract, the breach of which has brought damage on the plaintiff, but as a deceit practiced upon him, whereby he was induced to make the contract. In some cases it is true that an affirmation as to the title of a chattel, when the seller is in possession, will be considered as a warranty, *for as to the title the law itself implies a warranty; and even without such information, if a man sell goods as his own and the title prove deficient, the buyer may recover satisfaction.* 2 Blk. 451. *But as to the soundness of goods, an affirmation does not amount to a warranty, unless it appear on the evidence to have been so intended.* In declaring on a warranty, the charge is laid in assumpsit, either warrantizando vendidit, or he undertook and faithfully promised; but in this case there is nothing like a promise and undertaking. And what shows beyond all controversy that the action was not intended to be on a warranty is that a bill of sale was given without a warranty, and that Bond expressly refused to enter into one. That no contract existed is further evident from this, that whatever was said concerning the soundness of the slave was before the sale, and the true contract of the parties was reduced to writing by the bill of sale, to which no other terms or stipulations can be added. "I hold," says one of the judges, "that if a man brings me a horse, and makes any representation whatever of his quality and soundness, and afterwards we agree in writing for the purchase of the horse, that shortens and corrects the representations; and whatever terms are not contained in the contract do not bind the seller, and must be struck out of the case." 4 Taunton, 786. But if there is any *fraud* in the case, that cannot be done away by the contract, and the buyer may, notwithstanding, bring his action on the case, which is the only one that could be brought in this case. It, therefore, seems to me that those authorities do not apply which go to show that a breach of contract cannot be converted into a tort, for in all of them there was a clear contract, and in the leading ones the defendants had a joint ownership in the property. I do not think it was in the least degree necessary that it should be left to the jury to say whether the affirmation stated in the declaration was made by the defendant or not, since it was merely inducement and introductory to the gravamen.

which is the fraudulent concealment of a defect in the slave; and, generally, where a person is sued in tort for knowingly selling an unsound article, the charge is laid either with a false affirmation of the soundness, or that the defendant sold it for and as a sound article, or with a false warranty, all which terms import the same thing, and are never held as making a contract the gist of the action. As the jury have verified the charges in the declaration, I am of opinion that the plaintiff is entitled to recover, and that there ought not to be a new trial.

See "Fraud," Century Dig. §§ 27, 44; Decennial and Am. Dig. Key No. Series §§ 31, 49; "Sales," Century Dig. § 1207; Decennial and Am. Dig. Key No. Series § 425.

CHATHAM FURNACE CO. v. MOFFATT, 147 Mass. 403, 18 N. E. 168. 1888.

Deceit for a False Statement Which Defendant Did Not Know to Be False, Nor Did He Know it to Be True.

[Tort for alleged false and fraudulent representations whereby plaintiff was induced to lease and buy certain property. Judgment against the defendant, who alleged exceptions. Exceptions overruled, and judgment affirmed.]

The defendant held a lease of a mine in which there was iron ore. The mine was filled with water and debris. The defendant made certain representations as to a great quantity of ore being in the mine ready to be taken out as soon as the water and debris were removed. Such ore was in existence, but it was not within the limits covered by the defendant's lease. The defendant took upon himself to assert, as of his own knowledge, that this large mass of ore was in his mine. These representations would have been true, if the lines in a certain survey and plat of the mine had been correct; but they were not correct. The defendant knew that what purported to be a survey—upon the basis of which he made his representations—was not in all respects an actual survey, and that the lines had not been verified, but were merely assumed. He did not disclose this to the plaintiff, but made the assertion about the ore, as of his own knowledge, and exhibited the survey in support of his assertion, knowing that the lines had not been verified. An actual survey would have disclosed the fact that the mass of ore lay outside of his boundaries.]

C. ALLEN, J. It is well settled in this commonwealth that the charge of fraudulent intent, in an action for deceit, may be maintained by proof of a statement made as of the party's own knowledge, which is false; provided the thing stated is not merely a matter of opinion, estimate, or judgment, but is susceptible of actual knowledge; and in such case it is not necessary to make any further proof of an actual intent to deceive. The fraud consists in stating that the party knows the thing to exist when he does not know it to exist; and, if he does not know it to exist, he must ordinarily be deemed to know that he does not. Forgetfulness of its existence after a former knowledge, or a mere belief of its existence, will not warrant or excuse a statement of actual knowledge. This rule has been steadily adhered to in this commonwealth, and rests alike on sound policy and on sound legal

principles. *Cole v. Cassidy*, 138 Mass. 437; *Savage v. Stevens*, 126 Mass. 207; *Tucker v. White*, 125 Mass. 344; *Litchfield v. Hutchinson*, 117 Mass. 195; *Milliken v. Thorndike*, 103 Mass. 382; *Fisher v. Mellen*, *Id.* 503; *Stone v. Denny*, 4 Mete. 157; *Page v. Bent*, 2 Mete. 371; *Hazard v. Irwin*, 18 Pick. 95. And though this doctrine has not always been fully maintained elsewhere, it is supported by the following authorities, among others: *Cooper v. Schlesinger*, 111 U. S. 148, 4 Sup. Ct. Rep. 360; *Bower v. Fenn*, 90 Pa. St. 359; *Brownlie v. Campbell*, L. R. 5 App. 953, by Lord BLACKBURN; *Mining Co. v. Smith*, L. R. 4 H. L. 79, 80, by Lord CAIRNS; *Slim v. Croucher*, 1 De Gex, F. & J. 518, by Lord CAMPBELL. See also *Peck v. Derry*, 59 L. T. (N. S.) 78, which has been published since this decision was announced.

See further as to statements made without a knowledge that they are true, 6 L. R. A. 149; 20 Cyc. 24; *Bishop, Non-Cont. L.* §§ 312-343; also *Hamrick v. Hogg*, 12 N. C. 350, which says that it is not sufficient that the representation be false in point of fact, but that "the defendant must be guilty of a *moral falsehood*—he must *know or believe* it to be false, or, what is the same thing, have no reason to believe it to be true." This case has been several times approved, see *Munroe's Notes and Womack's Digest*. "The action for deceit rests in the intention with which a representation is made, or a fact not mentioned. It is not sufficient that the representation made should be *calculated to mislead*—for that may be done by the most honest communication—but the representation must be made *with the intent to deceive*. Moral turpitude is necessary to charge a defendant in an action for a deceit." *Stafford v. Newsom*, 31 N. C. at p. 510.

In *Aldrich v. Scribner*, 154 Mich. 23, headnote 1, 117 N. W. 581, it is said: "In this state, in order to constitute fraud, it is not necessary that the person making the statement should either know that it is untrue or be recklessly and consciously ignorant whether it be true or untrue, but it is sufficient if the representation be false in fact, and the person making it be a party to the contract and profits by the other's loss."

In the life of Lord Kenyon, Lord Campbell says this: "In *Haycraft v. Creasy*, Lord Kenyon was very properly overruled by his brother judges, and the mortification which he suffered was supposed to have occasioned his death. The action was brought by a shopkeeper against a credulous old gentleman for having given a deceitful representation of the character and circumstances of a young lady of the name of Robinson, whereby the plaintiff had been induced to sell to her a large quantity of goods on credit, the price of which he had lost. The defendant having, like many others, been deceived by her arts, and really believing that what he said was true, told the plaintiff that she was a lady of great fortune and heiress of the estate of Fascalley, in the county of Perth, and that she was not only respectable herself, but nearly connected with some of the highest families in Scotland. In truth she was a mere adventuress, and swindled all that would trust her. Law, for the defendant, contended that the action could not be maintained, as there was no *mala fides* to support it, and to make him liable without actual deceit would be to treat him as surety for Miss Robinson without any written guarantee. Lord Kenyon: 'The attorney-general relies on the statute of frauds. To this I shortly reply by saying that the statute of frauds has nothing to do with this case. The defendant is sued, not as surety for Miss Robinson, but for stating respecting her that which was not true, and which he had the means of knowing, and must be supposed to have known, was not true, whereby a damage has been suffered by the plaintiff. If the present action cannot be supported, I have

now for twelve years been deceiving the people of this country. Am I now, when perhaps from years the progress of my intellect may be retrograde, to unsay what I have said so often? Where can I go to hide my head if this point shall now be decided otherwise? What can I say to the people of this country? The ground I go upon is this: Did the defendant assert to be true that which he did not know to be true? This I consider sufficient evidence to support the charge of fraud. It may not amount to moral turpitude, but it is, in my opinion, sufficient to constitute legal fraud, and legal fraud is, in my opinion, enough to support an action of deceit.' Grose, Lawrence, and Le Blanc, Js., however, on the assumption that the defendant was a dupe, clearly held that he could not be made liable in this form of action, which supposed that the defendant had stated what he knew to be false, or that, from some bad motive, he had stated as true facts which were untrue, and the truth of which had not been investigated. As his brethren proceeded seriatim in this strain, the chief justice's face showed the most terrible contortions; and when they had finished he exclaimed: 'Good God, what injustice have I hitherto been doing! What injustice have I been doing!' A gentleman who witnessed the scene, says: 'It was visible to every person in court that this ejaculation was not uttered in the penitent voice of regret for any injustice which he might unconsciously have done from a mistake of the law, but in the querulous tone of disappointed pride, from finding that the other judges had presumed to think for themselves, and to question the supremacy of his opinion.'" 4 Campbell's Lives C. J., 127-129. Compare this statement with the principal case and the authorities cited in this note.

See further as to what constitutes an actionable misrepresentation, or deceit, in the eyes of the law, Hufcut and Woodruff's Cases on Contracts, 298-302; McIntosh, Cont. 303-304, and note, where reference will be found to the principal authorities on the subject. See 7 L. R. A. (N. S.) 646, 18 lb. 379, and notes (statements made without knowing whether they are true or not); 6 lb. 872, and note (when deceit lies against officers of a corporation for false statements in reports required by statute—e. g. bank statements). See "Fraud," Century Dig. § 5; Decennial and Am. Dig. Key No. Series § 13.

BROWN v. GRAY, 51, N. C. 103. 1858.

Latent and Patent Defects. Caveat Emptor. Suppression vere. Suggestio falsi. Scienter.

[Action on the case for deceit in the sale of a slave. The sale was at auction. The slave was unsound at the time of the sale and the defendant knew it. The defendant insisted that the plaintiff could not recover on these facts, but must show that defendant made false representations or resorted to some device by which to conceal the slave's unsoundness. The judge ruled otherwise and charged that the plaintiff could recover upon the facts above stated. Verdict and judgment against the defendant, and he appealed. Affirmed.]

PEARSON, C. J. In the sale of a chattel, the rule of our law is caveat emptor, and if the thing be unsound, to entitle the purchaser to maintain an action, he must prove either a warranty of soundness or a deceit.

In regard to a deceit, the distinction is: Where the unsoundness is *patent*, that is, such as may be discovered by the exercise of ordinary diligence, *mere silence* on the part of the vendor is not sufficient to establish the deceit, although he knows of the un-

soundness, *because the thing speaks for itself*, and it is the folly of the purchaser not to attend to it. So that, in such a case he will not be heard to say he was deceived, unless the vendor made a false statement, or resorted to some artifice in order to prevent an examination, or to hide the unsoundness, so as to make the examination of no avail. Where the unsoundness is *latent*, that is, such as could not be discovered by the exercise of ordinary diligence, *mere silence*, on the part of the vendor, is sufficient to establish the deceit, provided he knows of the unsoundness; for, as the thing is not what it appears to be, and diligence does not enable the purchaser to discover its unsoundness, he is deceived unless the fact is disclosed; so that, in such a case, without what the law considers laches on the part of the purchaser, the deceit is accomplished by the *suppressio veri*.

The first proposition, that, in regard to a *latent* unsoundness, to make out a deceit there must be proof of the *scienter*, and a *suggestio falsi*, is conceded on all hands. The second, that in respect to a *latent* unsoundness, proof of the *scienter* and a *suppressio veri* will be sufficient, we consider equally well settled, by the reason of the thing, and by the cases in our court: *Cobb v. Fogleman*, 23 N. C. 440; *Case v. Edney*, 26 N. C. 93. The former was for deceit in the sale of a female slave, who had a latent disease—cancer in the womb, but at the time of the sale was a stout, vigorous looking woman. The defendant was silent in respect to her disease. The judge, in the court below, instructed the jury, that to entitle the plaintiff to recover, he must prove, 1st, that the unsoundness existed at the time of the sale; 2nd, that the defendant knew of, or had reason to believe its existence; 3rd, but if these facts were proved, if the plaintiff also knew of the unsoundness, or had reason to believe it, he could not recover; and he then instructed the jury that there was no evidence on the last point. In this court the positions of law were approved, and, indeed, were not called in question, being taken by the profession as settled; and the decision was put, not on whether there was evidence on the last point, but on whether there was evidence of the *scienter* on the part of the defendant. The latter was for a deceit in the sale of a mare at auction by a trustee. The mare had a latent unsoundness, although on the day of sale she appeared to be well. The defendant, Marvill Edney, the maker of the trust, was "present at the sale, but took no part in it, and said nothing, one way or the other, as to the property." There was proof that he knew of the unsoundness. The evidence was contradictory as to the *scienter* on the part of the other defendant, the trustee. The judge, in the court below, held "that as the legal title had passed out of the defendant, Marvill, he was not accountable as an owner would be, who procured an auctioneer to cry his property, and stood by in silence." As to the other defendant, the court charged, that "although he acted as trustee in making the sale, yet, like all other persons who sold, he was bound to act honestly, and to disclose defects if he believed them

to exist. It was then left to the jury, whether the mare was unsound, and whether the defendant knew it—if so, as he failed to state the circumstances, he was liable in damages.” In this court, the positions of law, in reference to the deceit, were approved, but it was held that the defendant, Marvill Edney, although the legal title passed out of him, was liable for the deceit. In the conclusion of the opinion, the court say: “It will not be understood that we think the mere silence of a debtor, whose property is sold under execution, would amount to a fraud; for that is a proceeding in invitum; the sale is exclusively the act of the law.”

Nothing could show more conclusively that this doctrine was considered as settled, both by our courts and the profession, than the manner in which it is treated in these two cases; and after the elaborate argument of Mr. Boyden, we are satisfied that it is sustained by the weight of authority. The class of cases, *Mellish v. Matteux*, Peake N. P. 115; *Baglehole v. Watters*, 3 Camp. 154; *Pinckering v. Dawson*, 4 Taunt. 779, etc., where the property was sold “with all faults,” is not in point. Nor the class of cases, *Laidlaw v. Organ*, 2 Wheat. 178; *Bench v. Sheldon*, 14 Barb. 66, etc., where extrinsic circumstances, affecting the price of the article, exist, but in regard to which the means of intelligence are equally accessible to both parties, such as the conclusion of peace in 1815, between England and the United States, and the passages to be met with in some of the best writers, which seem to conflict, are all to be attributed to the fact that the distinction between a patent and a latent unsoundness in a thing, was not kept in view. These questions of law present no difficulty, and from the manner in which the statement of the case is made up, upon the defendant’s exception, the judgment must be affirmed.

The defendant’s counsel contended, “that admitting that the slave was unsound, and that the defendant knew it, the plaintiff could not recover, for that, in order to charge the defendants, he must prove, either that they made fraudulent misrepresentations, or resorted to some device by which to conceal the unsoundness,” and prayed the court so to instruct the jury. This proposition is not true in its generality. If the unsoundness was patent, it is true. If the unsoundness was latent, it is not true. The case does not show whether it was patent or latent, and it follows, that it was not error to refuse to give the instruction prayed for. In other words, it does not appear from the defendants’ exceptions, whether the court below erred or not; therefore, there is no ground upon which this court can reverse the judgment. Judgment affirmed.

For actions of Deceit arising out of sales of real estate, see *Fox v. Haughton*, 85 N. C. at p. 173; *Walsh v. Hall*, 66 N. C. 233; *Gatlin v. Harrell*, 108 N. C. 485, 13 S. E. 190; *May v. Loomis*, 140 N. C. 350, 52 S. E. 728, inserted post in this section; *Etheridge v. Vernoy*, 70 N. C. 713, inserted at ch. 3, § 17. In several of these cases the doctrine of moral turpitude is reiterated. It is immaterial whether the fraud consist in a *suppressio veri* or a *suggestio falsi*. *Lunn v. Shermer*, 93 N. C. at p. 169, inserted post in this section. See “Fraud,” *Century Dig.* § 15; *Decennial and Am. Dig. Key No. Series* §§ 15–170.

WEAVER v. WALLACE, 9 N. J. L. 251. 1827.

Damage Must be Alleged and Proved.

[Wallace sued Weaver before a justice of the peace in an action of Trespass on the Case, alleging "That he purchased some wood from Weaver, that the wood was standing on land which Weaver pretended to own, while Weaver *knew* that he had no such right; that Weaver "falsely and fraudulently sold the wood to the plaintiff for \$6.25 then and there paid, and falsely and fraudulently deceived plaintiff to his damage \$60." The justice gave judgment against Weaver, and this judgment was affirmed in the court of common pleas. Weaver then carried the case to the supreme court by certiorari. Reversed.]

EWING, C. J. The state of demand sets forth no legal cause of action. The plaintiff does not show that any injury was done to him. It may be, for aught that appears in the state of demand, that he has turned the wood into coal, sold it, and put the money in his pocket. He cannot recover merely for a false affirmation. On a warranty of title, if there was one, the purchaser could not immediately turn round and sue the vendor, *nor until some injury was sustained*. Judgment reversed.

See "Fraud," Century Dig. § 24; Decennial and Am. Dig. Key No. Series § 25; "Sales," Century Dig. § 799; Decennial and Am. Dig. Key No. Series § 283.

LUNN v. SHERMER, 93 N. C. 164. 1885.

Measure of Damages in Deceit. What Constitutes Actionable Deceit. Latent and Patent Defects. Suppressio Veri and Suggestio Falsi. Issues. What Constitutes Actionable Damage.

[Action for deceit in the sale of a mule. Verdict and judgment against the defendant, and he appealed. Affirmed.]

The complaint alleged: That the plaintiff was induced to purchase a mule from the defendant by the defendant's false and fraudulent representation that the "mule was sound *as far as he knew*;" that such representation was false, in that the mule at that time had the farcy or some other incurable disease; and that the defendant well knew that fact at the time of the sale.

The defendant answered admitting the sale and representation of soundness of the mule, but denying the other allegations. The following issues were submitted to the jury: "1. Was the mule sold by defendant to plaintiff unsound at the time of the sale? 2. Did the defendant represent the mule to be sound as far as he knew? 3. Did he at the time know or have good reason to believe that the said mule was not sound? 4. How much damage is plaintiff entitled to receive for the unsoundness of said mule?"

The plaintiff testified to the purchase of the mule and that he paid defendant \$175 for it; that he had exchanged the mule with his father; that he did not warrant the mule's soundness, but told his father what defendant had represented to be the facts as to its soundness; that the disease appeared two or three weeks after he had turned the mule over to his father; that his father had not threatened to sue him, but claimed damages from him on account of the mule's unsoundness.

The defendant requested the judge to charge that the plaintiff could not recover damages, because his testimony showed that he had sustained none. The judge refused this charge, but charged that the measure of damages was the difference between the value of the mule if

sound at the time of plaintiff's purchase, and its value if unsound at that time. The jury responded in the affirmative to the first three issues, and to the fourth by assessing the plaintiff's damages at \$175.]

ASHE, J. . . . The defendant excepted to the third issue, and offered as a substitute the following, to-wit: "If not sound at the time of the sale, did the defendant know of the unsoundness, and falsely and fraudulently represent him to be sound, with the intent to induce the plaintiff to buy?" We think there was no error in declining to submit the issue. The issues submitted to the jury were such as were legitimately raised by the pleadings, and such as entitled the plaintiff upon a finding in the affirmative to recover such damages as he may show he has sustained.

Fraud or deceit in the sale of a personal article may be perpetrated either by false representations or by a concealment of unsoundness in the article. When the action is brought for a deceit by false representation, three circumstances must combine: 1st. that the representation was false; 2d. that the party making it knew it was false; 3rd. that it was the false representation which induced the contracting party to purchase. Broome Com. 348. But when there are no representations made by the vendor, a deceit may equally be practiced by his silence, but in such cases an important distinction must be observed. For whether a cause of action for deceit will arise from mere silence and a knowledge of the defects in the article sold, will depend upon the fact whether the defect is patent or latent. In *Brown v. Gray*, 51 N. C. 103, the distinction is thus stated: "When the unsoundness is patent, that is, such as may be discovered by the exercise of ordinary diligence, mere silence on the part of the vendor is not sufficient to establish the deceit, although he knows of the unsoundness, because the thing speaks for itself, and it is the folly of the purchaser not to attend to it." But "when the unsoundness is latent, that is, such as cannot be discovered by the exercise of ordinary diligence, mere silence on the part of the vendor is sufficient to establish the deceit," provided he knows of the unsoundness.

In this case it is not stated whether the disease of the horse is latent or patent, but as it is alleged that the horse had "farcy," or some other disease, we take it that it was a latent disorder, as there was no proof offered on the part of the defendant that the unsoundness was a patent defect and no error assigned in that particular. *Brown v. Gray*, supra. Upon this authority, the finding of the jury on the first and third issues would have been sufficient to show the deceit and entitle the plaintiff to a judgment thereon, for the finding on them established the facts that the mule was unsound at the time of the sale and that the defendant knew it. This was all that the plaintiff was required to establish by his proof. Whether there was a fraudulent intent on the part of the defendant in suppressing the fact found to be within his knowledge was a question for the jury to be inferred from the facts and circumstances of the transaction.

But the jury also found in the second issue, that the defendant represented the mule to be sound *as far as he knew*. The case of *Ferebee v. Gordon*, 35 N. C. 350, was a case very similar in its facts, and we think decisive of this case. There was evidence in that case tending to show the unsoundness of the negro, who was the subject of the action, at the time of the sale, and of the defendant's knowledge of the fact, and it showed also the assertion of defendant that the negro was sound *so far as he knew*. The court held that if the statement made by the defendant as to the soundness was false within his knowledge, he was responsible for it as a false and fraudulent representation. So it is immaterial in our case whether the fraud was practiced by a *suppressio veri* or *suggestio falsi*, he is equally responsible.

The only other exception taken by the defendant was to the refusal of his honor to instruct the jury that the plaintiff, upon his own evidence, had sustained no loss and was entitled to no damages. The defendant is precluded by his answer from contending that the plaintiff is not the party in interest. Therefore he is entitled to recover such damages as may be the legal consequence of the fraud practiced upon him, which, as his honor held, was the difference between the value of the mule at the time of the purchase, if sound, and its value, if diseased, at that time, and it can make no difference what disposition the purchaser made of the mule afterwards whether he practiced a fraud upon some one else and got more than the actual value of the mule, or gave him away. There are some cases where the evidence of the price obtained by the vendor has been admitted, not to establish the value of the property, but as a fact proper to be laid before the jury to aid them in assessing the damages. It is a fact the party may prove, but it may or may not assist them in the assessment of the damages. *Houston v. Starnes*, 34 N. C. 313. There is no error. Judgment affirmed.

See 3 L. R. A. (N. S.) 465, and note for effect of resale by the warrantee. See "Fraud," Century Dig. §§ 15, 60-62; Decennial and Am. Dig. Key No. Series §§ 15-17, 59.

MAY v. LOOMIS, 140 N. C. 350, 52 S. E. 728. 1905.

Elements of the Action of Deceit. Caveat Emptor. Vendor's Choice of Remedies. Rescission, when Allowed. Puffing One's Wares. Counterclaim. Measure of Damages.

[Action by May against Loomis and Dobson on two notes, for \$750 each, given in December, 1892. Defendants pleaded fraud practiced upon them in procuring the execution of the notes, and also set up such fraud and deceit, and the damages suffered by them in consequence thereof, as a counterclaim. There was evidence introduced by the defendants tending, as they insisted, to support this counterclaim. At the close of the evidence the judge refused to submit issues covering the counterclaim, and dismissed the counterclaim as on a judgment of nonsuit. Judgment against defendants, and they appealed. Reversed.]

The answer admitted the execution of the notes sued on, and set up as

a defense and counterclaim, that the notes were given for the price of a saw mill plant and timber lands; that false and fraudulent representations were made by plaintiff and his partner as to the quantity of timber on the lands; that plaintiff stated that the quantity of timber which he represented to be on the land was arrived at by careful estimates; that defendants relied upon these statements and they were a material inducement to the purchase; that the statements were false, plaintiffs knew they were false, and made them fraudulently with intent to deceive defendants; that defendants were deceived thereby, and, in consequence thereof, made the purchase and executed several notes for the price; that all the notes had been paid except those sued on in this action; that the timber fell short of the quantity represented and the shortage amounted to \$2,036.77.

The plaintiff replied denying all fraud and deceit. There was testimony tending to establish the allegations of the answer.]

HOKE, J. Accepting the testimony favoring defendants' claim as true, and we are required so to accept it where a nonsuit is directed against the party who offers it, the facts disclose a clear case of deliberate fraud in which there appears every element of an actionable wrong—false representations as to material facts knowingly and wilfully made as an inducement to the contract, and by which the same was effected, reasonably relied upon by the other party and causing pecuniary damage. It is well established that the principle applies to contracts and sales of both real and personal property. The authorities are decisive and are against the ruling of the judge below as to defendants' counterclaim. *Walsh v. Hall*, 66 N. C. 233; *Houghtalling v. Knight*, 85 N. C. 17; *Lunn v. Shermer*, 93 N. C. 164; *Ramsey v. Wallace*, 100 N. C. 75, 6 S. E. 638; *Brotherton v. Reynolds*, 164 Pa. St. 134, 30 Atl. 234.

It is urged that the buyers in this case were negligent and on that account their claim for relief is barred; but not so. The parties were not at arm's length in reference to these representations and did not have equal opportunities of informing themselves. The only one of the defendants who had any experience in such matters essayed to make an examination of the property, but broke down from weakness incident to his disease, and told the plaintiffs he would have to rely on their statements. Further, there was evidence tending to show artifice used to induce the buyers to forbear making inquiry about the matter. In 14 Am. & Eng. Enc. (2d ed.), 123, we find it stated: "In no case can a person escape responsibility for representations on the ground that the other party was negligent in relying on them, if, in addition to making the representations, he resorted to artifice which was reasonably calculated to induce the other party to forego making inquiry." Our decisions are to like effect *Walsh v. Hall*, supra; *Hill v. Brower*, 76 N. C. 124; *Blacknall v. Rowland*, 108 N. C. 554, 13 S. E. 191; s. c., 116 N. C. 389, 21 S. E. 296.

Again, it is contended that these representations were not as to facts, but were matters of opinion, and we are cited to a number of authorities as supporting the plaintiff's position. *Pagan v.*

Newson, 12 N. C. 20; Saunders v. Hatterman, 24 N. C. 32; Lytle v. Bird, 48 N. C. 222; Credle v. Swindell, 63 N. C. 305; Etheridge v. Verney, 70 N. C. 724, and some others. As stated in *Cash Register Co. v. Townsend*, 137 N. C. 652, 50 S. E. 306: "Expressions of commendation or opinion or extravagant statements as to value or prospects, or the like, are not regarded as fraudulent in law;" but these representations in the case before us were not of that character; they were not mere matters of opinion, but purported to be statements of facts and were so intended and accepted by the parties.

Knowing that the only one of the defendants whose experience qualified him to make an examination of the property with any intelligence, was physically unable to do so, the plaintiffs assured the defendants that they had caused the timber on the land to be carefully estimated, and such estimate showed that there were 3,000,000 feet of hardwood timber on the tract; whereas, in fact and truth, the knowledge furnished to the plaintiffs by those estimates showed only 1,000,000 feet on the same. Even where there is doubt on the question, the matter must be referred to the jury to determine whether representations, though expressed in the form of an opinion, were given and reasonably relied on as material facts inducing the trade. And the authorities cited do not support the plaintiffs on the facts of the case before us. . . .

The only cases which give support to the plaintiffs' position are those of *Lytle v. Bird* and *Credle v. Swindell*, *supra*, in both of which it was expressly held that an action for deceit would lie in no case, on the sale of land, for fraudulent representation as to the quantity sold or what particular land was included in the deed; and this on the ground that the parties should inform themselves by a survey. These two cases are contrary to the trend of modern decisions; were expressly disapproved as to the point for which they are now cited, in the case of *Walsh v. Hall*, *supra*, and have since been ignored as authority.

Where a sale has been effected by an actionable fraud, the purchaser has an election of remedies. He may ordinarily, at least at the outset, rescind the trade, in which case he can recover the purchase price or any portion of it he may have paid, or avail himself of the facts as a defense in bar of recovery of the purchase price or any part of it which remains unpaid, or he may hold the other party to the contract and sue him to recover the damages he has sustained in consequence of the fraud.

In order to rescind, however, the party injured must act promptly and within a reasonable time after the discovery of the fraud, or after he should have discovered it by due diligence; and he is not allowed to rescind in part and affirm in part; he must do one or the other. And, as a general rule, a party is not allowed to rescind where he is not in a position to put the other in statu quo by restoring the consideration passed. Furthermore, if, after discovering the fraud, the injured party voluntarily does some act in recognition of the contract, his power to rescind is then at

an end. These principles will be found in accord with the authorities. Bishop on Cont. §§ 679, 688; Beach on Cont. § 812; Page on Cont. §§ 137, 139; Clark on Cont. pp. 236, 237; Trust Co. v. Auten, 68 Ark. 299, 57 S. W. 936; Parker v. Marquis, 64 Mo. 38.

Applying these principles to the facts before us, the defendants could not now rescind the trade and plead the fraud in bar of recovery on the notes. They have made payments in recognition of the contract; they have manufactured and sold the timber, and are not in a position to restore the consideration. They contracted to manufacture and sell the timber on the land, according to the evidence, not long after the trade, and their explanation seems satisfactory. They had put out large sums of money on the enterprise; and the witness Loomis states that he complained of the fraud before the note was due, but went on and cut the timber as the best and only thing to do to save themselves. The fact, however, that they are not now in a position to rescind the trade and plead the fraud in bar of recovery on the notes, does not prevent them from setting up the fraud by way of counterclaim and recovering for the damages suffered. This may be done, though the defendants have made payments in recognition of the contract, and may have continued to manufacture and sell the lumber after knowledge of the fraud. Trust Co. v. Auten and Parker v. Marquis, *supra*.

The damages usually are the difference between the value of the property sold as it was and as it would have been if it had come up to the representation. The sale having been ratified, the plaintiffs can maintain an action on the notes, subject to any counterclaim the defendants may have against the plaintiff, to be determined under the law as here declared and on the facts as they may be established. There is error. The judgment will be set aside and a new trial awarded.

See 8 L. R. A. (N. S.) 804, and note (measure of damages in deceit in sale of realty); 10 *Ib.* 640, and note (when action for deceit lies for failure to fulfill a promise). See "Fraud," Century Dig. §§ 12, 19-23; Decennial and Am. Dig. Key No. Series §§ 11, 22; "Sales," Century Dig. §§ 65-85, 296-301, 973-986; Decennial and Am. Dig. Key No. Series §§ 42, 121, 348.

SETZAR v. WILSON, 26 N. C. 501, 513. 1844.

Deceit for Fraud Practiced by Vendee on Vendor.

In the course of a long opinion discussing the rights and remedies of one who has been induced to sell his property to another by the purchaser's representations as to value, it is said by REEFIN, C. J.: "A vendor is liable in an action of deceit for false representations, as to the title or qualities of a chattel sold by him. But no action for a cheat has ever been maintained by a seller against the purchaser, for the misrepresentations of the latter upon those points. The law does not give an action against the vendor for his false affirmation as to the value of the thing sold.

Saunders v. Hatterman, 24 N. C. 32. Much less will an action lie against a purchaser for such an affirmation, or buying at an under value. In the nature of things, the owner of a chattel is supposed to be the best judge of its value, or to be most capable of ascertaining it."

In *Smith v. Beatty*, 37 N. C. at p. 458, it is said by Daniel, J.: "A vendee who knows that there is a gold mine on the land [he is seeking to purchase] is not compelled to disclose that fact to the vendor. But if he is interrogated as to his knowledge of such a thing and he then denies any knowledge of the mine, the denial will make the transaction fraudulent." This was said in a case in equity. See "Sales," Century Dig. §§ 86-100; Decennial and Am. Dig. Key No. Series § 43.

JOYNER v. EARLY, 139 N. C. 49, 51 S. E. 778. 1905.

Deceit Practiced by Vendee on Vendor. Vendor's Choice of Remedies. Recovery of the Specific Chattel. Damages.

[Action to recover possession of a mule. Judgment against defendant, and he appealed. Affirmed. The facts appear in the beginning of the opinion.]

BROWN, J. The plaintiff sued out claim and delivery proceedings for the mule, and filed the ordinary complaint, alleging simply ownership upon the part of the plaintiff and wrongful detention by the defendant. On the trial the plaintiff offered evidence tending to prove that the defendant obtained possession of the mule in a trade with the plaintiff by false, fraudulent, and deceitful representations. At the conclusion of the plaintiff's evidence the defendant moved to nonsuit. The court denied the motion and permitted the plaintiff to amend his complaint by setting out the allegations of fraud, misrepresentation, and deceit, upon the payment of costs, "and the trial proceeded without objection by the defendant." In his brief the defendant reviews the ruling of the court. Waiving the fact that the defendant did not except to the allowance of the amendment, we sustain the ruling of the judge below. It was in no sense the introduction of a new cause of action, nor is it prohibited in *Ely v. Early*, 94 N. C. 1. The mule was the property in controversy. The amended complaint simply set out in full the allegations of fraud and deceit.

Under the facts testified to by the plaintiff he had the right to sue for damages for the alleged false warranty, or repudiate the trade and sue to recover the specific property. This is well settled. *Des Farges v. Pugh*, 93 N. C. 31, 53 Am. Rep. 446; *Wilson v. White*, 80 N. C. 280; *Wallace v. Cohen*, 111 N. C. 103, 15 S. E. 892; *Bishop on Contracts*, § 667; *Benjamin on Sales*, § 656, and note; *Donaldson v. Farwell*, 93 U. S. 631, 23 L. Ed. 993; *Blake v. Blackley*, 109 N. C. 262, 13 S. E. 786, 26 Am. St. Rep. 566. The allowance of this amendment was a matter in the sound discretion of the court, and not reviewable.

If vendor sue for the price, is he thereby estopped to sue for the fraud and deceit? See *Sewing Mach. Co. v. Owings*, 140 N. C. 503, 53 S. E. 345, 8 L. R. A. (N. S.) 582, and note. See "Sales," Century Dig. §§ 890-895; Decennial and Am. Dig. No. Series § 316.

SEC. 8. CONSPIRACY.

KIMBALL v. HARMAN and BURCH, 34 Md. 407, 6 Am. Rep. 340. 1871.
Remedy for Conspiracy to Injure. Necessary Allegations and Proof. Conspiring Without Acting.

[Action on the Case by Harman and Burch for an alleged conspiracy to injure. There were three defendants, Kimball, Hanson and Phillips. Verdict and judgment against Kimball alone, and he appealed. Reversed.]

The declaration alleged that Kimball et als. combined and conspired together to prevent the plaintiffs' receiving some bedsteads which Kimball had sold to them; and that the plaintiffs were thereby subjected to great trouble, delay, and vexatious litigation. The defendants pleaded not guilty. The proof was, that the bedsteads had been purchased by plaintiffs, and had been shipped to them, but were not delivered because of acts of the defendants; and that plaintiffs had thereupon brought replevin for the bedsteads. There was no proof of any particular damage that had been done to plaintiffs, nor of any injury to their business. There were several prayers for instructions refused.]

ALVEY, J. Before considering any of the questions raised by the exceptions, it may be proper that we state briefly the general principles that govern cases of this character, as by so doing we may the more readily determine whether there be any sufficient ground disclosed in the record to sustain the plaintiff's right to recover as against the appellee.

There is no doubt of the right of a plaintiff to maintain an action on the case against several for conspiring to do, *and actually doing*, some unlawful act to his damage. But it is equally well established that no such action can be maintained *unless the plaintiff can show that he has, in fact, been aggrieved, or has sustained actual legal damage by some overt act, done in pursuance and execution of the conspiracy.* *Cartrique v. Behrens*, 30 Law J. Q. B. 168. It is not, therefore, for simply conspiring to do the unlawful act that the action lies. It is for doing the act itself, and the resulting actual damage to the plaintiff that afford the ground of the action. Indeed, the allegation of conspiracy by the defendants would seem to be immaterial as to the right of action. "A simple conspiracy," says Nelson, Chief Justice, in *Hutchins v. Hutchins*, 7 Hill (N. Y.) 107, "however atrocious, unless it resulted in actual damage to the party, never was the subject of a civil action, not even when the old form of a writ of conspiracy, in its limited and most technical character, was in use. Then, indeed, the allegation of conspiracy was material and substantive, because, unless established by the proof, the plaintiff failed, as it was essential that the verdict should be against two at least in order to be upheld." The action like the present, therefore, may

be brought against one defendant, or, if brought against several, one may be convicted and the others acquitted. But where the action is brought against several, as having combined to do the unlawful act, it is necessary, of course, in order to recover against them all, to prove that they were all engaged in the conspiracy. The foundation or gist of the action, however, is the actual damage sustained by the plaintiff. Some right of his must be violated, and damage must result therefrom as the direct and proximate consequence, otherwise the action cannot be sustained. This has been repeatedly decided. In *Saville v. Roberts*, 1 Ld. Raym. 374, Lord Holt, in answer to the suggestion at the bar, that the fact of the conspiracy was sufficient to maintain the action, said, "*that conspiracy is not the ground of these actions, but the damage done to the party*, for an action will not lie for the greatest conspiracy imaginable, if nothing be put in execution; but if the party be damaged, the action will lie. From whence it follows," continued his lordship, "that the damage is the ground of the action, which is as great in the present case as if there had been a conspiracy. And F. N. B., 114 D., says, that where two cause a man to be indicted, if it be false and malicious, he shall have conspiracy; where one, he shall have case, so that the actions are founded upon one common foundation; but the number of parties defendants determines it to the one or to the other. Though in the old books, such actions are called conspiracies, yet they are nothing in fact but actions on the case. For conspiracy (to speak properly) lies only for procuring a man to be indicted of treason or felony, where life was in danger F. N. B. 116 A. And if such an action be sued against two defendants for procuring a man to be indicted of a smaller offense, though the word *conspiraverunt* be in the writ, yet, if one of them be acquitted, the other may be found guilty. 11 Hen. VII. 25. Contra, of a proper action of conspiracy; for there, if the one be acquitted, no judgment can be given against the other."

It is clear, therefore, as well upon the authority of other cases as that of *Saville v. Roberts*, that *an act which, if done by one alone, constitutes no ground of action on the case, cannot be made the ground of such action by alleging it to have been done by and through a conspiracy of several*. The quality of the act, and the nature of the injury inflicted by it, must determine the question whether the action will lie. *Hutchins v. Hutchins*, 7 Hill, 104; *Wellington v. Small*, 3 Cush. 145; *Adler v. Fenton*, 24 How. 407; *Cotterell v. Jones*, 11 Com. Bench. 713; 73 Eng. Com. Law Rep. 713 [8 Cyc. 646, note 90]. The fact of conspiracy is matter of aggravation, and, as we have before stated, it only becomes necessary, in order to entitle the plaintiff to recover in one action against several, that the fact of the combination or conspiracy should be proved.

Now, with these general principles in view, let us turn to the prayers that were offered by the defendants and rejected by the court below, and ascertain whether there was error in their re-

jection. The third and sixth would seem to be the most material. By the third prayer, the court was requested to instruct the jury that, even if there had been an unlawful combination among the defendants to injure the plaintiffs, *there was no evidence that any damage was done, and they were not, therefore, entitled to recover.* As we have seen, the gist of the action is not the conspiracy, but the actual damage done to the plaintiffs; and this prayer must be taken as referring to such damage as was properly recoverable in this form of action. The combination or conspiracy among the defendants to damage the plaintiffs was negatived by the verdict of the jury in acquitting two of the defendants, Hanson and Phillips; and whether the other defendant, the appellant, should not also have been acquitted, depends upon the nature of the act proved and the consequent damage to the plaintiffs.

The only evidence in the case upon which the plaintiffs could pretend to rely for recovery as against the present appellant alone, was the well established fact that the bedsteads, which had been purchased by the plaintiffs and shipped to them in Baltimore, were withheld from them by the direction of and through the instrumentalities employed by the appellant, when, as it subsequently appeared, they were entitled to receive them. They resorted to replevin and recovered them; but it is very manifest from all the evidence in the cause, both on the part of the plaintiffs and defendants, that the replevin was more the result of the election of the parties than the necessity of the case. Be that, however, as it may, it is very clear, that no matter how flagrant may have been the intention of the appellant to violate his contract with the plaintiffs, or, however much he may in fact have violated it, this action was not the remedy for such wrong. If the property had been so far delivered to the plaintiffs as to vest in them the right of possession, then, for any unauthorized obstruction of or interference with that right, such as is complained of in this case, the actions of trespass or trover were the appropriate remedies for the recovery of damages. But an action on the case, in which consequential damages only are recoverable, is not the proper remedy, and especially not in the face of the testimony of one of the plaintiffs themselves, that "he could not say anything about any particular damage," and did not know of any instance in which their business had been hurt. Finding, therefore, no sufficient evidence in the record of damage to the plaintiffs that could be recovered in this action, we think the court below was in error in refusing the third prayer.

By the sixth prayer, the court was requested to instruct the jury that the plaintiffs were not entitled, under the pleadings in the cause, to recover any damage against the appellant for breach of any contract of sale to the plaintiffs; which prayer was refused, and, in which refusal, we think the court was clearly in error. The action is not founded upon breach of contract, and the jury should not have been allowed to take any such question into consideration. It appears by the bill of exceptions that the plain-

tiffs' counsel conceded the correctness of the prayer, but as the court rejected it, it was withheld from the jury, and, consequently, the appellant derived no benefit from the concession. It was clearly his right to have the instruction granted by the court, being, as we think, such as ought to have been granted.

The judgment of the court below will, therefore, be reversed; but, in order that the plaintiffs may have an opportunity of producing other proof, or to make application for leave to amend in such respect as they may be advised, we shall remand the cause for a new trial. But, of course, any further proceedings that may be had in the present case can only be taken against the appellant, as the other two original defendants stand acquitted and discharged. Judgment reversed.

"It is frequently criminal for many to combine to effect even a *lawful* end. It is doing a lawful thing by unlawful means. But that offense is to the *public*. A private person cannot complain of the conspiracy *as such*; but only when it operates to his injury—that is to say, when *as to him* the object of the conspiracy is unlawful. There must be a fraudulent combination." *Eason v. Petway*, 18 N. C. at p. 47. For further authorities on the subject of Conspiracy as a cause of a civil action, see *McIntosh* Cont. 390, 407, and note; 8 Cyc. 645 et seq. 2 L. R. A. (N. S.) 292, 789, 824, 4 Ib. 302, 5 Ib. 899, 6 Ib. 1067, 9 Ib. 904, 12 Ib. 642, 16 Ib. 85, 17 Ib. 162, 18 Ib. 707, 22 Ib. 607, and notes (conspiracies by unions, strikes, boycotts, blacklisting, etc.); 3 Ib. 470, and note (to alienate affections of spouse); 4 Ib. 1119, and note (to blacklist a servant). See "Conspiracy," Century Dig. §§ 1-5; Decennial and Am. Dig. Key No. Series §§ 1-6.

SEC. 9. INJUNCTION AGAINST BREACH OF CONTRACT.

HARRIS v. THEUS, 149 Ala. 133, 43 So. 131, 10 L. R. A. (N. S.) 204. 1907.

Contracts in Restraint of Trade.

Statement of facts by DENSON, J.: This was a bill filed by Theus against Harris and wife for an injunction to restrain the said Harris from engaging in or carrying on the business of buying crude gum and distilling turpentine within ten miles of the town of Geneva. The bill is based on a contract wherein Theus purchased of Harris certain leases of pine land for turpentine purposes, and erected a distillery for the manufacture of turpentine, and a covenant in said contract that said Harris would not engage in the naval stores business within ten miles of the town of Geneva, so long as Theus should be engaged in said business at Geneva. The allegations of the bill and of the answer, together with the pleadings in the cause, are sufficiently set out in the bill of exceptions. The chancellor declined to dismiss the bill for want of equity, overruling the demurrer thereto, and, on a final hearing, decreed that complainant was entitled to the relief prayed for. From this decree, respondents appealed.

DENSON, J. It may be conceded as being the general rule in all the states, as well as in England, that contracts in general re-

straint of trade are void as against public policy. 24 Am. & Eng. Enc. Law (2d ed.), 842; 3 Ib. 882; 9 Cyc. 525; 2 Pom. Eq. Jur. § 934; *McCurry v. Gibson*, 108 Ala. 451, 54 Am. St. Rep. 177, 18 So. 806; *Brewer v. Marshall*, 19 N. J. Eq. 537, 97 Am. Dec. 679; *Mitchell v. Reynolds*, 1 P. Wms. 181; *Trenton Potteries Co. v. Oliphant*, 58 N. J. Eq. 507, 46 L. R. A. 255, 78 Am. St. Rep. 612, 43 Atl. 723. "In determining what is the public policy in this regard, we have, however, to take into account certain contracts which restrain trade. It is of public interest that every one may freely acquire and sell and transfer property and property rights. A tradesman, for example, who has engaged in a manufacturing business, and has purchased land, installed a plant, and acquired a trade connection and good will thereby, may sell his property and business, with its good will. It is of public interest that he shall be able to make such a sale at a fair price, and that his purchaser shall be able to obtain by his purchase that which he desired to buy. Obviously, the only practical mode of accomplishing that purpose is by the vendor's contracting for some restraint upon his acts, preventing him from engaging in the same business in competition with that which he has sold. His contract to abstain from engaging in such competitive business is a contract in restraint of trade, but one which . . . has been recognized as not inimical to, but permitted by, public policy. Therefore, while the public interest may be that trade in general shall not be restrained, yet it also permits and favors a restraint of trade in certain cases. Contracts of this sort, which have been sustained and enforced by courts, have been generally declared to be such as restrain trade, not generally, but only partially, and no more extensively than is reasonably required to protect the purchaser in the use and enjoyment of the business purchased, and are not otherwise injurious to the public." This is the doctrine recognized in the courts of many of the states, including our own court. (Cyc. 529, and cases cited in note 70; 24 Am. & Eng. Enc. Law (2d ed.), 850; *McCurry v. Gibson*, supra; *Tuscaloosa Ice Mfg. Co. v. Williams*, 127 Ala. 110, 50 L. R. A. 175, 85 Am. St. Rep. 125, 28 So. 669; *Trenton Potteries Co. v. Oliphant*, supra. . . . It appears . . . that the covenant is that the covenantor shall not enter into nor engage in the turpentine business at any point within ten miles of the town of Geneva so long as the covenantee shall operate a turpentine still at Geneva. The bill avers that, "soon after taking possession of the property purchased from Harris, complainant erected, at considerable expense, a turpentine distillery near Geneva; said town being the shipping point of complainant." The contention of Harris, the covenantor, is, that this averment does not show that complainant is operating a still "at" Geneva—that operating the still "near" Geneva does not show the operation of it "at" Geneva—and, therefore, that no breach of the covenant is shown by the bill. . . . The proof shows that complainant's distillery is located about a mile from the county court-house in Geneva, and about half a mile outside of the corporate limits of the town; that

Geneva is the shipping point for all the products of his enterprise. Construing the word "at" in the light of the circumstances shown by the evidence, and on the considerations heretofore adverted to in respect to this question and the authorities cited, we are of the opinion that this insistence is not well made. We concur with the chancellor that the complainant has made a case entitling him to the relief prayed for, and the decree must be affirmed.

See note to the principal case in 10 L. R. A. (N. S.) 204; McIntosh on Cont. 381-387; 5 Pom. Eq. Jur. § 293. That specific performance of a contract of service between master and servant will not be decreed, see *In re Mary Clark*, 1 Blackf. 122, inserted at ch. 6, § 3, (c). See further, as to what contracts are and are not void for being in restraint of trade, and for when injunctive relief will be afforded in such cases, 5 L. R. A. (N. S.) 136, 6 Ib. 847, 892, 9 Ib. 446, 501, 14 Ib. 909, 19 Ib. 762, 769, and notes. See Key No. Series Vol. 2, "Contracts," §§ 62, 117, 202; "Injunction," §§ 61, 114.

PHILA. BALL CLUB v. LAJOIE, 202 Pa. 210, 51 Atl. 973, 58 L. R. A. 227. 1902.

Enforcement of Negative Covenants.

POTTER, J. The defendant in this case contracted to serve the plaintiff as a baseball player for a stipulated time. During that period he was not to play for any other club. He violated his agreement, however, during the term of his engagement, and, in disregard of his contract, arranged to play for another and a rival organization. The plaintiff, by means of this bill, sought to restrain him during the period covered by the contract. The court below refused an injunction, holding that, to warrant the interference prayed for, "the defendant's service must be unique, extraordinary, and of such a character as to render it impossible to replace him; so that his breach of contract would result in irreparable loss to the plaintiff." In the view of the court below the defendant's qualifications did not measure up to this high standard.

The learned judge who filed the opinion in the court below, with great industry and painstaking care, collected and reviewed the English and American decisions bearing upon the question involved, and makes apparent the wide divergence of opinion which has prevailed. We think, however, that, in refusing relief unless the defendant's services were shown to be of such a character as to render it *impossible* to replace him, he has taken extreme ground. It seems to us that a more just and equitable rule is laid down in Pom. Spec. Perf. p. 31, where the principle is thus declared: "Where one person agrees to render personal services to another, which require and presuppose a special knowledge, skill, and ability in the employee, so that in case of a default the same service could not be easily obtained from others, although the affirmative specific performance of the contract is beyond the

power of the court, its performance will be *negatively enforced by enjoining its breach*. . . . The damages for breach of such contract cannot be estimated with any certainty, and the employer cannot, by means of any damages, purchase the same service in the labor market." We have not found any case going to the length of requiring, as a condition of relief, proof of the *impossibility* of obtaining equivalent service. It is true that the injury must be irreparable; but, as observed by Mr. Justice Lowrie in *Com. v. Pittsburgh & C. R. Co.*, 24 Pa. 160, 62 Am. Dec. 372: "The argument that there is no 'irreparable damage' would not be so often used by wrongdoers if they would take the trouble to observe that the word 'irreparable' is a very unhappily chosen one, used in expressing the rule that an injunction may issue to prevent wrongs of a repeated and continuing character, or which occasion damages which are estimated only by conjecture, and not by any accurate standard." We are therefore within the term whenever it is shown that no certain pecuniary standard exists for the measurement of the damages. This principle is applied in *Vail v. Osburn*, 174 Pa. 580, 34 Atl. 315. That case is authority for the proposition that a court of equity will act where nothing can answer the justice of the case but the performance of the contract in specie, and this even where the subject of the contract is what, under ordinary circumstances, would be only an article of merchandise. In such a case, when, owing to the special features, the contract involves peculiar convenience or advantage, or where the loss would be a matter of uncertainty, then the breach may be deemed to cause irreparable injury. . . .

We feel, therefore, that the evidence in this case justifies the conclusion that the services of the defendant are of such a unique character, and display such a special knowledge, skill, and ability, as renders them of peculiar value to the plaintiff, and so difficult of substitution that their loss will produce "irreparable injury," in the legal significance of that term, to the plaintiff. The action of the defendant in violating his contract is a breach of good faith, for which there would be no adequate redress at law, and the case, therefore, properly calls for the aid of equity in negatively enforcing the performance of the contract by enjoining against its breach. . . . Decree reversed.

For other cases on enforcing negative covenants, see 6 L. R. A. 653, 7 Ib. 281, 6 Ib. (N. S.) 1115, 23 Ib. (N. S.) 506, and notes, see *McIntosh Cont.* 381-386, and note, for North Carolina cases and other authorities on contracts in restraint of trade; for a full presentation of the subject, see Part I-VI, *Ames' Cases in Eq. Jur.* 89-122; see also 22 Cyc. 856. For a contract by a shareholder, who sells his stock, that he will not compete with the corporation, see 23 L. R. A. (N. S.) 506, and note. See "Injunction," 10 Decennial Dig. §§ 14, 60.

SEC. 10. "BREACH OF PROMISE."

SHORT v. STOTTS, 58 Ind. 29. 1877.

Breach of Promise of Marriage.

[Margaret Stotts sued Short for damages for a breach of contract to marry her. Verdict and judgment against Short, who carried the case to the supreme court by writ of error. Affirmed.]

The complaint was as follows: "The plaintiff, Margaret Stotts, for her amended complaint herein, complains of the defendant, Samuel W. Short, and says, that on the 1st day of July, 1869, she was, and still is, unmarried; that on said day the defendant, in consideration of a promise by plaintiff that she would marry him, undertook and agreed to marry the plaintiff within a reasonable time thereafter, upon request; that the plaintiff, confiding in said promise, has always since remained, and is now, ready and willing to marry the defendant; but she avers that the defendant, although often by her since thereunto requested, and especially so requested on or about the 10th day of March, 1870, has theretofore, then, and ever since refused, and still refuses, to marry the plaintiff; and, further, that on the 15th day of September, 1871, at the county of Monroe and state of Indiana, the defendant, in violation of his promise to her as aforesaid, married one Jennie Batterton; and the plaintiff avers that, by reason of the refusal and failure to marry her as defendant had promised and agreed to do, she became sick and greatly afflicted in body and mind, and so remained sick and distressed from that time to the present; and for all the matters herein complained of she says, she has been damaged in the full sum of five thousand dollars, for which she demands judgment, and for all other proper relief."

It was insisted "that the complaint was not good, because there was no law in Indiana which authorized an action to recover damages for the breach of a contract to marry."]

WORDEN, J. . . . The counsel for the appellant, in their brief, which shows much industry and research, claim that, prior to the year 1607, the contract for marriage was one exclusively of ecclesiastical, and not of common law, jurisdiction; and that, prior to that time, no action had been maintained in a *common law court* for the breach of such contract. We are referred by counsel to the case between Stretcher and Parker, 1 Rol. Abr. 22, as the first case in which such action was maintained in England, and this was in 1639. We have not found any case of an earlier date. The case of Holcroft v. Dickenson, Carter, 233, decided in 25 Car. 2, is an important one, and shows, as it seems to us, that it was always regarded as a principle of the common law, that an action would lie for damages in such a case. . . .

In Anglo-Saxon times, there was no distinction between the lay and ecclesiastical jurisdiction; the county court was as much a spiritual as a temporal tribunal; the rights of the church were ascertained and asserted at the same time, and by the same judges, as the rights of the laity. It was not until after the Norman conquest, that the common-law and the ecclesiastical courts were separated, and the latter invested with sole jurisdiction over ecclesiastical causes. 3 Chitty's Blk. 61-63. Until the pontificate of Pope Alexander III., which commenced, we believe, in 1159, marriage, it seems, was not a subject of ecclesiastical jurisdiction.

Now, the case of *Holeroff v. Dickenson*, *supra*, establishes that, by the principles of the common law which existed long anterior to 1607, an action for the breach of contract for marriage will lie. Indeed, the principle which upholds such action is as old as the principle which gives damages in any case for the breach of a contract. And it is immaterial whether any case can be found in England prior to 1607 in which such action has been maintained. The principle is what we have adopted as a part of the common law. The doubt which seems to have arisen in the early cases was, not whether, on the principles of the common law, the action would lie, but whether, as the ecclesiastical courts had connusance of matrimonial matters, such action could be maintained in a common-law court. Thus, Vaughan, Chief Justice, in the case above cited, thought it could not, because if there was any impediment to the marriage, it could not be shown in the common law court. But the establishment of separate ecclesiastical courts in England was no part of the common law. William L. says Blackstone, "was at length prevailed upon to establish this fatal encroachment, and separate the ecclesiastical court from the civil." 3 Blk. 62. Nor were any statutes of England, on the subject of such separate ecclesiastical courts, statutes in aid of the common law, but rather in derogation of it; and they were local to that kingdom, and never in force here. The whole system of English ecclesiastical courts, as separate from the civil, is foreign to our institutions, and has no place in our jurisprudence. There is here, therefore, no conflict of jurisdiction between the courts of the one class and the other. Here, all wrongs are redressed and remedies furnished in the civil tribunals. And there is no reason why an action may not be maintained for the breach of a contract of marriage, in our courts, according to the principles of the common law. . . . Judgment affirmed.

See Bouv. Law Dict. "Promise of Marriage," 4 Am. & Eng. Enc. L. 882 et seq.; 5 Cyc. 1001 et seq.; 10 L. R. A. 584, and note; 47 Ib. 385; 4 L. R. A. (N. S.) 616, and note (damages); 7 Ib 582, and note, 86 N. C. 91, (ill health as a defense); 9 L. R. A. (N. S.) 1020, and note, 86 N. C. 91 (abatement of action); 19 L. R. A. (N. S.) 656, and note (release of, as a consideration for a promise to support); 14 Ib. at p. 748 (character of female plaintiff as a defense). See Mordecai's L. L. 265-275, 176, 357. See Vol. 3 Cent. Dig., "Appeal and Error," § 2933; Vol. 8, "Breach of Marriage Promise," §§ 1, 36; Vol. 10, "Common Law," § 10; Vol. 13, "Courts," § 162; Vol. 23, "Frauds, Statute of," § 3; Vol. 39, "Pleading," § 1401.

CHAPTER IX.

REMEDIES IN SPECIAL CASES.

SEC. 1. BILLS FOR ADVICE TO A FIDUCIARY.

TAYLOE v. BOND, 45 N. C. 5, 14-17. 1852.

The Jurisdiction for Advising Fiduciaries and the Limits of Such Jurisdiction.

[Bill in Equity filed by the executors appointed by a will, against the legatees and devisees, to obtain the advice, direction and opinion of the court in construing the will. Twelve questions were propounded to the court. The cause was transferred to the supreme court and heard upon bill and answer. Only so much of the opinion as discusses the remedy, is here inserted.]

PEARSON, J. The bill is filed by the executors of Lewis Bond, against the legatees. It sets out the will, and prays for a construction in reference to several matters specified, and submits to dispose of the fund under the direction of the court. It also prays for the advice and opinion of the court in reference to several other matters.

The questions of construction, although furnishing proper grounds for the application, are not very difficult of solution: and the case would have been disposed of at last term, but for the several matters in reference to which, the *opinion* and *advice* of the court (as distinguished from its *direction*), is asked. The subject was thus made complicated, and an advisari was taken, for the purpose of ascertaining the full scope and object of the bill and of defining the jurisdiction of a court of equity in regard to such matters.

Besides asking for a construction of the several parts of the will, which is necessary for the present action of the court, a construction is asked for on various other parts, in reference to the past conduct of the executors, and to their future rights, and the future rights of the legatees—the bill proceeding on the assumption, that an executor has a right to ask for the opinion and advice of the court, as to any matter, past, present or future, provided it has grown, does or may grow, out of the construction of the will, *upon the general idea, that a court of equity has a sweeping jurisdiction in reference to the construction of wills. This idea is an erroneous one.* The jurisdiction in matters of construction, is limited to such as are necessary for the present action of the court, and upon which it may enter a decree, or direction in

the nature of a decree. The court cannot, for instance, entertain a bill for the construction of a devise. Devisees claim by purchase under the devise, as a conveyance. Their rights are purely legal, and must be adjudicated by the courts of law. A court of equity can only take jurisdiction when trusts are involved, or when devises and legacies are so blended, and dependent on each other, as to make it necessary to construe the whole, in order to ascertain the legacies: in which case, *the court having a jurisdiction in regard to the legacies*, takes jurisdiction over all other matters necessary for its exercise.

The power of a court of equity to decree the payment of legacies is a well settled and ancient jurisdiction, assumed on the ground that the ecclesiastical court cannot take the accounts usually involved, or enforce its decree. The power to entertain bills of interpleader is also a well settled and ancient jurisdiction, assumed in cases of conflicting trusts, on the ground that, as the court has exclusive control of trustees, it is right to allow them, where there are conflicting claims, to bring in the fund, have the claims adjusted, and the fund disposed of under its decree, so as to save the trustees from responsibility and future litigation; and assumed, in cases of conflicting legal claims, for the protection of any person, of whom several claim the thing, debt, or duty (provided he has incurred no independent liability to either, and has no interest), on the broad ground of protecting a mere stakeholder, and because this principle, although always recognized at common law, is excluded from practical application in the courts of law, by their technical forms of pleading.

From these two powers is clearly derived jurisdiction to entertain a bill, at the instance of executors, for the purpose of construing wills, fixing the legacies, and having them paid under the direction of the court. This jurisdiction has been long exercised, and, in fact, is nothing more than an extension of the doctrine of interpleader to the case of executors and legatees, under the power of the court to decree payment of legacies—treating the executor as a trustee or stakeholder of a fund over which the court has control. The jurisdiction is extended even further, and in cases of difficult and complicated accounts, a court of equity will have the accounts taken, the debts ascertained, and the assets, legal as well as equitable, paid over to the creditors under its direction—in these cases, the ingredient of account (a very extensive head of equity jurisdiction), being also involved.

We can see no ground upon which to base a jurisdiction, *to allow executors to ask the opinion of the court as to the future rights of a legatee*:—for instance, “Who will be entitled, when a life estate expires?” “When property is given to one for life, with a limitation over, does the first taker have the entire interest by the rule in *Shelly’s case*?”—or, “What would be the consequence of a supposed state of facts that may hereafter arise?” True, these are matters of construction, but the questions cannot

now be presented, so as to be settled by a decree. A declaration of opinion would be merely in the abstract, until existing rights come in conflict, so as to give the court a subject to act on.

Again, we can see no ground for the jurisdiction to give an opinion to executors as to whether their *past conduct was right*, if they chose to act. It is then too late to ask the opinion of the court, because the court can then make no decree in the premises. Such a jurisdiction is directly excluded by the doctrine of interpleader. It is well settled, if the stake-holder pays over the fund to one of the parties, he comes too late; for he is not then able to put the fund in the power of the court, so that it can be disposed of under its direction. Again, we can see no ground for the jurisdiction to give advice to an executor in regard to his *future conduct or his future rights*. He must get such advice from a lawyer; but he can only get the advice (more properly, the direction) of the court, when its *present action* is invoked in regard to something to be done under a decree.

These conclusions are almost self-evident, and are necessary consequents of the fact, *that the court can only act by its decree, which must be made on an existing state of facts, so as to be the action of the court, as distinguished from an abstract opinion*. It is therefore unnecessary to pursue the discussion further, especially as no authority, dictum, or intimation to the contrary was cited. It was considered proper to announce them, and to trace the limits of the jurisdiction of the court, in order to prevent the present bill from being drawn into precedent, whereby bills may become unnecessarily complicated, by the introduction of matters foreign to the jurisdiction.

The principal case is approved in *Heptinstall v. Newsome*, 146 N. C. 503, 60 S. E. 416. For a good form of a bill for advice, see *Clark v. Atkins*, 90 N. C. 629. See 28 Am. & Eng. Enc. L. (2d ed.) p. 1050, c; *Haywood v. Trust Co.*, 149 N. C. 208, 62 S. E. 915. See "Wills," Century Dig. §§ 1665-1669; Decennial and Am. Dig. Key No. Series § 695.

LITTLE v. THORNE, 93 N. C. 69. 1885.

Limits of the Jurisdiction in Bills for Advice. Devises Construed in Such Cases, When. Parties. What Questions Answered.

[Action by those claiming as legatees and devisees under the will of Gray Lodge, against other legatees and devisees under his will, for a construction of certain trusts and devises in such will. Cause heard upon a "case agreed." The court was asked to decide: 1. Whether under the will the widow of testator took in fee, or for life only, the realty devised to her; 2. Whether she took absolutely, or for life only, the personally bequeathed to her. The judge below gave judgment settling these points, and the plaintiffs appealed. Both the action and the appeal dismissed.]

ASHE J. The action seems to be predicated upon the general idea that a court of equity has a sweeping jurisdiction in reference to the construction of wills, which Chief Justice Pearson said, in

the case of *Tayloe v. Bond*, 45 N. C. 5, was an erroneous idea. In that case, the learned judge, in his well considered opinion, has given a very clear exposition of the jurisdiction of a court of equity in the construction of wills, and from it we deduce the following rule as established: That the jurisdiction in matters of construction is limited to such as are necessary for the present action of the court, and upon which it may enter a decree or direction in the nature of a decree. It will never give an abstract opinion upon the construction of a will, nor give advice, except when its present action is involved in respect to something to be done under its decree. That it will not entertain an action for the construction of a devise, for the rights of devisees are purely legal, and must be adjudged by the courts of law. The only exception to this is where a case is properly in a court of equity, under some of the known and accustomed heads of jurisdiction, and a question of construction *incidentally* arises, the court will determine it, it being *necessary to do so in order to decide the cause*—as for instance, in actions for partition, or for the recovery of legacies where devises and legacies are so blended and dependent on each other, as to make it necessary to construe the whole, in order to ascertain the legacies; because the court having jurisdiction over legacies must take jurisdiction over all matters necessary to its exercise.

The advisory jurisdiction of the court is primarily confined to trusts and trustees, *Alsbrook v. Reid*, 89 N. C. 151, and cases there cited. Hence the court will advise executors who are regarded as trustees, as to the discharge of the trusts with which they are clothed, and as incident thereto, the construction and legal effect of the instrument by which they are created, when a case is presented where the *action* of the court is invoked as distinguished from an *abstract opinion*. *Simpson v. Wallace*, 83 N. C. 477; *Tayloe v. Bond*, *supra*. But in the latter case it is said there is no ground upon which to base a jurisdiction, to give advice to an executor in regard to his future conduct or future rights or to allow him to "ask the opinion of the court as to the future rights of a legatee," as, for instance, "who will be entitled when a life estate expires?" But the advice is only given upon an existing state of facts, upon which a decree or some direction of the court in the nature of a decree is solicited.

In the case presented by the appeal for our consideration, the *executor* does not invoke the aid of the court with respect to any of his duties arising under the will of the testator, *but the action is constituted by some of the legatees and devisees under the will against others*, for the abstract opinion of the court with regard to their several rights under the will. The executor is made a party, *pro forma*, after the institution of the action, and he who is a trustee, and is the only party to the action who could ask the aid of the court, asks nothing. And then there are no pleadings in the case, no complaint, no answer, no order, or decree asked—nothing but a summons and a case agreed between the parties, who

have never been recognized as persons who might invoke the advisory aid of the court. It is a case of the first impression, and is not authorized by any decision or dictum of any court that we are aware of. The action is therefore dismissed, and each party will pay his own costs. Appeal dismissed.

The idea that the courts of equity possess a sweeping jurisdiction to construe wills, is an erroneous one. The jurisdiction in matters of construction is limited to such questions as are *necessary to the present action of the court*. Devises will not be construed in bills for advice, because the rights of devisees are purely legal and must be adjudged when a cause of action arises with respect thereto—and not before. *Heptinstall v. Newsome*, 146 N. C. 503, 60 S. E. 416. For a full review of the jurisdiction and practice in Bills for Advice, see 3 Pom. Eq. Jur. §§ 1155-1158. See also 28 Am. & Eng. Enc. (2nd ed.) 1050, c.; *Haywood v. Trust Co.*, 149 n. c. 208, 62 S. E. 915. See "Courts," Century Dig. § 11; Decennial and Am. Dig. Key No. Series § 5; "Wills," Century Dig. §§ 1665-1669; Decennial and Am. Dig. Key No. Series § 695.

SEC. 2. CAVEAT TO THE PROBATE OF A WILL.

HUTSON v. SAWYER, 104 N. C. 1, 10 S. E. 85. 1889.

Nature of the Proceeding. Proceeding in Rem. Nonsuit. Withdrawal. Citation "To See Proceedings." Parties.

[Issue of Devisavit vel non. The propounders, because of an adverse intimation from the judge, submitted to a judgment of nonsuit and appealed. Error. Judgment set aside.]

MERRIMON, J. The proceeding is not like an ordinary action or special proceeding to which, regularly, there are parties plaintiff and defendant; nor is the purpose of it to litigate a cause of action which the plaintiff may abandon or withdraw from the court by suffering a judgment of nonsuit, or otherwise. It is a proceeding in rem, to which strictly there are no parties. The court, in the way prescribed by statute, takes jurisdiction of the paper writing or script propounded for probate as the will of the alleged testator. The jurisdiction is in rem, and the chief purpose is not to settle and administer the rights of the parties claiming under or against the alleged will, but to ascertain whether the supposed testator died testate or intestate; and, if he died testate, whether or not the script propounded, or any part of it, be his will. When the issue devisavit vel non is raised the court desires to have all persons interested before it to see proceedings. When they are cited they come into court, and may stand passively, or take active part on either side of the contest, accordingly as they may be interested in favor of, or adversely to, the script propounded as the will. And any party thus before the court may withdraw from the proceeding, paying such costs as he may properly be chargeable with; but, in that case, the script is left with the court, to be proven or disposed of according to law. In the very nature of the matter, a party before the court does not

sustain such relation to the proceeding as to give him control of it or the subject-matter of the issue. He is there to see proceedings and take active part, if he will, in any inquiry as to a matter—the script—of which the court has control, and which it is its duty to settle and determine. The purpose is to determine the nature of the script, for the benefit of all whom it may concern, and not specially for that of any particular person, whether he be before the court or not. The proceedings—the script, the issue—are not of the persons before the court. They cannot control or direct the same as parties: that is the sole province of the court, as to the issue. They are not parties, and hence, whether they take part on one side or the other of it, they cannot take or suffer a judgment of nonsuit: nor can they dismiss the proceeding. *Lodge v. Callender*, 4 Ired. 335; *Sawyer v. Dozier*, 5 Ired. 97; *Enloe v. Sherrill*, 6 Ired. 212; *Whitfield v. Hurst*, 9 Ired. 170; *Love v. Johnston*, 12 Ired. 355; *Syme v. Broughton*, 85 N. C. 367. The appellants could not therefore suffer a judgment of nonsuit, as they undertook to do. If they could and this court should affirm the judgment appealed from, the consequence would be to withdraw the script from the jurisdiction of the court, put an end to the proceeding, and leave the issue undetermined; and thus the purpose of the law would be defeated. Obviously, the action of the court was erroneous. The appellants, having excepted because of the rejection of evidence offered by them on the trial, should have waited until after a verdict and judgment, and then assigned errors, and appealed. This is the proper course of practice in this and like cases. There is no formal assignment of the error we have pointed out, but it is the duty of this court to inspect the whole record, and give such judgment as in law ought to be given. Code, § 957; *Thornton v. Brady*, 100 N. C. 38, 5 S. E. Rep. 910. Upon an examination of the record before us we see that the judgment appealed from is not warranted by law. It contravenes the nature and purpose of the proceeding. It is hence erroneous, and this court must so declare. The judgment of nonsuit must be set aside, and the issue tried and disposed of according to law. To that end let this opinion be certified to the superior court. It is so ordered.

As to right of withdrawal, nonsuit, etc., and agreements not to contest, or to defeat probate, see 19 L. R. A. (N. S.) 121, 16 Ib. 235, 13 Ib. 484, and notes. See "Wills," Century Dig. § 771; Decennial and Am. Dig. Key No. Series § 326.

BENJAMIN v. TEEL, 33 N. C. 49. 1850.

Who May Take Part in the Controversy, and at What Time and How They Should Proceed.

[A script was propounded in the county court by the executor named therein. The widow of the testator filed a Caveat. The county court ordered an issue of *devisavit vel non* to be made up and a notice to issue to the heirs and next of kin "to come in and see proceedings." Those

persons being infants, a guardian ad litem was appointed for them. The issue was tried and the verdict was against the validity of the script as a will. The propounder appealed to the superior court. In that court the propounder moved to set aside the issue upon the ground that the widow was not a party in interest and had no right to file the caveat. This was opposed by the infants through their guardian ad litem, who also moved that they be admitted to contest the will as parties to the issue. The propounder's motion was overruled; that of the infants was allowed; and the propounder appealed. Affirmed.]

RUFFIN, C. J. Persons, to whom notice to see proceedings is given, are bound by them, and are, in the view of the court of probate, parties to the proceedings, as far as there can be said to be parties in such a controversy. It is true, they may not be actors in the cause, and therefore not liable to costs. But, unless they do something to preclude them, they may become active at any time before the sentence is pronounced; for, until that is done, any party in interest is entitled to be heard for or against the script. The usual manner of effecting that with us has not been by a new and distinct allegation for or against the will; but by becoming a party to the issue made up under the direction of the court, according to the statute. For, if such allegation were made, it would not entitle that person to an issue to be tried separately, as that might lead to opposite verdicts on the same matter; but the course is merely to state on the record such matter as shows on which side the person becomes an actor, so as to show distinctly whether he may in the result be entitled to or liable for costs. The proceeding being in rem, any person may intervene to protect his interest while the thing continues sub judice. Orders affirmed.

Can the state take part in order to protect its rights in escheats? 2 L. R. A. (N. S.) 643, and note.

For the law as to who is and who is not estopped by the judgment in caveat proceedings, see Mordecai's L. L. 1071-1072. See "Wills," Century Dig. §§ 609, 610; Decennial and Am. Dig. Key No. Series § 263.

BRYAN v. MORING, 94 N. C. 687. 1886.

Double Caveat. Two Wills Propounded, the Propounders of the One Being Caveators of the Other. Issues. Form of Judgment.

[Issue of devisavit vel non. Verdict and judgment against one script and establishing another script as the will. The propounders of the first script appealed. The judgment below was reversed and a venire de novo was ordered because of an error in excluding certain evidence. A portion of the opinion is here inserted because it is a precedent for having two scripts passed upon in one trial and points out the practice, issues to be submitted, and form of judgment in such cases.]

SMITH, C. J. A paper writing, purporting to be the will of William C. Faucette, who died in June, 1883, was shortly thereafter produced before the clerk of the superior court of Chatham county, at his office, by Elias H. Bryan, and Rosa J., his wife, and, upon the written examination of witnesses, admitted to probate

in common form, as his holographic will, and letters of administration cum testamento annexo issued to the propounder. . . .

To the probate, a caveat was entered by Emma V. Moring, her husband, John M. Moring, uniting with her, early in December thereafter, and in May of the next year, she, the said Emma, and her children, by their said father and next friend, propounded for probate and proposed to establish, a later holographic will of the said William C. Faucette, alleged to have been lost, and the substance of which is set out in their complaint. The said John M. was subsequently appointed guardian to said infants, to defend their interests in the action. To prevent the double controversy, an issue in the alternative was framed and submitted to the jury, as follows: "Is the paper writing, dated July 21, 1879, or any part thereof, the last will and testament of W. C. Faucette; or does the paper marked A, contain the substance of a holographic will, duly executed by W. C. Faucette and dated July 12, 1880?"

Upon the rendition of the verdict, judgment was entered as follows: "The jury having found the following paper writing, marked A, to-wit: [Here is inserted a copy of the paper] contained in substance the last will and testament of W. C. Faucette, deceased; it is now on motion of, etc., . . . adjudged, that the finding of the jury, together with a copy of this judgment, be certified to the clerk of the superior court of Chatham county, with instructions that he proceed as the law directs, and in accordance with the finding of the jury and this judgment, to admit to probate the paper writing, found by the jury and hereinbefore set forth, as and for the last will and testament of W. C. Faucette, deceased, and that he proceed in other respects as the law directs. Ordered that the defendants Emma V. Moring and others named, E. H. Bryan and wife, Rosa J., pay costs of this proceeding."

In this connection, it may not be amiss to observe, in order to prevent the adoption of the foregoing form of judgment as an approved precedent, that in such case, *the probate is in the verdict*, and the judgment so declaring, should direct the remission of the transcript, in which the last script is contained (with the original script, if there be one among the papers), to the probate court, *to the end that they may be recorded and filed, and other necessary proceedings had therein*. A precedent is found in Eaton's Forms, 444, 448; *McNeill v. McNeill*, 14 N. C. 393.

In *Love v. Johnston*, 34 N. C. at p. 364, it is ruled, that, when there are two scripts set up as wills, the issue of *devisavit vel non* should be so framed as to pass upon both—as was done in the principal case.

The following forms taken from Eaton's Forms have been frequently approved in North Carolina. While these forms are adapted to the practice in the court of Pleas and Quarter Sessions, as it existed before the constitution of 1868, still, by a very little and obvious substitution of terms, they are suitable to the present practice and are almost invariably used in North Carolina:

PROPOUNDING OF A WILL FOR PROBATE IN SOLEMN FORM. CAVEAT.

A paper writing purporting to be the last will and testament of A. B., deceased, and which is in words and figures following, to-wit [here copy carefully the will as to language and punctuation, giving the spelling of the testator however incorrect.] is propounded for probate in open court by C. D., the executor therein named. Whereupon E. F. and G. H., two of the heirs at law and next of kin of the said A. B., come into court and enter a caveat to the probate thereof, and say that the same is not the last will and testament of the said A. B., or any part thereof. And thereupon the court directs the following issue to be made up and submitted to a jury, to-wit, "Is the said paper writing, or any part thereof, and if so, what part, the last will and testament of the said A. B., or not?" And on motion it is ordered that a citation be issued against J. K. and L. M., two of the heirs at law and next of kin of the said A. B., who reside in this state, to appear at the next term of this court, to see proceedings in this cause, and to make themselves parties to the said issue, if they shall think proper. And it appearing to the satisfaction of the court, that M. N. and O. P., the other heirs at law and next of kin of the said A. B., reside beyond the limits of the state, it is ordered that publication be made in the ——— for six [successive] weeks, notifying them to appear at the next term of this court, then and there to see proceedings in this cause, and to make themselves parties to the said issue, if they shall think proper so to do.

VERDICT AND JUDGMENT IN AN ISSUE OF DEVISAVIT VEL NON IN THE SUPERIOR COURT.

C. D. Executor of A. B. v. E. F. and G. H.

The parties aforesaid, by their attorneys, come into court, and thereupon the following jurors, to wit: (name them) being chosen, tried, and sworn to speak the truth of and concerning the issue joined between the said parties, upon their oath say, that the said paper writing, and every part thereof, is the last will and testament of the said A. B. It is therefore declared by the court that the said paper writing, and every part thereof, is the last will and testament of the said A. B., and it is ordered that the original will remaining in the office of this court, be remitted to the court of Pleas and Quarter Sessions of ——— county, with a transcript of the proceedings thereupon in this court, to the end that the said will may be duly recorded and filed in the said court of Pleas and Quarter Sessions, and that further proceedings may be had thereon according to law. It is considered that the said C. D., executor as aforesaid, do recover against the said E. F. and G. H., and L. M. and O. P., their sureties to the appeal, his costs of suit.

Order of the county court after the probate of a Will in the superior court.

A transcript of the record from the superior court of ——— county, duly authenticated, showing the probate in that court at its fall term, 1860, of the last will and testament of A. B. deceased, having been transmitted to this court, together with the original will of the said A. B. which has been proved as aforesaid, it is therefore ordered that the said transcript and the said will be recorded and filed.

These forms have been approved in the principal case and in *Cornelius v. Brawley*, 109 N. C. 542, 14 S. E. 78; *Crenshaw v. Johnson*, 120 N. C. 270, 26 S. E. 810; *Collins v. Collins*, 125 N. C. at p. 103, 34 S. E. 195, and in many other cases. For a full review of the North Carolina practice in caveat proceedings, see Mordecai's L. L. 1082-1088.

IN RE PALMER'S WILL, 117 N. C. 133, 33 S. E. 104. 1895.

Effect of Caveat on the Executor or Administrator c. t. a.

[Motion before the clerk of the superior court to set aside a summary order removing E. A. Johnson as executor of Frank Palmer's will. Motion overruled by the clerk and appeal by Johnson to the judge of the superior court. Johnson also moved before the clerk to remove a collector of the estate of Frank Palmer—such collector having been appointed by the clerk at the time of Johnson's removal. Motion overruled and appeal by Johnson to the judge. The judge overruled the clerk in both instances, and the collector and caveators appealed. Affirmed.]

Frank Palmer left a will of which E. A. Johnson was the executor. Johnson propounded the will; it was admitted to probate; letters testamentary were issued to Johnson who duly qualified as executor. Afterwards a caveat was filed. Thereupon the clerk, without *any notice to Johnson*, removed him from his executorship and appointed Marcom collector.]

MONTGOMERY, J. The question for consideration is: Can the clerk of the superior court, after a will has been admitted to probate in common form, and letters testamentary issued to the executor, remove such executor, and appoint a collector for the estate, without a hearing based upon notice to show cause why he should not be removed? We are of the opinion that he cannot. In this case the caveat was filed after the will had been proved and the executor qualified. Under this condition of facts, it was the duty of the clerk, upon the giving by the caveators of the bond required by law, to have transferred the case to the superior court for trial, and also to have issued an order to the executor, Johnson, the appellee, requiring him to preserve the property and collect the debts of the decedent until the issue devisavit vel non should be determined. Code, § 2160. Instead of doing this, he, on the caveat being entered, ordered that the probate be recalled, and that the letters testamentary which he had issued to the executor be revoked; no notice to show cause why this should not be done having been given, nor any cause shown. The clerk afterwards refused to set aside his order revoking the letters testamentary, and appointed J. C. Marcom collector. . . . In Hughes v. Hodges, 94 N. C. 56, this court said concerning 2160 of the Code: "This provision is manifestly intended, in cases to which it is applicable, to dispense with the necessity of appointing an administrator pendente lite, and confers very similar powers upon the executor, and more especially when he has entered upon the duties of his office before the caveat is entered." There is no way in this state by which an executor or an administrator, who has had letters issued to him, and who is in charge of his decedent's estate, can be removed except after a hearing and upon notice given to show cause why he should not be removed. The causes for such removal and the manner of having it done are prescribed in §§ 2170 and 2171 of the Code. Murrill v. Sandlin, 86 N. C. 54; Edwards v. Cobb, 95 N. C., at page 9.

Section 1383 of the Code, providing for collectors, does not apply to cases where the will has been proved and the executor qualified, but it applies where there are difficulties in limine disconnected with controversy or contest over the will, preventing for the time the admission of the will to probate or the issuing of letters testamentary,—e. g. protracted absence of witnesses, illness of executor, etc.; and, also, it applies where a caveat is entered at the time the will is offered for probate. A collector is appointed only in cases where there is no one in rightful charge of the estate; and in this respect there is a resemblance between him and an administrator pendente lite under the old system. Wherever a will has been admitted to probate, and the executor or administrator *e. t. a.* qualified, there can be no necessity for the appointment of a collector under the Code, nor would there have been for the appointment of an administrator pendente lite under the old system, for the executor or administrator *e. t. a.* had the right to act to the extent of preserving the property and collecting the debts until the contest was decided. *Syme v. Broughton*, *supra*; *Floyd v. Herring*, 64 N. C. 409. In the matter before us, his honor held that there was error in the order of the clerk removing the executor without notice to him and without cause shown, in the clerk's refusal to set aside the order revoking the letters testamentary, and in his refusal to revoke the letters he had issued to Marcom. There is no error in the rulings of his honor. No error.

See and compare 21 L. R. A. (N. S.) 275, and note. See "Executors and Administrators," Century Dig. § 249; Decennial and Am. Dig. Key No. Series § 35.

SEC. 3. PARTITION.

LEASE et als. v. CARR, 5 Blackford 353, 355. 1840.

History of the Remedy at Law and in Equity. Proper Allegations of the Petition. Practice. Form of Judgment.

[Proceedings for partition among tenants in common, instituted under a statute of Indiana. Commissioners were appointed to make the partition; and they filed their report, which was confirmed. To reverse the order of the circuit court appointing the commissioners and the judgment confirming the report, *Lease et als.*, the defendants below, carried the case to the supreme court by writ of error.]

DEWEY, J. . . . The proceedings in this case were instituted under the act "to provide for the partition of real estate." The provisions of this statute are very general and vague. They authorize any two or more persons, who are proprietors of real estate, to apply to the circuit court of the county within which the estate may be situate (notice of the intention to make such application having been previously given, at least four weeks, in some newspaper in the state), to appoint three commissioners to divide such estate. The commissioners, or any two of them, having taken the prescribed oath, are "to make division of said es-

tate as directed by the court among the owners and proprietors thereof according to their respective rights." R. C. 1831, p. 387—R. S. 1838, p. 426. In making this law, doubtless, the legislature designed to give a more summary and simple remedy respecting partition among common owners of land, than existed before its passage; but as they have omitted to specify the form or substance of the petition or application for a division, which the statute authorizes, we apprehend they intended the proceedings under it, so far as regards the case to be made out by the petitioner, and the action of the court upon that case, should be governed by principles and rules already known and established.

By the common law, coparceners can compel a division of their land by *writ of partition*—whence they derive their name; and by statutes passed in the reign of Hen. 8. joint tenants and tenants in common have the same privilege. Both the writ and the declaration must state that the plaintiff and defendant hold together and undivided the land sought to be divided; 2 Sell. Pr. 310, 313; and if default be made, or the title of the plaintiff be denied, he must establish it by proof. 2 Sell. Pr. 314; *Halton v. Thanet*, 2 Blk. Rep. 1134, 1159. If the plaintiff prevail, there are two judgments: the *first*, that partition be made between the parties, etc., and that the sheriff cause the land to be divided into as many parts as the case may require, and to be delivered and assigned to each party (naming him) his respective part to be holden to him and his heirs in severalty; upon this judgment, the writ *de facienda partitione* issues to the sheriff and upon his return showing the manner of his executing it agreeably to the first judgment, the *second and final* judgment is rendered "that the aforesaid partition be holden firm and effectual forever." 2 Sell. Pr. 315, 319.

But the more usual mode of enforcing partition in England now, is by resort to the courts of equity. It is essential that the title of the plaintiff should be set out in the bill of complaint, and shown to the court. The rights of the parties are declared by the decree which orders a partition; or the master is directed to ascertain the rights and shares of the parties—which having been done and reported—a partition is decreed, and a commission to divide the estate issues; but the commissioners have no power to ascertain the *rights* of the parties, nor the *proportions* to which they are entitled. 1 Smith's Ch. Pr. 477, 478; *Miller v. Warmington*, 1 J. & W. 464; *Cartwright v. Pultney*, 2 Atk. 380.

Tested by these principles, the petition or application for a partition in this case is obviously defective; and the order or decree appointing the commissioners, and investing them with power to divide the land in question between the parties "agreeably to the statute in such case made and provided," is clearly erroneous. The petition should have shown the nature and extent of the interest of the petitioner in the land, and that he held it in common with the defendants; it should also have stated their interest in the premises so far as it was known to the petitioner. On these points the petition is silent. It merely requests the appointment

of commissioners to divide the land designated in the notice, between the petitioner and George Lease and the unknown heirs of William Lease, deceased. As there was no appearance by any of the defendants, the title of the petitioner should have been shown to the court, and proof made that the defendants were common proprietors with him of the land, to justify the appointment of commissioners; and the court should have declared the proportion of the petitioner, and also have established the rights of the other parties, unless they had been satisfied that proof of such rights was not in the power of the petitioner. The decree having thus ascertained the rights and proportions of the parties, the commissioners should have been directed to divide the land accordingly, and to deliver and assign to each party his share; they should have had no discretionary power to judge of the provisions of the statute.

This view of the matter is greatly strengthened by a reference to the 2nd section of the statute, which provides, that if the real estate held in common is so situated as not to be susceptible of an equitable partition, and the commissioners shall so report, the court shall order the whole, or that part which cannot be so divided, to be sold; and on partition of a part of it being made "to any portion or number of the proprietors thereof, such proprietors shall release of record in court all claim to the residue and undivided portion of the land, and the proceeds thereof, to the residue of the proprietors." R. C. 1831, p. 388; R. S. 1838, p. 426. The purchasers under this provision of the statute would run great risk, were it not incumbent upon the petitioner to set forth and prove a title to the land before he can procure an order of sale. As the act directs the court to decree a sale upon the report of the commissioners without any additional proof on the part of the petitioner, we conceive the law contemplates that he shall establish title to the premises before the appointment of the commissioners. In this respect, the statutory proceeding under consideration is analogous to a bill in chancery for partition, the decree in which presupposes a conveyance of title. 1 Smith's Ch. Pr. 479; 1 J. & W. 473.

It has been objected to the legality of the proceedings in this case, that a part of the defendants are unknown heirs. This objection, we think, cannot be sustained. The provision of the statute regulating the practice in chancery, that when the complainant does not know all the heirs, he may proceed against those unknown, as well as the known, we conceive to be applicable to cases of partition. R. S. 1838, p. 443.

Per Curiam. The order appointing the commissioners, and the decree confirming their report, are reversed, and the proceedings subsequent to the proof of publication set aside, with costs. Cause remanded, etc.

Can assignee in bankruptcy or assignee for creditors maintain? 20 L. R. A. (N. S.) 105, and note. See "Partition," Century Dig. §§ 152, 199, 304; Decennial and Am. Dig. Key No. Series §§ 55, 73, 95.

WOOD v. SUGG, 91 N. C. 93, 97-99. 1884.

History of the Remedy. What Estates May Be Divided by Actual Partition or by Sale for Partition.

[Special proceeding for Partition by Sale. Upon issues joined before the clerk the proceedings were transferred to the superior court in term, for trial. The plaintiffs were the owners in fee of the reversion after the life estate of a widow who held a dower right in the locus in quo. The defendant, who had purchased the widow's life estate and the shares of some of the reversioners, resisted a sale for partition on the ground that reversioners and remaindermen were not entitled to the remedy sought in this proceeding, so long as the life tenant lived. The judge ruled with the defendant, and judgment was entered to that effect. Plaintiff appealed. Affirmed.]

ASHE, J. . . . At the common law, parceners only were compellable to make partition by a writ of partition, but the benefit of that writ was extended to joint-tenants and tenants in common by the statute of 31 and 32 Henry 8. By the former statute, none but tenants of the freehold who had estates of inheritance could have partition, and only against tenants of the freehold. By the latter, tenants for life or years might have partition, but not to affect the reversioner or remainderman. The essential provisions of these statutes are still in force in this state, with only a modification of the remedy. In 1787 an act was passed by the general assembly which gave to tenants in common of real estate the petition for partition, in place of the ancient writ of partition. Act 1787, ch. 274, s. 1, brought forward in the Revised Statutes and Revised Code. [Revised, s. 2487.] The construction put upon this statute is, that it applied only to such cotenants as had seizen where the estate was freehold, but had no application to reversioners or remaindermen. *Maxwell v. Maxwell*, 43 N. C. 25; *Hassell v. Mizell*, 41 N. C. 392. And in so holding this court has followed the English decisions in construing the statute of Henry 8. Our act of 1787 has made no change in the principles or law applicable to partition, but has only changed the remedy. Mr. Freeman in his work on Cotenancy says: It is a general rule prevailing in England without exception, and also throughout a majority of the United States, that no person has the right to demand any court to enforce a compulsory partition, unless he has an estate in possession; one, by virtue of which he is entitled to enjoy the present rents or the possession of the property as one of the cotenants thereof, sec. 446. The same doctrine is announced and maintained in 1 Wash. on Real Prop. ch. 13, s. 7, sub-div. 7.

In New York it has been held that proceedings in partition can be instituted only by a party who has an estate entitling him to immediate possession. *Brownell v. Brownell*, 19 Wend. 367. See also *Miller ex parte*, 90 N. C. 625. In New Hampshire it is held: "To maintain a proceeding for partition the applicant must show a present right of possession." 36 N. H. 327. And again, that "one who is interested with others in a remainder or reversion, after an estate of freehold, cannot maintain a petition for parti-

tion of the lands in which he is so interested." 8 N. H. 93. We might multiply authorities, but we deem those cited are sufficient to show that the principle is well established, that cotenants in remainder or reversion have no right to enforce a compulsory partition of land in which they have such estate.

By the act of 1812, ch. 847, jurisdiction was given to courts of equity to order the sale of lands for partition, when an actual partition could not be made without injury to some of the parties; but it was held to apply only to such cases where partition might have been made at law. *Maxwell v. Maxwell*, and *Hassell v. Mizell*, supra. Now, by the act of 1868-9, ch. 122, s. 12, and The Code, s. 1903, jurisdiction is given to the clerk of the superior court of the county where the real estate or some part thereof lies. We are of opinion there is no error in the judgment of the superior court. Affirmed.

"Partition can only be made by tenants in common who are seized of the freehold, and not by those who have the remainder or reversion. Ordinarily, partition lies only in favor of one who has a seizin and a right of immediate possession. *Hassell v. Mizell*, 41 N. C. 392; *Maxwell v. Maxwell*, 43 N. C. 25; *Wood v. Sugg*, 91 N. C. 93; 1 Wash. Real Prop. 583." *Osborne v. Mull*, 91 N. C. at p. 207. Remainders and reversions may now be the subject of partition by judicial sale, under the statutes of North Carolina. See *Mordecai's L. L.* pp. 570, 571; *Pell's Rev.* secs. 2487, 2508, 2509. See "Partition," *Century Dig.* §§ 39-51; *Decennial and Am. Dig. Key No. Series* § 12.

BRAGG v. LYON, 93 N. C. 151, 153. 1885.

Equity Jurisdiction and Practice in Partition. Sale for Partition, when Ordered and when not Ordered. Partial Partition. Actual or by Sale. Clerk's Jurisdiction.

[Special proceeding for partition by sale. The locus in quo consisted of nine acres of land on which there were a grist mill, saw mill, carding machine and water power. The property was owned in common by the plaintiffs, who together owned one-third; James B. Floyd, who owned one-third; and Pattie N. Lyon, who owned one-third subject to the life estate of her father, Edward B. Lyon, who held it as tenant by the curtesy. The petitioners alleged that a sale was necessary because, owing to the nature and size of the tract of land, an actual partition could not be made without material injury to some or all of those interested.

The defendant Pattie N. Lyon answered, denying the necessity for a sale. Edward B. Lyon answered, denying the necessity for a sale and setting up as a defense that a sale would injure him because his interest was for life only; he also insisted that the court had no power to order a sale under the facts and circumstances of this case. The clerk ruled with Edward B. Lyon, as far as the sale of his life interest was concerned, and dismissed the proceeding as to him; but ordered a sale of the two-thirds of the land not embraced in his life estate. The plaintiff appealed to the judge at chambers, who affirmed the judgment of the clerk. They then appealed to the supreme court. Reversed and proceeding dismissed.]

ASHE, J. . . . When there is a tenancy in common, each claimant has the right to partition, and to have his interest apportioned to him in severalty if the estate be susceptible of division.

but if not or it shall be made to appear upon the application of any one or more of the claimants by satisfactory proof, that an actual partition cannot be made without injury to one or more of the parties interested, the court shall order a sale of the property. The Code, sec. 1904. The court of equity has always had the power to make partition as one of its known and accustomed heads of jurisdiction, but it had no power to order a *sale of land* for that purpose, before such jurisdiction was conferred upon it by statute. After it was invested with that jurisdiction, it possibly had the power to make a decree directing a partial sale such as was ordered by his honor in the court below. But this proceeding is not in a court of equity, but in the superior court before the clerk who had no equity jurisdiction; and besides, the statute giving jurisdiction to courts of equity over sales for partition, has been repealed by secs. 1903 and 1904 of The Code, which confer that jurisdiction upon the superior court to be exercised by the clerk, who is not vested with any equity powers, except where specially conferred by statute.

It would seem, therefore, that as the right to decree a partial partition was a power incident to an equity jurisdiction, the clerk could have no such power as was exercised by him in this case, to order a sale of part of the land and leave the residue unsold. The legislature, we think, in enacting the above cited section of The Code, contemplated a sale of the whole land, and the clerk had no right to order a partial sale. Our conclusion therefore is, that there was error in the judgment rendered by the clerk, and also in that of his honor in affirming the judgment of the clerk, and as Edward B. Lyon, the tenant by the curtesy, objected to the sale, we cannot do otherwise, under the decision of *Park v. Siler*, 76 N. C. 191, than dismiss the petition. Petition dismissed.

The existence of a life estate is no longer a bar to a sale for partition. See Pell's Rev. secs. 2508, 2509. That a partial division may be had in an ordinary proceeding for partition is provided for by Rev. sec. 2506. See "Partition," Century Dig. §§ 211-223; Decennial and Am. Dig. Key No. Series § 77.

DAVIS v. DAVIS, 37 N. C. 607, 608. 1843.

Essentials to an Application for a Sale for Partition. Policy of the Law as to such Sales.

[Bill in equity asking for a sale of lands for partition. Sale refused and bill dismissed. Plaintiffs appealed. Affirmed.]

The bill was filed by the owners of two undivided eighths of the locus in quo against those who were supposed to own the other six-eighths. One of the defendants, Semple Davis, answered that he had bought the shares of the other cotenants and, consequently, owned the six-eighths not owned by the plaintiffs. He also alleged that he owned other lands adjoining the locus in quo and desired to have his part of the locus in quo set apart to him. He further alleged that a sale for partition was not only unnecessary, but would be a detriment to him, and that an actual partition was practicable and would be beneficial to all concerned.

The locus in quo contained ninety-nine acres. The judge below dismissed the bill, and plaintiff appealed. Affirmed.]

RUFFIN, C. J. . . . No other decree, it seems to us, could have been made than the one that was made. The cause was heard without proof, and upon the answer admitted to be true, and the court was obliged to take it, that actual partition could properly be made without prejudice to any party, and that a sale could not be made but to the prejudice of the defendant Semple. But it was insisted at the bar that the answer itself furnished a sufficient ground to decree the sale as prayed, inasmuch as the judges must understand that so small a tract of land could not be actually divided among so many persons without a prejudice to the owners, each of whom would get a little more than twelve acres in severalty, which in this state must be of little or no value for purposes of agriculture. We answer that the court is not at liberty to make such an inference against the positive statements of the answer, touching the effects of a sale or partition of the land upon the interests of the several proprietors. But furthermore, it does not appear that this land is valuable only for agriculture in the common acceptation of the term. Its situation does not appear, nor its quality. It may have minerals on it, or it may be near Charlotte, or there may be many other circumstances which would render even so small a parcel as twelve acres of value sufficient to render it proper to divide the land itself among the claimants, instead of selling it. *Prima facie*, each party is entitled to actual partition, and it is incumbent on him who asks for a sale to show that his advantage will be promoted by it, and that no loss will be worked by it to any other party. Decree affirmed.

As to the reluctance of the courts to order a sale unless it be clearly necessary in order to do justice, see *Craighead v. Pike*, 58 N. J. Eq. 15, 43 Atl. 424, inserted post in this section. See "Partition," Century Dig. § 223; Decennial and Am. Dig. Key No. Series § 77.

SIMMONS v. HENDRICKS, 43 N. C. 84. 1851.

Jurisdiction in Equity. "Tenants in Common with a Partial Division Made by the Donor." *When Deeds and Wills Construed in Bills for Partition.*

[Bill in equity seeking a partition. Defendant demurred. Demurrer sustained. Plaintiffs appealed. Reversed. The facts appear in the opinion.]

PEARSON, J. The will of Tobias Hendricks contains this clause: "I will and bequeath unto my son Solomon 80 acres of land, the place on which he lives, getting his complement on the north side. I will and bequeath unto my daughter Mary, the remainder of the place, on which my son Solomon lives." Mary is the plaintiff, together with her husband and Alderd an alleged purchaser under them. Solomon is the defendant. The bill alleges that the tract

contains about 130 acres, and the defendant refuses to make a division by running a straight line across the tract so as to take off 80 acres for him on the north side, or to make one any other way. The prayer is that a partition may be made by a decree of this court. A demurrer was sustained in the court below. In this, there is error.

It is said, this bill is an application to a court of equity to put a construction upon a devise; which, being purely a legal question, should be decided in an action of ejectment, and a court of equity has no jurisdiction. We grant that a court of equity never has assumed jurisdiction simply to construe a devise, for it is in the nature of a conveyance. The title passes directly to the devisee. . . . But courts of equity have always taken jurisdiction in cases of partition, and if, in the exercise of that jurisdiction, it becomes necessary incidentally to put a construction upon a devise, there is no reason, when the court is constituted like ours,—that is, when both courts are held by the same judge—why the judge, sitting in a court of equity, should arrest the case, and send it to himself, sitting in a court of common law, for the purpose of obtaining a construction of the devise. This is every day practice. If a case is in a court of equity, and it becomes necessary, in order to the decision, to say whether by a proper construction “the rule in *Shelly’s case*” (for instance) applies, that court proceeds to determine the question, whether it be presented by a deed or by a devise. The amount of it is this. A court of equity will not take jurisdiction simply to put a construction on a deed or a devise, because that is a pure legal question. There is a plain remedy at law, and such an assumption, on the part of a court of equity, would break down all distinction between the two jurisdictions. But where a case is properly in a court of equity, under some of its known and accustomed heads of jurisdiction, and a question of construction incidentally arises, the court will determine it, it being necessary to do so, in order to decide the cause.

The present is a case strictly of partition, and there is no remedy except in a court of equity; for, fifty actions of ejectment (supposing either party could maintain one) would not establish the dividing line, because there is in fact no such line; and none other but a court of equity can make the line, and this that court has jurisdiction to do, because there is no other remedy, and it is against conscience for the party to object to a division.

But it is said, these parties are neither joint tenants, co-parceners, nor tenants in common, and consequently this cannot be a question of partition. It is true, the parties are not strictly speaking tenants in common; but they are in a similar relation towards each other; neither has any part in severalty, and yet they own the whole tract to be divided between them. And in fact, their relation is that of tenants in common between whom the deviser has made a partial division; leaving it to be completed by their agreement, or otherwise by a court of equity, which is the only court that can “enforce the right.” A deviser gives a tract of land to

be equally divided between two. They are tenants in common, strictly speaking. And he gives a tract of land to be equally divided between A and B; but B is to have the "upper part." Their relation is that of tenants in common with a partial division made by the deviser. He gives (as in this case) a tract of 130 acres of land to be divided between A and B; but B is to have 80 acres laid off on the north side, and A is to have the residue. Their relation is that of tenants in common with a partial division made by the deviser, providing that B's share shall not only be on the north side, but shall contain 80 acres; and A shall have the remnant as his share; without giving any beginning or course for the dividing line or the form of the land.

The decretal order must be reversed, and this opinion be certified. If the defendant, by his answer, admits the facts alleged, he will suggest the mode of division which he insists will be right. The court can then decide between the two modes of partition suggested; or he may refer the matter to the master, with directions to have a survey and to report a scheme of division, together with the facts. To this report either party may except, and the question will thus be directly before the court.

See also *Wright v. Harris*, 116 N. C. 462, 21 S. E. 914, and *Harris v. Wright*, 118 N. C. 422, 24 S. E. 751, for other cases of partition among "tenants in common with a partial division made by the deviser." See "Wills," Century Dig. § 1454; Decennial and Am. Dig. Key No. Series § 627.

CRAIGHEAD v. PIKE, 58 N. J. Eq. 15, 22-25, 43 Atl. 424. 1899.

Partition of Partnership Lands. Sale for Partition and Actual Partition in Equity. Setting Apart the Share of One Tenant and Leaving the Residue to be Held in Common by the Other Tenants.

[Bill in equity for actual partition of lands held by several persons as co-partners in a land speculation. The lands consisted of what is known as Salt Marsh, and the main tract contained 2800 acres. The plaintiff's share was one sixty-fourth. The income from the lands was insufficient to defray the taxes and other expenses. The defendants resisted an actual partition upon various grounds, none of which need be stated except: (1) That it was contended that the lands should be sold in one body, because such, it was contended, was the intention of the co-partners when the lands were purchased. The court held that such was not the intention—a conclusion arrived at upon the facts before the court; (2) That so small a share as one sixty-fourth could not be allotted to one co-owner without great prejudice to the other owners; (3) That it was impracticable to set apart one sixty-fourth of the land in severalty. Decree for the plaintiff.]

PITNEY, V. C. . . . The rule in this country is well settled that lands held for partnership purposes will be considered as converted into personalty only to the extent necessary to pay the partnership debts. All lands remaining after that purpose is served are liable to be divided in specie by partition proceedings. So that the case, under the view most favorable to the defendants' contention, stands thus: The complainant is entitled to have the

partnership enterprise wound up. Its assets in part consist of lands. There are no debts. Under those circumstances I can see no reason why she should not have her share set off to her in specie. *Freem. Co-Ten.* (2d ed.) §§ 118, 443; *Shearer v. Shearer*, 98 Mass. 111. Formerly the same rule prevailed in England, but latterly the disposition of the English courts has been to hold that land held by partners for partnership purposes is converted absolutely into personality, and must be disposed of as such upon dissolution. Probably the secret of this tendency of decision is the disposition of the English courts to avoid the injustice of the English canon of descent of real estate to the eldest son. The disposition of the law is against holding land to be perpetually free of the right of partition, and the courts have only held such freedom under peculiar circumstances and for limited periods.

The leading case in this country is *Coleman v. Coleman*, 19 Pa. St. 100. That was a suit for the partition of the famous Cornwall ore banks and mine hills in Lebanon county, Pa., which were held under a peculiar agreement sanctioned by a decree made in the last century, and the decision against partition was put on the intrinsic difficulty, if not impossibility, of making an actual partition, and on the feasibility of the property being held in a sort of severalty according to the special agreement mentioned. Another case is one in England, of *Peck v. Cardwell* (decided by Lord Langdale in 1839) 2 Beav. 137. There land was bought by four persons and laid out into building lots under a special and particular scheme by which the lots were to be sold for the benefit of all parties, and there was a provision for buying out the share of any one of the parties who desired to withdraw from the enterprise. The agreement is not fully set forth, and the question apparently not much debated or fully considered, the attention of counsel and court being devoted to another question arising in the cause. Neither of these cases covers the present.

But, in the second place, the defendants allege, and offer proof tending to show, that these lands cannot be divided or even so small a share as 1-64 set off without great prejudice to the remainder. The theory of the defense is that it will be unfair to the great majority who desire to keep the whole premises in a body to take away even so small a portion. I have carefully considered all the evidence on that topic, and I am unable to accede to that contention. It seems to me that there can be no injury to the body of the tract by setting off 1-64, which will amount to only between forty and fifty acres. Parcels larger and smaller than that were sold voluntarily by the original joint proprietors, and without any undertaking on the part of the grantees to contribute towards the expense of sustaining the dikes. But it is further said that the value of the different portions varies so much that it will be impracticable to set off to the complainant her part so that it will be in value just equal to 1-64 of the whole. Here, again, I am unable to adopt that view. As we have seen, the land is traversed in many directions by railroads, turnpikes, and trolleys; and it

seems to me that there will be no difficulty in picking out forty or fifty acres or a tract of such size as in the judgment of three sensible and intelligent commissioners will amount in value to 1-64 of the whole. For it must be remembered that the commissioners are not confined to laying off a plot which shall be in acres 1-64 of the whole and 1-64 in value. They may vary the size of the lot to make it in their judgment equal in value to 1-64 of the whole. Again, I think it would be a great hardship upon the complainant to compel her to submit to a sale of the whole premises in one block, and to take 1-64 of the proceeds. The Pikes and Tilneys have been trying for years to make a sale of these premises in one block, and proceedings in this partition were delayed from time to time upon the statement of counsel that a sale was about to be completed, and yet it never has been completed; and if the premises were decreed to be sold, as at present advised, I would not advise a decree that they be sold in a body, but in reasonable parcels, so that each person holding a small share would be able to protect himself. Upon the whole case I think it but just to the complainant, and by no means unfair to the defendants, that she should have her 1-64 part set off to her. The defendants desiring not to have a partition among themselves, but to have the power to sell as they shall be advised, may have a decree to that effect, which may be enforced to suit their convenience.

See also, for partition of co-partnership lands, *Collins v. Dickinson*, 2 N. C. 240, where it is held that a partition of such property is a matter of right, which a court of equity will enforce; and *Flanner v. Moore*, 47 N. C. 120, which holds that there will be no decree for the partition of such property unless and until all the partnership accounts have been adjusted between the members of the firm, and the clear interest of each partner ascertained; and, as a court of law cannot take such accounts, the jurisdiction for a partition of co-partnership lands must necessarily be in equity, whenever it is necessary to adjust the accounts before the respective interests of the several members can be ascertained. As to the jurisdiction in equity for partition of partnership realty, see 6 Pom. Eq. Jurisp. sec. 943; 30 Cyc. 184; 21 Am. & Eng. Enc. L. (2d ed.) 1154. See "Partition," Century Dig. §§ 37, 211-223; Decennial and Am. Dig. Key No. Series §§ 14, 77.

NIXON v. LINDSAY, 55 N. C. 230. 1855.

Contribution for Defects. Implied Warranty in Partition. Caveat Emptor.

[Cause in equity removed to the supreme court, and heard there upon bill, answer and proofs. Decree for contribution and account.]

The bill in equity alleged that the plaintiff and defendants, being owners in common of certain slaves, had agreed that a partition thereof might be made by certain commissioners; that the commissioners so selected valued the slaves at the aggregate sum of \$4,600, the share of each tenant in common being \$1,150; that a division was made and two slaves, Gabriel and Mary, were set apart to the plaintiff at the respective values of \$750 and \$400; that Mary was sick at the time she was turned over to the plaintiff, but the commissioners and all the interested parties thought her malady was of no importance; that in fact Mary, at that

time, was afflicted with African consumption, of which she died two months thereafter; that plaintiff had paid out a good deal of money in administering to the necessities of Mary. There were also charges of fraud and deceit, on the part of some of the defendants in putting off Mary upon the plaintiff, such defendants having knowledge of her condition and concealing it, etc. The bill prayed that the defendants be decreed to contribute pro rata to make good the plaintiff's loss by the death of Mary and the expenses incurred in attending to her while sick. The allegations, other than the charges of fraud, etc., were practically admitted by the answer.]

PEARSON, J. The bill contains an allegation that the defendants knew of the unsoundness of the slave, and fraudulently concealed it from the persons selected to make the division and from the guardian of the plaintiffs; and, by misrepresentation and falsehood, caused them to believe that she was laboring under temporary indisposition, from want of sleep, etc., in attending at a sick bed. Without passing upon the proofs, we put this allegation out of the case; nor do we lay any stress upon the fact that the plaintiffs were infants, and according to Lord Coke, are not bound by the partition, unless it be equal. Coke Lit. 171. a.

The question is this: Tenants in common of slaves select commissioners who make partition: in the lot assigned to the plaintiffs is a girl, who, at the time of the division, was unsound, having an incurable disease called African consumption, of which she died about two months thereafter: the tenants in common and the commissioners had no knowledge of this unsoundness, and all supposed the girl's indisposition to be slight and temporary, and she was valued at \$400: have the plaintiffs an equity for contribution?

The plaintiffs are entitled to contribution, upon the broad ground of substantial justice, expressed in the books by the maxim "equality is equity." This conclusion may be supported upon two well settled principles:

1. In partition of *chattels*, which is an equitable proceeding, a warranty is implied, *not only of title, but of soundness*; and the common law maxim "caveat emptor" has no application, being restricted (as the word "emptor" imports) to *sales* of chattels. In the conveyance of a *fee simple estate in land*, no warranty is implied; because there is no tenure. In *partition of land*, a warranty is implied; because of the *privity of estate*. In *sales of chattels* a warranty of *title* is implied; but there is *no implied warranty of soundness*, the maxim of the common law being "caveat emptor;" because it was thought some "play" (as mechanics call it) ought to be allowed for the chaffering and exercise of individual judgment, attendant upon the traffic in such articles when the parties are at "arm's length," and each is supposed to trade with his eyes open; so that in the absence of an express warranty of soundness, the *purchaser* of a chattel has no remedy except on the ground of deceit. This maxim, however, was peculiar to the common law. The civil law enforced a more refined morality, and acted on the rule, in the sale of chattels, "a sound price implies sound property." The common law maxim was confined

to sales, where, as we have seen, the parties are supposed to be at arm's length, and no authority or intimation in the books can be found, that it ever was supposed to extend to *cases of partition*. 1 Story's Eq. 221; 2 Kent, 479; 2 Buk. Com. 451. Upon partition, the parties are in equali jure; there is supposed to be mutual confidence by reason of the privity of estate; and the object is to make an equal division of a common fund. There is no chaffering or trafficking about it; third persons, selected by themselves, or appointed by the court, make the division, and if the common fund is not as large as the parties suppose, either from defect of title, or of unsoundness as to part, the loss should be borne equally; in other words, *in partition there is an implied warranty both as to title and soundness*.

2 Where the parties act upon a mutual mistake as to a fact, equity will relieve, for the purpose of carrying the intention into effect. Here, the intention was to make a fair and equal division. In consequence of a mutual mistake as to a fact, i. e. the unsoundness of one of the slaves, the division is grossly unequal; so that the share allotted to the plaintiffs is of less value than the other shares by more than one-third. Need any authority be cited to show that a court of equity will compel contribution in order to set the matter right, so that the loss may be divided? By way of familiar illustration: four boys have four apples; they divide: one of the apples, although sound outside, is rotten at the core and not fit to be eaten; will the others hesitate to make their comrade, who was so unfortunate as to get the rotten apple, equal, by each giving him a part of theirs?

The plaintiffs are entitled to contribution for the estimated value of the slave, and also for the necessary and reasonable expense incidental to her last illness, and for loss of service; in regard to which there must be an account.

See also *Cheatham v. Crews*, 88 N. C. 38, for an approval of the principal case and a further ruling that if, through mistake, a parcel of land be allotted to one of the parties at a valuation based upon an erroneous impression as to the number of acres it contains, such party can obtain compensation, in money, from the others. In adjusting such matters, the lost or deficient property is valued as of the time of the partition, and that value, plus interest to the time of contribution, is the amount the injured party is entitled to receive—less his share of the incidental loss. As to the jurisdiction and practice in partition of chattels, see *Robinson v. Dickey*, 143 Ind. 205, 42 N. E. 679, inserted post in this section. See "Partition," Century Dig. § 450; Decennial and Am. Dig. Key No. Series § 116.

CLARENDON v. HORNBLY, 1 Peere Williams, 446. 1718.

Charges of Ouelty to make the Partition Equal and Reasonable.

[Bill in equity for partition. Of the lands held in common, the plaintiffs Bligh and wife owned two-thirds and the defendant one-third. The lands consisted of "a great house called Cobham House, and Cobham Park in Kent, and of farms and lands about it of 1000 pounds per annum." The defendant insisted on having allotted to him *specifically* a third of the great house and a third of the park.]

Lord Chancellor PARKER. Care must be taken, that the defendant Hornby shall have a third part, in *value*, of this estate; but there is no colour of reason, that any part of the estate should be lessened in value, in order that the defendant Hornby should have one third of it; now if Mr. Hornby should have one third of the house and of the park, this would very much lessen the value of both. If there were three houses of different value to be divided amongst three, it would not be right to divide every house, for that would be to spoil every house; but some recompense is to be made, either by a sum of money, or rent for owelty of partition, to those that have the houses of less value. It is true, if there were but one house, or mill, or advowson, to be divided, then this entire thing must be divided in manner as the other side contend; secus when there are other lands, which may make up the defendant's share. By the same reason, every farm-house upon the estate must be divided, which would depreciate the estate, and occasion perpetual contention; and it may be the intent of the defendant, when this partition is made, to compel the plaintiff to give the defendant forty years purchase for his third of the house and park.

Therefore, since the plaintiff Bligh and his wife have two-thirds, I recommend it that the seat and park be allowed then, and that a liberal allowance out of the rest of the estate be made to the defendant, in lieu of his share of the house and park.

See Rev. sec. 2491 and Pell's notes thereto; also Rev. secs. 2496, 2497. See "Partition," Century Dig. §§ 230-235; Decennial and Am. Dig. Key No. Series § 84.

HALL v. PIDDOCK, 21 N. J. Eq. 311, 313-317. 1871.

Betterments put on Common Property by One Tenant in Common. Equitable Partition. Adjustment of Rights when Betterments are Made. Sale for Partition.

[Bill in equity to restrain partition proceedings at law and for partition by the court of chancery. The cause was heard upon bill, answer, and proofs. Decree for the plaintiff.

The bill, etc., showed that the plaintiff and defendants were tenants in common of an acre of land covered with buildings, which were erected by those from whom plaintiff derived his share—no part thereof having been erected by the defendants or those under whom they claim; the plaintiff owned an undivided three-fourths, and the defendants, one-fourth.]

ZABRISKIE, Chancellor. . . . The rule that a tenant in common, who has made improvements on the land held in common, is entitled to an equitable partition, is well established, and is hardly disputed by counsel. The only good faith required in such improvements is that they should be made honestly for the purpose of improving the property, and not for embarrassing his co-tenants, or encumbering their estate, or hindering partition. The fact that the tenant making such improvements knows that an undivided share in the land is held by another, is no bar to equitable

partition. No other want of good faith is alleged or contended for by the defendants in this cause.

The peculiarities of an equitable partition are: (1) That such part of the land as may be more advantageous to any party on account of its proximity to his other land, or for any other reason, will be directed to be set off to him if it can be done without injury to the others; (2) That when the lands are in several parcels each joint owner is not entitled to a share of each parcel, but only to his equal share in the whole; (3) That where a partition exactly equal cannot be made without injury, a gross sum or yearly rent may be directed to be paid for owelty or equality of partition, by one whose share is too large, to others whose shares are too small, and, (4) That where one joint owner has put improvements on the property, he shall receive compensation for his improvements, either by having the part upon which the improvements are, assigned to him at the value of the land without the improvement, or by compensation directed to be made for them. The doctrine as to allowance for improvements is laid down by Justice Story in *Eq. Jur. sec. 655*. It was recognized and acted on by the English Court of Exchequer in equity, in *Swan v. Swan*, 8 Price, 518; by the courts of New York, in *Town v. Needham*, 3 Paige, 553; *St. Felix v. Rankin*, 3 Edw. Ch. 323; *Conklin v. Conklin*, 3 Sandf. Ch. 65, and *Green v. Putnam*, 1 Barb. S. C. 500; and by this court, in *Brookfield v. Williams*, 1 Green's Ch. 341; *Obert v. Obert*, 1 Halst. Ch. 397, and *Doughaday v. Crowell*, 3 Stockt. 201.

In making the partition in this case, if any can be made without great injury, the share or one-fourth to be allotted to the defendants must, if practicable, be set off from such part of the premises as has no improvements upon it or improvements of small value, and must be equal in value, without improvements, to one-fourth of what would be the value of the whole land if it had no improvements upon it.

I am not satisfied from the evidence that this tract cannot be partitioned in this manner without great injury. The report of the commissioners appointed by the Chief Justice, and his action in confirming it, do not affect the question as *res adjudicata*. There the direction was to divide the whole premises, including the buildings, into four equal shares, and to assign one share by lot to each of the original tenants in common. I am satisfied that the premises could not be divided in that manner without great prejudice to the owners.

In examining the map annexed to the answer, I see that the northeast side fronts on a public road, and that on the northwest side of the tract a lot of ninety feet in front, with a depth which might be extended to two hundred and forty-five feet, being nearly one-half of the whole tract, has upon it only a granary and a shed. If these are of small value, their value might be disregarded by consent of the complainant; or if they are, as seems probable, buildings that can be removed without much loss, the right to re-

move them within a reasonable time might be reserved to the complainant. Coupled with the right in equity to allow a proper amount as owelty to equalize the partition, the evidence, which consists mainly of the opinions of witnesses without regard to these matters, does not convince me that a partition cannot be made without great injury.

It must, therefore, be referred to a master, to inquire into and report what would be the value of the whole tract if no improvements had been made upon it, and whether some part of the tract upon which no improvements have been made, or only improvements of small value or that can be removed without material loss, cannot be set off, which will be, without improvements, equal in value to one-fourth of the value of the whole tract so ascertained; or whether such part cannot be set off in that manner by allowing or charging a reasonable sum for owelty; and whether such partition can be made without great prejudice to the owners of the property. And further to inquire into and report what is the present value of the premises with the improvements now standing on them, and also what has been the yearly net value of the premises from April 1st, 1865, when the defendants acquired their title to the one-fourth of it. The defendants are entitled to such portion of the fourth of the net proceeds of the premises as belongs to the land. The proper way to ascertain and apportion that is, to give to the land such proportion of the whole net yearly value, as the value of the land bears to the value of the whole premises, and to award one-fourth of it to the defendants.

If it shall appear that the premises cannot be divided in the manner directed, a sale must be ordered, and out of the proceeds of the sale a proper allowance made for the value of the improvement put upon the premises. The part of the proceeds to be allowed for the improvements must be such proportion as the value of the improvements, that is the excess of the value of the whole over the value of the land, bears to the value of the whole premises. The cases of *Conklin v. Conklin* and *Green v. Putnam* are authority for such allowance out of the proceeds of the sale. In the last case, Justice Paige says: "Where one tenant in common lays out money in improvements on the estate, a court of equity will not grant a partition without first directing an account and suitable compensation, or else in the partition it will assign to such tenant in common that part of the premises on which the improvements have been made." And he directs a reference to inquire into the value of the buildings, and by whom paid for, and the amount of rents and profits, and by whom received, so that in case a sale should be ordered the proper allowance might be made. . . .

See *Holt v. Couch*, 125 N. C. 456, 34 S. E. 703; *Wetherell v. Gorman*, 74 N. C. 603. See ch. 3, sec. 4, ante. See "Partition," *Century Dig.* §§ 236-239, Decennial and Am. Dig. No. Series § 85.

HERMAN v. WATTS, 107 N. C. 646, 651, 12 S. E. 437. 1890.

Remedy for Collection of Owelty.

[Action to recover a sum of money charged as owelty upon lands held by defendant at the time the action was brought. There was a prayer for judgment for a sale of the land unless the owelty were paid by a day to be fixed by the court. The defendant moved to dismiss the action upon the ground that plaintiff's remedy was by motion in the cause in which the partition had been ordered and the owelty charged. Motion overruled. Verdict and judgment against the defendant. Defendant appealed. Reversed. Only so much of the opinion as disposes of the motion to dismiss, is here inserted.]

MERRIMON, C. J. . . . Whatever may have been the method of procedure and practice in enforcing the charge of money upon the dividend of land of superior value to make equality in partition cases, it is well settled, under the present method of civil procedure, that it should be done by the writ of venditioni exponas, granted upon application by motion or petition in the proceeding made by the party or parties interested. Such method is orderly, prompt, and economical, and should be observed, unless in possible cases involving complicated litigation. *Waring v. Wadsworth*, 80 N. C. 345; *Halso v. Cole*, 82 N. C. 161; *Turpin v. Kelly*, 85 N. C. 399; *Dobbin v. Rex*, 106 N. C. 444, 11 S. E. 260; *Meyers v. Rice*, 107 N. C. 66, 12 S. E. 66, and *Ex parte Walker*, 107 N. C. 340, 12 S. E. 136. . . . Upon the motion the issue as to payment could have been raised easily, as in case of a motion for execution upon a judgment that has become dormant, and the judgment debtor alleges that the judgment has been paid, or raises any other proper defense. The present method of civil procedure does not tolerate, much less encourage, unnecessary actions. *Long v. Jarratt*, 94 N. C. 443; *Knott v. Taylor*, 99 N. C. 511, 6 S. E. 788; *Wilson v. Chichester*, ante, 139 (decided at this term), and the cases there cited. The counsel for the plaintiffs insisted that the partition proceeding was ended,—that a final judgment therein had been entered,—and therefore the plaintiff could not have the remedy by motion therein. It is true that the rights of the parties had been settled, and the merits of the subject-matter of the proceeding had been determined by a final decree, and no motion could be entered to disturb that decree unless for irregularity, but the final decree had not been enforced, and it was orderly and proper to take any appropriate steps in the proceedings subsequent to that decree to enforce it. This is always done when need be. The final judgment must be enforced ordinarily in the proceeding or action; certainly in particular proceedings. We are therefore of opinion that the action should have been dismissed, and that the court erred in denying the motion to dismiss the same. To the end that the judgment may be reversed, and the motion to dismiss the action allowed, let this opinion be certified to the superior court. It is so ordered.

For the law in North Carolina as to when a claim for owelty is barred by the statute of presumptions or the statute of limitations, see *Smith*

ex parte, 134 N. C. 495, 47 S. E. 16. For further rulings on the same subject, see Pell's Revisal sec. 2491 and notes. As to proceeding by separate action or by motion in the cause, see *Townshend v. Simon*, 38 N. J. L. 239, inserted at ch. 8, sec. 6, ante. See "Partition," Century Dig. § 233; Decennial and Am. Dig. Key No. Series § 84.

ROBINSON v. DICKEY, 143 Ind. 205, 208-210, 42 N. E. 679. 1895.

Partition of Chattels. Remedies of One Co-tenant of Chattels Against Another.

[Action for partition of personal property. The complaint alleged that the plaintiff and defendant were tenants in common of \$800 in cash and a stock of goods—clothing, etc., worth \$10,700—all of which was in the possession of the defendant; that such property was capable of actual partition; that the defendant refused to divide, but excluded the plaintiff from any possession or control of the property; that the defendant was endeavoring to take all of the property out of the state and sell it; that the plaintiff was entitled to his share and to a division. Prayer for a division and the appointment of a receiver.

The defendant insisted that the complaint was insufficient in that it failed to allege a *request* that the defendant divide, and raised this point by demurrer. Demurrer overruled. A receiver was appointed and judgment rendered that the goods be sold for partition and the proceeds divided between the parties. Defendant appealed. Affirmed.]

MONKS, J. . . . We think this paragraph of the complaint sufficient to withstand the demurrer. A co-tenant of personal property out of possession has no remedy at law against the tenant in possession, unless his dealing with same has been such as to amount to a conversion of the property by him. Each of the co-tenants is equally entitled to the possession of such property, and, if the possession of one excludes the other, this does not amount to a conversion. There is no liability at law, unless the co-tenant has been guilty of an actual or practical conversion, or an actual or practical destruction of the common property. *Mills v. Malott*, 43 Ind. 248, 251; *Bowen v. Roach*, 78 Ind. 361; *Schenck v. Long*, 67 Ind. 579, 581, 582; *Lowman v. Sheets*, 124 Ind. 416, 425, 24 N. E. 351; *Dain v. Cowing*, 22 Me. 347; *Oviatt v. Sage*, 7 Conn. 55; *Frans v. Young*, 24 Iowa, 376; *Conover v. Earl*, 26 Iowa, 167; *Russel v. Allen*, 13 N. Y. 173; *Tripp v. Riley*, 15 Barb. 334; *Wilson v. Reed*, 3 Johns. 175; *Nowlen v. Colt*, 6 Hill, 461; *Gilbert v. Dickerson*, 7 Wend. 449; *White v. Osborn*, 21 Wend. 72; *Hyde v. Stone*, 9 Cow. 230, 18 Am. Dec. 501, and note, 503. *Freem. Part.* §§ 287, 298, 426. It is well settled by the authorities that equity has exclusive jurisdiction of suits for the partition of personal property, even though the defendant denies plaintiff's title. *Godfrey v. White*, 60 Mich. 449, 27 N. W. 593; *Marshall v. Crow*, 29 Ala. 279; *Smith v. Smith*, 4 Rand. (Va.) 102; *Conover v. Earl*, supra; *Tinney v. Stebbins*, 28 Barb. 290; *Tripp v. Riley*, 15 Barb. 334; *Forbes v. Shattuck*, 22 Barb. 568; *Swan v. Knapp*, 32 Minn. 431, 21 N. W. 414; *Crapster v. Griffith*, 2 Bland. 5; *Low v. Holmes*, 17 N. J. Eq. 148; *Spaulding v. Warner*, 59 Vt. 646, 11 Atl. 186; *Irwin v. King*, 6 Ired. 219; *Weeks v. Weeks*, 5 Ired. Eq.

118; *Edwards v. Bennett*, 10 Fred. 363; *Smith v. Dunn*, 27 Ala. 316; *Freem. Part.* § 426; 17 Am. & Eng. Enc. Law, 681; 5 Wait, Act. & Def. p. 89, § 4; 6 Lawson, Rights, Rem. & Prac. § 2735. A law writer of eminent ability, speaking of the question under consideration, said that "the necessity of some remedy by which partition of this species of property could be compelled was much greater than in the case of real estate; for real estate was susceptible of a common possession and enjoyment, and, in case of a total exclusion of either co-tenant, he had his remedy at law by an action of ejectment. The entire absence of any remedy at law induced courts of chancery to take jurisdiction of actions for partition of personal property. At what time or under what circumstances this jurisdiction was first assumed we are unable to state, but that it exists and was exercised by the courts of chancery both in England and in the United States is undisputed." *Freem. Coten.* § 426. In *Tinney v. Stebbins*, 28 Barb. 290, the court said: "A court of equity is competent to give relief in such cases by decreeing partition of the property, or a sale thereof where partition is impracticable, and a division of the proceeds. The powers of a court of equity were conferred and exist to meet just such cases where no adequate remedy exists at law." It follows that the court did not err in overruling the demurrer to the second paragraph of complaint. . . . There is no available error in the record. Judgment affirmed.

For jurisdiction in equity for partition of chattels, see *Nixon v. Lindsay*, 55 N. C. 230, inserted ante in this section. For the liability of one tenant in common to another in trover, see *Waller v. Bowling*, 108 N. C. 289, 12 S. E. 990, 12 L. R. A. 261, and notes. For statutory provisions in North Carolina regulating partition of chattels by special proceedings before the clerk of the superior court, see *Revisal*, secs. 2504-2505. For further rulings as to remedies of tenants in common of chattels against each other, see *Pell's notes to Revisal*, secs. 2504-2505. See "Partition," *Century Dig.* §§ 149-156; *Decennial and Am. Dig. Key No. Series* § 55.

The cases inserted in this section illustrate the general principles of the remedy by partition. The matter is to a great extent regulated by the statutes of the several states. There have been important amendments to the North Carolina statutes since the decisions above selected were made. See *Pell's Revisal*, §§ 2485-2520, and notes. For a general discussion of the remedy by partition, see 6 *Pom. Eq. Jurisp.* §§ 701-722.

SEC. 4. SALE OF REAL ESTATE AND CHATTELS BELONGING TO INFANTS.

GOODMAN v. WINTER, 64 Ala. 410, 38 Am. Rep. 13. 1879.
Jurisdiction of Equity Courts. What Estates may be Sold. What Circumstances Will Justify a Sale.

[In the opinion is the following discourse on the sale of realty and personalty belonging to infants.]

BRICKELL, C. J. It is insisted that a court of equity, being without jurisdiction to decree a sale of the lands of an infant, is

without jurisdiction to ratify or confirm an unauthorized sale of his lands by a guardian or trustee, or by a stranger intruding himself into the relation of either; and that no estoppel can be raised against them. Whatever may be the doctrine prevailing in the court of chancery in England, or whatever contrariety of opinion, or of doubt, may prevail in the different states as to the jurisdiction of a court of equity to decree a sale of the real estate of an infant, in this state the jurisdiction must be regarded as existing. *Ex parte Jewett*, 16 Ala. 410; *Rivers v. Durr*, 46 Ala. 418. The jurisdiction does not spring from, nor is it dependent upon, the character of the estate—whether absolute or contingent; whether in possession, or the possession postponed until the happening of a future event. It rests upon the power and duty of the court to protect infants—to take care of, and preserve their estates while under disability debarring them from the administration of property. The courts would be more reluctant to decree the sale of an estate in remainder, or of a contingent estate, lest it might operate a sacrifice of the interests of the infant; but the jurisdiction exists, though it may be more seldom and more sparingly exercised. It may be that the infant has no other source from which maintenance and education can be derived. Or, it may be the estate is deteriorating in value, without fault or neglect on the part of the tenant of the particular or prior estate, and that the deterioration will continue, so that when the preceding estate expires, it will be, if not valueless, of greatly less value than when the court is requested to order a sale. A sale is then necessary for the maintenance and education, or to conserve the interests of the infant, and it has been the practice of the courts of chancery in this state to decree it. . . .

The reasons controlling the English court of chancery for repudiating jurisdiction to decree a sale of an infant's real estate, seem to have been, that on the death of the infant, the course of descent might have been interrupted; and if converted into personal property, he could, during minority, bequeath it. The first reason could never have been of force in this state, as the same persons who would take real estate by descent, as heirs, would take personal property, as next of kin under the statute of distribution. Each reason subordinates the necessity and interest of the infant, while living, to that of those who would succeed to the estate on his death; while with us, the court looks only to the care, protection, and advantage of the infant. 2 *Perry on Trusts*, sec. 605. In England, real estate may be of fixed and certain value, and the better investment for infants or other persons resting under disability. The courts here are admonished that real estate is fluctuating in value, and often in some kinds of personal property investments are of more certain value, yielding a larger and more reliable income. There seems no substantial reason for distinguishing here between the power of a court to decree a sale of real and of personal property; and in practice none has been recognized.

See, for a full discussion of this remedy, the proper practice, etc., *Sutton v. Schonwald*, 86 N. C. 198; *Mordecai's L. L.* 406-408; 20 L. R. A. 247; 21 Cyc. 119. For the sale of an estate of a non compos mentis, see *Dodger v. Cole*, 97 Ill. 338, 37 Am. Rep. 111; *In re Propst*, 144 N. C. 562, 57 S. E. 342. See "Infants," Century Dig. § 66; Decennial and Am. Dig. Key No. Series § 33.

COFFIELD v. McLEAN, 49 N. C. 15. 1856.

Statutory Proceedings to Sell Realty of an Infant to make Assets for Payment of Debts.

[Ejectment by an infant whose land had been sold by order of court. Judgment against defendant and he appealed. Affirmed.]

The defendant held under a sale made by order of court in a proceeding instituted by the plaintiff's guardian. The petition of the guardian set forth that his ward was "indebted to the amount of \$216 and upwards;" that the guardian had no assets in hand with which to pay such debts nor was there enough personalty belonging to his ward to discharge such debts. The question before the court in this action of ejectment was as to the sufficiency of the proceedings and the validity of the sale of the plaintiff's land.]

PEARSON, J. The sale was void, because it does not appear *that the county court passed on and ascertained the fact*, that there was a debt of demand against the estate of the ward. *Spruill v. Davenport*, 48 N. C. 42; *Pendleton v. Trueblood*, 48 N. C. 96. But there is another fatal objection. *The petition does not allege* that there was a debt or demand *against the estate* of the ward. The allegation is, that the *ward is indebted* to the amount of \$216, and the guardian has no assets, and there is no personal property out of which the debt can be paid. There is a *material difference between a personal debt of the ward and a debt against the estate of the ward*—i. e., a debt of the ancestor, for which the land of the ward is liable. It is manifest, by a perusal of it, that the statute under which this proceeding was had (Rev. Stat. ch. 63) is, as its title shows, "A mode of subjecting the land of *deceased debtors* to the payment of their debts," and consequently does not extend to personal debts contracted by, or on account of, infants. At common law, an heir, sued for the debt of his ancestor, might pray *the parol to demur* until he arrived at full age. The statute changes this by substituting a provision, that no execution shall issue against the lands of heirs, who are under age, until after the expiration of one year, during which time, it is the duty of guardians, under the 11th section of the act, to apply for an order of sale.

It was stated at the bar, that the debt for which the land was sold, was contracted in prosecuting or in defending a suit for or against the infant. So, it was not a debt of the ancestor, but was a personal debt of the ward; and the defendant's title is bad, not for a mere omission of the proper entries by the court, but upon the merits, because upon the facts, the county court had no power to order a sale. There is no error. Judgment affirmed.

See "Guardian and Ward," Century Dig. § 342; Decennial and Am. Dig. Key No. Series § 86.

IN RE DICKERSON, 111 N. C. 108, 15 S. E. 1025. 1892.

Statutory Proceeding to Sell Realty Belonging to an Infant for Change of Investment, or the like. Proper Practice. Reference to Ascertain if Sale be Proper or Necessary. Report and Confirmation of Sale.

[Motion in the cause to vacate an order of sale, and to set aside a sale of land made thereunder and to restore the land to its original owner. Iola Dickerson, an infant. At the same time the assignees of the purchaser made a counter motion for the confirmation of the sale. The sale had been made under a special proceeding before the clerk of the superior court, and the above motions were made before the clerk. The clerk refused the motion to vacate and set aside the sale, but granted the motion to confirm the sale. Iola Dickerson appealed to the judge of the superior court. The judge overruled the clerk, and ordered a re-sale of the land. From this order of the judge, the Bells, who were the assignees of the purchaser, appealed. Modified and affirmed.]

In Dec. 1882, the guardian of Iola Dickerson filed a petition, in her name, before the clerk, asking for an order to sell her interest in 160 acres of land belonging to her and to Solomon Fisher, as tenants in common. The reason assigned for requesting such sale was, that the ward's interests yielded no income because the land was in woods, etc., and that the taxes were in arrears some five or six years because there was no income, etc., out of which to pay such taxes. The petition stated that the guardian had been offered \$125 for his ward's share in the land. The prayer for relief was, that the guardian be empowered to sell the ward's interest in the land and apply the proceeds to the ward's maintenance and education. Upon this ex parte application it was ordered by the clerk that the guardian "make a deed to the purchaser for said land upon payment of the purchase money. . . . That said land shall first be advertised, etc., prior to said sale and that no bid less than \$125 be received therefor." This order was approved by the judge of the superior court; a sale was made thereunder to Samuel S. Willis; and the guardian made a deed to him for the ward's interest in the land. Willis conveyed his interest to another person, and it finally became the property of the Bells. *There was no order confirming the sale.* The infant's interest was worth about \$300 at the time it was sold for \$125.]

MACRAE, J. It is contended by the counsel for the appellant that the order of sale made by the clerk and approved by the judge December 23, 1882, was a final decree, and that there was no need for a confirmation of the sale; it being admitted upon the argument, though it does not so appear in the case or in the record, that the interest of the petitioner brought \$130 at the sale, this sum being more than the sum named in the petition as a fair price, and in the order as the lowest bid which should be received. If this contention were correct, if by a proper construction of the order of sale, directing a deed to be made "to the purchaser for said land upon the payment of the purchase money by said purchaser," we were required to hold that the price was fixed at any sum not less than \$125, and the sale confirmed in advance at such price, we could do no otherwise than hold the decree to be final and the parties bound. But, impressed as we are by the extreme looseness of the whole proceeding, it is a relief to us to be able, upon examination of the order and of its approval, to hold it evi-

dent that the judge who approved it intended that there should be a public sale, and that no bid should be entertained for a less sum than \$125, and that it should take the regular course in such proceedings, that it might be ascertained whether the land sold for a fair price, before the judgment should be made confirming the sale. We may, with profit, reproduce, as applicable to the present case, the remarks of the venerable Chief Justice Rufin in *Harrison v. Bradley*, 40 N. C. 136: "The court cannot forbear expressing a decided disapprobation of the loose and mischievous practice adopted in this case of decreeing the sale of an infant's land upon *ex parte* affidavits offered to the court, without any reference to ascertain the necessity and propriety of the sale and the value of the property, so as to compare the price with it. The court ought not to act on mere opinions of the guardian or witnesses, but the material facts ought to be ascertained and put upon the record, either by the report of the master or the finding of an issue; and, after a sale, it ought to appear in like manner to be for the benefit of the infant to confirm it. Otherwise, there is great danger of imposition on the court, and much injury to infants." As was said by the present chief justice, delivering the opinion in *Morris v. Gentry*, 89 N. C. 248: "It is the duty of courts to have special regard for infants, their rights and interest, when they come within their cognizance;" and, in the exercise of this duty, nothing but clear internal evidence of a confirmation of this sale should induce us so to construe the order. The sale, then, not having been confirmed, the commissioner's deed has not yet divested the title out of the petitioner. The proceeding is still pending. The petitioner is still an infant, and she has a right to be heard upon the report of sale and the motion for confirmation, and to move to set aside the sale for inadequacy of the sum bid for the land. *Foushee v. Durham*, 84 N. C. 56. While a formal direction to make title is not always necessary, a confirmation of the sale cannot be dispensed with. *Mebane v. Mebane*, 80 N. C. 34; *Latta v. Vickers*, 82 N. C. 501; *Brown v. Coble*, 76 N. C. 391; *England v. Garner*, 90 N. C. 197.

We concur in the view of his honor upon his finding of fact that said sale had not been made for a fair price; that a resale should be ordered, provided it shall be made to appear, as required in section 1602 of the Code, that the interest of the ward would be materially promoted by a sale of her interest in said land, and that report of sale to be made to the court. *Dula v. Seagle*, 98 N. C. 458, 4 S. E. Rep. 549. As it was admitted that the purchaser, S. S. Willis, paid the purchase money, and took a deed for said land from the guardian, and that said Willis conveyed the land for value to R. W. Bell, who is now dead, and whose interest in said land is now vested in W. R. and J. N. Bell, the appellants, it will be proper that an account be taken of the amount paid to the guardian by said Willis, and of the rents and profits of said land since said attempted sale, and the possession of said Willis and those claiming under him; and that the balance of the sum

so paid, after deducting the sum ascertained to be due for rents and profits, be a charge upon the fund arising from the sale now ordered in favor of the appellants. Modified and affirmed.

See further as to the proper practice in such proceedings and especially as to the propriety of a reference to ascertain the facts, etc., relating to the necessity or propriety of selling, *In re Propst*, 144 N. C. at p. 567, 57 S. E. 342.

The sale of an infant's realty is regulated by statute in North Carolina. See Pell's Revisal, secs. 1798-1801, and notes, which give clear information upon all points. For the sale of timber, see sec. 1790, and for sale of chattels, secs. 1787, 1791, of Pell's Rev. See also, for the practice in such proceeding, Mordecai's L. L. 406-408. See "Guardian and Ward," Century Dig. §§ 349, 379, 396; Decennial and Am. Dig. Key No. Series §§ 90, 103, 108.

SEC. 5. INQUISITION OF LUNACY.

HUGHES v. JONES, 116 N. Y. 67, 73-77, 22 N. E. 446. 1889.

Jurisdiction and Practice in Equity. Acts of the Lunatic after Adjudication. Estoppel by the Adjudication. Scope of the Inquiry.

[Action by the heir of Richard Hughes to set aside a deed executed by him to the defendant Jones, and a mortgage made by Richard Hughes and Jones to Caroline Root whose executors were also defendants in the action. The plaintiff was the son of Richard Hughes and caused his father to be imprisoned for debt. In order to have him released, the defendant instituted proceedings to have Hughes declared a lunatic. A commission was issued from the county court which resulted in an adjudication that Hughes was a lunatic incapable of governing himself or managing his estate. The inquisition further found that Hughes had been in such condition for five or six years previous to the inquisition. Thereafter a committee was appointed by the court for the estate of Hughes. The inquisition and the appointment of the committee took place in 1871. The deed to Jones, which is attacked in this action, was made in 1870—about a year before the inquisition of lunacy. The mortgage attacked was made by Hughes and Jones in 1874—about three years after the inquisition.]

There was evidence tending to show that Hughes was not a lunatic, but, on the contrary, was fully capable of attending to his affairs, when the deed was made in 1870. The plaintiff objected to such evidence, but his objection was overruled. The plaintiff had put in evidence the record of the inquisition, and he also introduced other evidence tending to show that Hughes was a lunatic when the deed was made. The court found that Hughes was sane when he made the deed, and gave judgment against the plaintiff dismissing his action. Plaintiff appealed. Affirmed.

As Jones, the grantee in the deed attacked in this action and a defendant, had been instrumental in bringing about the inquisition of lunacy—he having joined with another person in the petition for such inquisition—and as the inquisition had found that Hughes was a lunatic at the time the deed in question was executed, i. e. the deed from Hughes to Jones, made prior to the inquisition—the plaintiff insisted that Jones was estopped, by the proceedings upon the inquisition, to deny that Hughes was a lunatic when the deed was made.]

VASS, J. On the trial of this action, the court found as a fact, upon a conflict of evidence, "that said Richard Hughes, at the time of the execution and delivery of the said deed— was

mentally competent to execute the same; that said deed was not executed by said Richard Hughes through force, fraud, or undue influence imposed upon him by said defendants. . . . or any or either of them, but the same was the free and voluntary act and deed of said Richard Hughes." It is conceded that there was sufficient evidence to sustain this finding, unless the record in the lunacy proceedings was conclusive evidence, and hence the facts found by the jury therein are incapable of contradiction by the defendants in this action. All contracts of a lunatic, habitual drunkard, or person of unsound mind, made after an inquisition and confirmation thereof, are absolutely void until by permission of the court he is allowed to assume control of his property. *L'Amoureux v. Crosby*, 2 Paige, 422; *Wadsworth v. Sharpsteen*, 8 N. Y. 388; 2 Rev. St. (6th ed.) 1094, § 10. In such cases the lunacy record as long as it remains in force, is conclusive evidence of incapacity. *Id.* Contracts, however, made by this class of persons before office found, but within the period overreached by the finding of the jury, are not utterly void, although they are presumed to be so until capacity to contract is shown by satisfactory evidence. *Id.*; *Van Deusen v. Sweet*, 51 N. Y. 378; *Banker v. Banker*, 63 N. Y. 409. Under such circumstances, the proceedings in lunacy are presumptive, but not conclusive, evidence of a want of capacity. The presumption, whether conclusive or only *prima facie*, extends to all the world, and includes all persons, whether they have notice of the inquisition or not. *Hart v. Deamer*, 6 Wend. 497; *Osterhout v. Shoemaker*, 3 Hill, 513; 1 Greenl. Ev. § 556. These principles are now well settled in this state, and no question could have arisen as to the right of the defendants to show that the grantor, at the time the conveyance in question was executed, was of sound mind, but for the fact that the grantee was the petitioner in the lunacy proceedings. It is claimed that he thereby became a technical party to the record, as that expression is commonly understood in law, and hence that he is so completely bound by the finding of the jury as to be precluded from attempting to show the actual truth. This point does not appear to have been passed upon by the courts, although there are dicta of learned judges bearing somewhat upon it. A party is ordinarily one who has or claims an interest in the subject of an action or proceeding instituted to afford some relief to the one who sets the law in motion against another person or persons. Interest, or the claim of interest, is the statutory test as to the right to be a party to legal proceedings, almost without exception. Unless a party has some personal interest in the result, he can have no standing in court. But any one, even a stranger, can petition for a commission to inquire as to the sanity of any other person within the jurisdiction of the court. While this is now provided by statute, it was also the rule at common law, although a strong case was required if the application was not made by some person standing in a near relation to the supposed lunatic. Code Civil Proc.

§ 2323; *In re Smith*, 1 Russ. 348; *In re Persse*, 1 Moll. 439; Shelf. Lun. 94; 2 Crary, Pr. 5; *Ordr. Jud. Ins.* 218.

The origin and history of lunacy proceedings throw some light upon the subject. It was provided by an early statute in England that "the king shall have the custody of the lands of natural fools [idiots], taking the profits of them without waste or destruction, and shall find them in necessities, of whose fee soever the land be holden; and after their death he shall restore them to their rightful heirs, so that no alienation shall be made by such idiots, nor their heirs be in any wise disinherited." 17 Edw. II. c. 9. The same statute provided for lunatics, or such as might have lucid intervals, by making the king a trustee of their lands and tenements, without any beneficial interest, as in the case of idiots, who were the source of considerable revenue to the crown. *Id.* c. 10; *Beverley's Case*, 4 Coke, 127; 1 Bl. Comm. c. 8, § 18, p. 304. This statute continued in force from 1324 until 1863. *Ordr. Jud. Ins.* 4. The method of procedure thereunder is described by an early writer as follows: "And therefore when the king is informed that one who hath lands or tenements is an idiot, and is a natural from his birth, the king may award his writ to the escheator or sheriff of the county where such idiot is, to inquire thereof." Fitzh. Nat. Brev. 232. The object of the writ was to ascertain by judicial investigation whether the person proceeded against was an idiot or not, so that the king could act under the statute; for his right to control idiots or lunatics and their estates did not commence until office found. Shelf. Lun. 14. Subsequently, authority was given to the lord chancellor to issue the writ or commission to inquire as to the fact of idiocy or lunacy, and the method of procedure was by petition suggesting the lunacy. *Id.*; *In re Brown*, 1 Abb. Pr. 108, 109. It was the ordinary writ upon a supposed forfeiture to the crown, and the proceeding was in behalf of the king, as the political father of his people. *Id.*; Fitzh. Nat. Brev. 581. As the means devised to give the king his right by solemn matter of record, it was necessary before the sovereign could divest title. 3 Bl. Comm. 259; *Phillips v. Moore*, 100 U. S. 208, 212; *And. Law Diet.* tit. "Office Found." It was used to establish the fact upon which the king's rights depended, as in the case of an alien, who could hold land until his alienage was authoritatively established by a public officer, upon an inquest held at the instance of the government. Whether the basis of action was infancy, or alienage, or otherwise, the proceeding was in behalf of the public, represented by the king. *Id.* The inquisition was an inquiry made by a jury before a sheriff, coroner, escheator, or other government officer, or by commissioners specially appointed, concerning any matter that entitled the sovereign to the possession of lands or tenements, goods or chattels, by reason of an escheat, forfeiture, idiocy, and the like. *Chit. Prerog.* 246, 250; *Staunf. Prerog.* 55; *Rap. & L. Law Diet.* tit. "Inquest of Office." Thus the law came to us from England; and after the Revolution the care and custody of per-

sons of unsound mind, and the possession and control of their estates, which had belonged to the king as a part of his prerogative, became vested in the people, who by an early act confided it to the chancellor, and afterwards to the courts. Laws 1788, c. 12; 2 Greenl. Ev. 25; Laws 1801, c. 30; Laws 1817, c. 32; 1 Rev. Laws, 147; 2 Rev. St. 52. But, while the same power was confided, the practice or method of exercising that power was not regulated by the legislature, so that almost of necessity the English course of procedure was followed. In *re Brown*, *supra*.

For nearly a century there was no statute authorizing any court or officer to issue a commission of inquiry, except as the right to judicially ascertain who were lunatics, etc., was implied from the acts committing their care and custody at first to the chancellor, and later to the supreme court. The right to judicially learn whether a person was a lunatic or not was inferred from the right to his care and custody, provided he was such. Thus it appears that these proceedings have always been instituted in behalf of the public; at first in behalf of the king, as the guardian of his subjects, and then in behalf of the people of the state, who succeeded to the rights of the king in this regard. In both countries the theory of the proceeding was the same, resting upon the interest of the public, as is apparent from an examination of the various statutes and decisions upon the subject already cited. That interest is promoted by taking care of the persons and property of those who are unable to care for themselves, and, by preserving their estates from waste and loss, preventing them and their families from becoming burdens upon the public. The inquisition is an essential step, preliminary to assuming control. It is a judicial determination that the person proceeded against is one of the class of persons whose care and custody has been delegated to the courts by the public. Although it involves the forfeiture or suspension of civil rights over person and property, it acts upon the status of the individual only. All the other results follow the judicial decision that the status of the alleged lunatic has changed from soundness to unsoundness of mind. It is then, and only then, that the courts assume control, which they exercise through their own appointee, who is subject, at all times, to their orders. The whole world is bound by the inquisition, and no one, unless it is the lunatic himself, more than another. The law is set in motion by information, of a more or less formal character, spread before the court, not by a party, but, as in a criminal prosecution, by some one who assumes to act in the matter. While the petitioner in rare cases has been required to pay costs, it was because he acted in bad faith towards the court by calling upon it to act when he knew that there was no ground for action. For the same reason, Lord Eldon required the brothers and sisters of a supposed lunatic, who could not be considered parties in any sense, to pay the costs occasioned by their opposition to a petition for a commission of lunacy, presented by strangers to the family. In *re Smith*, *supra*. The primary object of the proceeding is not to benefit any particular

individual, but to see whether the fact of mental incapacity exists, so that the public, through the courts, can take control. The petitioner can derive no direct benefit from it. The advantage to him, if any, is only such as would result if any other person had first acted in the matter. Attentive study of the history, nature, and object of lunacy proceedings leads to the conclusion that the petitioner therein is not a party to the record so as to be personally estopped by the finding of the jury, except as all the world is estopped.

We also agree with the learned general term in its conclusion that the title to land was not involved in the proceeding under consideration, and that a commission to inquire as to the mental status of an alleged lunatic has no power to settle any such question. Such a tribunal is not adapted to so important an inquiry. It is not constituted for such a purpose, but simply to inform the conscience of the court as to a particular fact, for a special purpose. It would have no pleadings to guide it. No distinct issue upon the subject could be presented. It would be only incidental to the main question, which relates to existing incapacity. When that is found, the care of the person and estate belongs to the court. Unless that is found, the court has no further jurisdiction, whatever else may be found. No other inquiry can become material except from its relation to that question. The command of the commission is to inquire whether the person is a lunatic, and, if so, from what time, in what manner, and how. The period of the incapacity is of no importance, unless it includes the present time. The secondary character of the inquiry as to duration is evident from the fact that, if the jury find the alleged lunatic to be of sound mind, they have no power to pass upon any other question, even if they are of the opinion that he has been insane. Moreover, the petitioner would not be allowed to control the proceeding by a settlement or discontinuance, or by submitting to a nonsuit, except by permission of the court, which could allow any one to continue if he abandoned it. Shelf, Lun. 22. The difficulty of correcting errors by appeal or review is obvious. In fine, such a method of determining the title to real estate is opposed to the theory and policy of the law, which surrounds landed property with so many safeguards. We think that the validity of the deed in question was not at issue, and that it could not properly be tried in the lunacy proceeding. The judgment should be affirmed, with costs.

For remedies at law and in equity to attack a deed of an insane person both before and after an adjudication of insanity, see 19 L. R. A. (N. S.) 461, and note; see also note to the next succeeding case.

The briefs of counsel printed in the volume with the principal case furnish much valuable information and cite many authorities. See "Insane Persons," Century Dig. §§ 36, 153; Decennial and Am. Dig. Key No. Series §§ 26, 89.

IN RE BLEWITT, 131 N. Y. 541, 30 N. E. 587. 1892.

Practice under Modern Statutes.

[Motion of James Blewitt to vacate and set aside a commission and proceedings in lunacy, whereby he had been declared insane, and to revoke the appointment of a committee of his person and estate. The ground of the motion was, that no notice of the proceedings in question had been served on James Blewitt, the mover, and other alleged irregularities in the proceedings. He also moved, as an alternative, that an issue be submitted to a jury to try the fact of lunacy, etc. The court refused to vacate the proceedings, but directed the suggested issue to be tried by a jury. Blewitt appealed. Affirmed.]

The lunacy proceedings were commenced in June, 1890, upon the petition of Blewitt's wife, supported by the affidavit of a physician. Upon the presentation of the petition and the affidavit, the court ordered a commission to issue to three persons "to inquire into the matters set forth in the petition," and also as to the nature and value of Blewitt's estate. The commissioners were also ordered to cause a jury to be summoned to pass upon the sanity of Blewitt, and to give notice to Blewitt himself, and to his wife and sons, of the time and place of the execution of the commission. The wife and sons were notified accordingly. The inquisition was executed on June 23, 1890, and resulted in finding that Blewitt was "an insane person with lucid intervals," but not competent to attend to his personal or business affairs. There was no formal confirmation of the inquisition, but on June 25, 1890, Blewitt's wife was appointed the committee of his estate and person. There was nothing in the record or proofs to show that Blewitt, the alleged lunatic, had ever been served with any notice of the proceedings. It was sworn by Blewitt that the first intimation he had that any such proceedings had been taken, was in November, 1890; but his wife swore that a written notice of the date set for executing the commission, had been directed to him and received by her, and that on June 22nd, she had told him of the pendency of the proceeding, and that the hearing would take place next day, at the court house, at 4 o'clock. She further swore that such was Blewitt's condition—mental and physical—at the time she gave him this information, that she doubted if he understood its purport.

Some time previous to this motion, Blewitt had made a motion before Mr. Justice Ingraham to supersede the commission in question and the proceedings thereunder, on the ground that he had recovered his reason and "is now (at the date of that motion) of sound mind and understanding." After hearing much evidence on both sides, Judge Ingraham denied the motion. Thereafter Blewitt made the motions in controversy in this appeal.]

ANDREWS, J. The jurisdiction which formerly was vested in the chancellor, over the person and estate of lunatics, is now exercised by the supreme court. But the supreme court exercises the power under the same rules as appertained to and regulated the jurisdiction of the chancellor, subject to such statutory provisions on the subject as are contained in the Code of Civil Procedure. Code, § 2320 et seq. The power of the court to appoint a committee of the person and estate of a lunatic is very essential, but it should be exercised with scrupulous regard to the rights of the alleged lunatic, and under the protection which attends other judicial proceedings affecting person or property, modified only so far as the peculiar nature of the inquiry and the condition of the alleged lunatic may render modification necessary. The fact of

lunacy must be ascertained judicially before the court can deprive the lunatic of his custody of his estate, or submit his person to the control of a committee. The proceeding for the appointment of a committee is no exception to the rule that the person proceeded against must have notice of the proceedings, to give validity to an adjudication against him. Where the lunacy is of such a character as to wholly deprive him of his understanding, and this is made to appear to the court on the initiation of the proceedings, it was the practice in chancery for the chancellor to direct notice of the proceedings to be served on some relative or some other person, in order that opportunity might be afforded to protect the interests of the alleged lunatic. The Code now prescribes that in all cases the court must require notice to be given of the presentation of the petition in lunacy proceedings to the husband or wife, or to one or more relatives, or to an officer specified, unless sufficient reasons are set forth in the petition or accompanying affidavits for dispensing with such notice. Code, § 2325. This section does not touch the question of the right of the alleged lunatic to have notice also. It was said by the chancellor in *Ke Tracy*, 1 Paige, 580, that, if there "were any peculiar circumstances in the case which rendered it improper or unsafe to give notice to the party, as in some cases of furious madness, the facts should be stated in the application to the court, so that a provision might be inserted in the commission dispensing with the necessity of notice." In our opinion, a very clear case should be made before the court should proceed in lunacy proceedings, in the absence of actual personal and written notice to the party, and that, unless such a case is made by the petition or affidavits, and an order made by the court dispensing with personal notice and providing for notice to relatives or others in lieu of personal notice, an adjudication, in the absence of such notice, should be set aside. The cases must be very rare in which a notice may not be served on the alleged lunatic, and it seems to us the better practice would be to require service of notice upon the party (if within the jurisdiction) in all cases, in addition to notice to relatives and others, as required by section 2325 of the Code. Attempts by interested persons to get control of the person and property of another by the aid of lunacy proceedings, or proceedings on the ground of habitual drunkenness are not infrequent, and no precaution should be omitted which may apprise the party of the proposed action, and enable him to appear and defend. The authorities and text writers assume that the party proceeded against should have notice of the time and place of executing the commission. In *re Tracy*, *supra*; In *re Petit*, 2 Paige, 173; *Chase v. Hathaway*, 14 Mass. 222; 2 Barb. Ch. Pr. 231.

In the present case there was no ground presented in the petition why the alleged lunatic could not be served with notice, and, as his insanity was with lucid intervals, there is no reason for supposing that notice would have been useless. We are of opinion that the proceeding and adjudication were invalid for want of

notice to the party. The statement of Mrs. Blewitt that she informed her husband, on the day before the inquisition was taken, that she had applied to the court to have a committee appointed, and that hearing was appointed for an hour on the next day, was not notice, within the requirement. It would be dangerous to bind a party by a notice so informal. There is no reason to suppose that these proceedings were instituted by the petitioner in bad faith, but justice, and the possible grave injuries which may flow from irregular proceedings in these cases, admonish courts to guard them with great strictness, and to require an observance of all practicable safeguards against fraud and injustice. We have concluded that the order appealed from may be affirmed, without weakening the principle which we have announced, on these grounds: First, that, on the proceedings instituted before Judge Ingraham by the alleged lunatic, there was a full opportunity afforded him to present and litigate the question of his sanity, and it was litigated and decided adversely to him without his raising any question of jurisdiction; second, that the appellant in his present motion asked alternative relief, viz., that the proceedings should be vacated, or that the petitioner be permitted to traverse the inquisition, which latter relief, or relief more favorable, has been awarded him; third, that the order below allows the appellant to traverse, not the inquisition, but the original petition, thereby putting him in the same position as upon an original hearing thereon; and, fourth, that it was discretionary with the court, pending the traverse, to let the inquisition and proceedings stand until the termination of the inquiry. In *re Tracy*, supra. The other objections taken to the procedure, which resulted in the appointment of a committee, are not, we think, available as a ground of reversal. The orders of the special and general terms should therefore be affirmed.

Effect of commitments to, and discharges from, asylums for the insane, see 14 L. R. A. (N. S.) 469, and note. Collateral attack upon inquisition of lunacy, 12 Ib. 895, and note. Effect of acquittal on a criminal charge, upon the ground of insanity, on liberty of the prisoner. See *In re Watkins*, 3 Pet. 193, inserted at ch. 5, sec. 8 (a) ante.

For the practice in North Carolina in inquisitions of lunacy, and for the rulings and dicta as to whether or not the acts of one who has been adjudged insane are void or voidable, if such acts be done while such adjudication remains unvacated, see *Bethea v. McLennon*, 23 N. C. 523; *Sims v. Sims*, 121 N. C. 297, 28 S. E. 407; *Johnson v. Kincade*, 37 N. C. 470; *Crump v. Morgan*, 38 N. C. 91; *Sprinkle v. Wellborn*, 140 N. C. 163, 52 S. E. 666; *Mordecai's L. L.* 219-224. See further as to when and how inquisitions of lunacy are to be conducted, *Pell's Revisal*, sec. 1890, et seq.; *In re Propst*, 144 N. C. 566, 57 S. E. 342; *In re Anderson*, 132 N. C. 243, 43 S. E. 649; *Woerner's Am. Law of Guardianship*, 384; *McIntosh Cont.* 237. See "Insane Persons," *Century Dig.* § 21; *Decennial and Am. Dig.* Key No. Series § 13.

SEC. 6. SALE OF REAL ESTATE, BY THE PERSONAL REPRESENTATIVE, TO MAKE ASSETS FOR THE PAYMENT OF THE DEBTS OF A DECEDENT.

BLOUNT v. PRITCHARD, 88 N. C. 445. 1883.

What the Complaint or Petition Should Contain. Amount of Debts. Value of Personality.

[Special proceeding to make real estate assets, filed before the clerk of the superior court. The complaint stated that the debts outstanding against the estate of the decedent amounted to about \$900 and that the value of the personality of the estate did not exceed \$500. The defendants demurred for that the complaint failed to state: That the personality had been *exhausted*; the *application* thereof; or that it "had been made assets according to law." Demurrer overruled, and defendants appealed. Affirmed.]

ASHE, J. The statute authorizing the sale of land to make assets for the payment of debts (Bat. Rev., ch. 45, sec. 61) provides, that when the personal estate of a decedent is insufficient to pay all his debts, including the charges of administration, the executor, administrator, or collector may, at any time after the grant of letters, apply to the superior court of the county where the land or some part thereof is situated, by petition, to sell the real property for the payment of the debts of such decedent.

Sec. 62. The petition, which must be verified by the oath of the applicant, shall set forth, as far as can be ascertained: (1) The amount of the debts outstanding against the estate; (2) The value of the personal estate and the application thereof; (3) A description of the legal and equitable real estate of the decedent, with the estimated value of the respective portions or lots; (4) The names, ages, and residences, if known, of the devisees and heirs at law of the decedent.

It is the insufficiency of the personal estate of a decedent to pay his debts which is the essential fact that gives jurisdiction to the court, and imposes upon the representative the duty of applying for leave to sell the real property. In *Finger v. Finger*, 64 N. C. 183, it is held that "on a petition to sell lands of a deceased person, the administrator must satisfy the court, either that the personal estate has been *exhausted* in the payment of debts, and that others are due, or that it will be clearly *insufficient* for that purpose."

In *Shields v. McDowell*, 82 N. C. 137, Judge Dillard says, in relation to Bat. Rev. ch. 45, sec. 61: "In construing this section, in connection with the clause of the section requiring a statement in the petition of the amount of the personality and its application, we think the meaning of the statute is, that the power and duty to apply for a license exist whenever insufficiency occurs, and can be shown forth in the petition, whether presently or remotely, after the grant of letters, or before or after a full application of the personal assets." In that case there had been an application.

in part, of the assets of the testator to his debts, and the judge was no doubt speaking in reference to the facts of the case, when he said license to sell might be granted "before or after a full application of the personal assets." For we think the proper construction of the statute is, that license may be granted even if there has been no application of the assets; but if there has been an application, it should be stated that the court may see that there has not been a *misapplication*.

The statute expressly provides that in case of an insufficiency of assets, the personal representative may at any time after the grant of letters, apply for the license; and if he may apply at any time, he may do so just so soon as he ascertains there is an insufficiency, and before he can possibly convert the personal estate into money and make an application of it to the debts. As under the present plan of administration the assets must be applied pro rata to the several classes of debts according to their priorities, we do not well see how any application can be safely made before an administrator ascertains what amount of [personal] assets he will have to apply.

The main and essential fact to be stated in the petition is, that there is an insufficiency of [personal] assets to pay the debts, and, that the court may know this, the statute requires a statement of the amount of the debts and the value of the personal estate; but these statements are not required to be made with exact particularity, but only "*as far as can be ascertained*," for these italicized words used in section sixty-two, according to grammatical construction, qualify each of the subdivisions of that section. There is no error in his honor's judgment in overruling the demurrer. Let this be certified to the superior court of Pasquotank, to the end that a procedendo may be issued to the probate court [clerk of the superior court] of the county, to proceed upon the petition for the sale of the land as prayed for. Affirmed.

The present statute of North Carolina is identical with that quoted in the principal case. See Pell's Revisal, sec. 77 and notes, where the later cases are digested. The amount of the debts and the value and disposition of the personalty must be set out in the complaint. See "Executors and Administrators," Century Dig. § 1370; Decennial and Am. Dig. Key No. Series § 336.

PERSON v. MONTGOMERY, 120 N. C. 111, 113, 26 S. E. 645. 1897.

Defenses Open to the Heirs and Devisees. Reference.

[Special proceeding to make real estate assets. In the course of the opinion is the following:]

FURCHES, J. . . . An administrator has a right to have land sold to pay debts and costs of administration, where the personal assets are not sufficient. Code, § 1436. The heirs must be made parties to a proceeding to sell land for assets, and where

they deny that it is necessary to sell, that there are sufficient personal assets if properly administered, or that the debts upon which it is asked that the land be sold are not due by the estate, the court will not order a sale until these questions are determined; and the usual course is to refer the matter, as was done in this case. This reference is not for the purpose of settling the estate, but for the purpose of informing the court whether it is necessary to sell the land for assets, and the probable amount that it will be necessary to raise out of the land. In this proceeding, it being against the heirs and for the purpose of taking and converting their land to the payment of debts due by their ancestor, they are at liberty to show any personal estate that should be first made liable, and a solvent debt due the estate, that might be collected, is a part of the personal assets. They are also at liberty to dispute and contest the liability of their ancestor's estate to the debts for which their lands are sought to be sold; and even to plead the statute of limitations against the debts claimed to be due, unless they have been reduced to judgment; and, if fraud and collusion can be shown between the administrator and the creditor, it may be pleaded where there has been judgment. . . .

See "Executors and Administrators," Century Dig. §§ 1334-1342, 1418; Decennial and Am. Dig. Key No. Series §§ 322-325, 339.

MORRISETT v. FEREBEE, 120 N. C. 6, 8, 26 S. E. 628. 1897.

Claiming the Homestead.

[Special proceeding to sell land for assets. Judgment against the plaintiff, and he appealed. The complaint was in the proper form. Some of the defendants were infants who were duly represented by a guardian ad litem. The answer filed on behalf of these infants admitted the allegations of the complaint, and the clerk gave judgment for a sale of the land subject to the widow's dower estate—the dower having been theretofore allotted. After a sale and report thereof to the court, a petition was filed in the cause on behalf of the infants, asking that \$1,000 of the proceeds of the sale be invested for the benefit of the infants until they arrived at full age. The clerk confirmed the sale and ordered the investment of the \$1,000 as prayed. The plaintiff administrator appealed to the superior court in term. The judge of the superior court reversed the judgment as to the \$1,000, but held that the infants were entitled to a homestead in the land to be allotted by metes and bounds so as to include that part of the land which was already covered by the widow's dower, and gave judgment accordingly. He further adjudged that the administrator refund to the purchaser of the reversion after the widow's dower the amount paid for such interest. The widow was the purchaser of such reversionary interest.]

FITCHES, J. . . . There is error in both rulings. The infant defendants were entitled to their homestead, which should have been laid off on the dower land. *Watts v. Leggett*, 66 N. C. 197; *Graves v. Hines*, 108 N. C. 262, 13 S. E. 15; *Gregory v. Ellis*, 86 N. C. 579. But when they were made parties, and were properly in court, represented by a guardian, as is found to be

the case here, admitted the allegations of the complaint, and made no claim to their homestead, and allowed judgment to be taken against them, and an order of sale subject to the dower of the widow, a sale of the property, a confirmation of the sale, and a payment of the purchase money, as must have been the case here, as the order of the court is "that the plaintiff pay back the purchase money," it is too late. They are estopped by this judgment. *Dickens v. Long*, 109 N. C. 165, 13 S. E. 841. Third parties have become interested, and this judgment cannot be thus collaterally attacked. *Dickens v. Long*, supra, and cases there cited. It is true that the defendants made their application to have the \$1,000 paid into court for their benefit before the sale was confirmed. But they did not object to the confirmation. In fact, the order they asked to have made substantially asks a confirmation of the sale, as there could have been no money in the hands of the plaintiff to pay into court without such confirmation. Defendants not being entitled to a homestead, there is no ground to support the order for plaintiff to pay back to the widow the money she paid him for the reversionary interest in the land covered by the dower. She is the owner of this reversion, and must pay for it, if she has not done so. For the errors pointed out, the judgment appealed from is reversed, and the judgment will be the ordinary judgment of confirmation. Error.

See "Executors and Administrators," Century Dig. § 377; Decennial and Am. Dig. Key No. Series § 1543.

TILLET v. AYDLETT, 90 N. C. 551, 552. 1884.

Clerk's Powers and Duties in Designating What Portion of the Lands Shall Be Sold.

[Special proceeding for sale of land for assets. The defendants insisted that the clerk had no authority to designate, in the judgment of sale, what particular tract or portion of the land should be sold. The clerk ruled otherwise, and gave judgment directing that certain specified portions of the land be sold. Upon appeal to the court in term the judge reversed the clerk's ruling and remanded the case with instructions to the clerk to make an order granting to the plaintiff license to sell *all of the lands described in the complaint "or so much thereof as may be necessary."* From this judgment the plaintiff appealed. Reversed.]

MERRIMON, J. The appellant contends that in making this judgment the judge erred, and we are of that opinion. The statute (The Code, § 1436) allows the administrator, in the contingencies therein mentioned, to apply to the *superior court* [for license] to sell the real property for the payment of the debts of the deceased debtor. It is further provided, in section 1443, that "as soon as all proper parties are made to the proceeding, the clerk of the superior court before whom it is instituted, if the allegations in the petition are not denied or controverted, shall have power to hear the same summarily and decree a sale;" and section

1444 provides, "that the court may decree a sale of the whole, or of any specified parcel of the premises, in such manner as to size of lots, place of sale, terms of credit and security for payment of purchase money, as may be most advantageous to the estate," etc.

It is manifest that the last mentioned section confers upon the court a large power of discretion, and in terms authorizes it to decree a sale of the real estate of the decedent in whole or in part, and to designate what part shall be sold. It might, and often does, happen that only a part of a deceased debtor's land is required to be sold to pay his debts, and in many cases it may be advantageous to the estate and those interested in it to sell only particular parts of it. Such a discretion must be lodged somewhere, and the legislature has chosen to confer it upon the court. This discretion is not an arbitrary one; it is a *sound legal discretion*, having in view the best interests of the estate and all persons interested therein. To direct a sale of the whole or any particular part or tract of land to suit the convenience of one or two of the parties interested, to the prejudice of others having a like or similar interest, would not be a sound discretion or a just exercise of the power conferred. The court should endeavor, according to its information, to subserve the best interests of the estate, and fairly the interest and convenience of all interested in it. The *clerk of the superior court*, for the purpose of decreeing a sale in the case provided in section 1443, *represents and is the court*, and has authority to exercise the discretionary powers conferred. Indeed the clerk implies the court in cases like this, as well as in many other like cases. The Code, § 132.

We are not at liberty to decide upon the propriety and expediency of the decree made by the clerk of the court in this case, or to say that a sale of the land should not be made as directed by the judge; but we think we may properly suggest that the decree should direct a sale to be made in such way as to disturb as little as practicable the will of the testator. This is enjoined by the statute. The Code, § 1430. There is error, and *the judgment and order of the judge must be reversed*.

See "Executors and Administrators," Century Dig. §§ 1365, 1444, 1445; Decennial and Am. Dig. Key No. Series §§ 339, 346, 347.

THOMPSON v. COX, 53 N. C. 311. 1860.

Parties. Creditors' Rights. Report and Confirmation of Sale. Raising the Bid. Opening the Biddings. Attacking the Sale for Fraud.

{Petition filed in the county court to set aside a sale made under an order of that court rendered in a petition to make real estate assets. There was a sale of the decedent's lands under the order of the court, report of sale, and judgment confirming the report and sale. Thereafter certain creditors of the decedent filed this petition against the administrator and the purchaser, charging fraud and collusion between them; that the land brought much below its value; that the administrator and the purchaser had a secret understanding by which the administrator

was to participate in the purchase; that the administrator had, by false statements and fraud, induced the court to confirm the sale; and that by reason of these things the petitioners and other creditors of the decedent would be losers to a large amount. The prayer was, that the sale and order of confirmation be set aside and a re-sale ordered, etc. The administrator and the purchaser answered the petition and testimony was taken. The county court dismissed the petition, and the petitioners appealed to the superior court, where the judgment of the county court was affirmed. They then appealed to the supreme court. Affirmed.]

PEARSON, C. J. The statute, ch. 46, § 47, Rev. Code, requires that "the heirs and devisees or *other persons interested in said estate*," shall be made parties to the petition of an executor or administrator to sell real estate. We think it obvious that the words, "or other persons interested in said estate," were intended to embrace the *assignees of the heir or devisee*, that is, their heirs or devisees or persons taking by purchase or alienation within two years after the qualification of an executor or letters of administration granted, which conveyances are made void against creditors or executors and administrators by section 61, *and do not embrace the creditors of a deceased debtor*; for: (1) They are represented by the executor or administrator who made the application for the license to sell the real estate for their benefit, and the only adversary interest is that of the heir or devisee, or their assignees; (2) The creditors may not be known, or their debts ascertained; (3) *Creditors have no direct interest in the estate, and can only reach it by charging the executor or administrator with the proceeds of the sale as assets.*

There is no express provision in the statute requiring the sale made by an executor or administrator to be reported to the court and be confirmed. It may be that the 49th section, which omits the word "license" and substitutes that of "decree," and requires "that the title shall be made to the purchaser by such person, and at such time as the court shall prescribe," furnishes sufficient ground for the inference that the sale ought to be reported to, and confirmed by, the court; yet, in the absence of some express provision, we are not at liberty to carry the construction further, and infer that the fund, in respect to its collection and mode of application, is to be under the control and direction of the court; for, by section 51, it is provided, "the proceeds of the sale shall be assets in the hands of the executor or administrator for payment of debts, etc., and applied as though the same were the proceeds of personal estate." It follows that after granting a license or decree of sale, and the order confirming the sale and to make title to the purchaser is passed, the court has nothing more to do in the matter, and its jurisdiction is at an end. Having arrived at these conclusions in regard to the construction of the statute, the application to the case under consideration shows that the proceeding cannot be sustained.

Viewed in the light of a *petition to open the biddings*, there are two fatal objections: No responsible specific offer is made in respect to the amount, and no assurance given that the price will be

increased. After the term at which a sale is confirmed, a court of equity [even] in the case of a decree of sale or for partition, of an infant's land and the like, where the fund, in respect to its collection, distribution, and application, is still under its control, will not open the biddings; *Ashby v. Cowell*, 45 N. C. 158; a fortiori the court cannot do so in a case where, after passing the order of confirmation, etc., its jurisdiction is at an end.

Viewed in the light of a *petition to rehear*, it cannot be entertained, because the petitioners were not and ought not to have been *parties* to the original proceeding. One who is not a *party* cannot appeal, or petition to rehear, or file a bill of review. This is settled, according to the practice of the courts, and no precedent to the contrary can be found.

Viewed in the light of a *bill in equity to convert the purchaser into a trustee*, on the allegation of a fraudulent collusion between him and the administrator to suppress competition—buy the land at a sacrifice and divide the spoils—and on the footing of fraud, to hold them liable for the actual value of the land instead of the price at which it was sold, the proceeding cannot be entertained; because the county court, in which it originated, had no such equity jurisdiction. It has general original jurisdiction in causes of a civil nature at the common law: its equity jurisdiction is limited, and depends on specific statutory provisions (*Leary v. Fletcher*, 23 N. C. 257) — e. g., “petitions for filial portions, legacies, and distributive shares, matters relating to orphans, idiots and lunatics, and the management of their estates.” Revised Code, ch. 31, § 5.

Whether by force of the 53rd section of the statute under consideration, which subjects to sale, on the application of an executor, or administrator, “all rights and interests in land which may be devised or would descend to the heirs, and all such other interests in real estate as would be liable, in a court of equity, to be applied in discharge of debts,” has the effect of giving jurisdiction to the county court in such cases, is a question not now presented; but it is certain that these matters are peculiarly fit to be dealt with by a court of full equity powers, and the interests of all parties will be best protected by having the rights declared by a decree in a court of equity, before the land is exposed to sale. This section, however, has no application to the case before us; the powers of a court of limited jurisdiction cannot be enlarged by implication. Order affirmed.

That the creditors are not proper parties, and should not be joined with the administrator as *plaintiffs*, see *Strickland v. Strickland*, 129 N. C. 84, 39 S. E. 735. For who *should* be and who *may* be parties plaintiff or defendant, see *Pell's Revisal*, secs. 68, 74–76, and notes. As to raising the bid, see *Vass v. Arrington*, 89 N. C. at p. 13, where it is said: “In this state our courts have adopted the English practice, and will set aside a sale for inadequacy of price, when that fact is shown to the court by affidavit or otherwise; but when the commissioner has reported that the property sold has brought a fair price, and there is no evidence adduced to the contrary, the court will confirm the sale, unless before con-

firmation an offer is made to raise the bid ten per cent.; in which case our courts will always set aside the sale and open biddings. *Blue v. Blue*, 79 N. C. 69; *Bost ex parte*, 56 N. C. 482; *Pritchard v. Askew*, 80 N. C. 86; *Wood v. Parker*, 63 N. C. 379; *Atty. Gen. v. Roanoke Nav. Co.*, 86 N. C. 408."

In *Attorney General v. Roanoke Nav. Co.*, 86 N. C. 408, referred to above, is this: "The practice here, established by long usage in our courts of equity, has been to re-open biddings and order a re-sale whenever an advance bid has been offered of ten per cent. upon the amount bid at the sale, provided it is made before the confirmation of the sale and in apt time, which is at the term ensuing the sale, but never to re-open biddings after confirmation except in cases of fraud, meaning fraud in its broadest sense. The rule laid down by Mr. Justice Rodman in *Blue v. Blue*, 79 N. C. 69, is, we think, the correct rule, and is in accordance, so far as our information extends, with the uniform practice which has obtained in our courts in such cases. He says, 'the practice in this state is to set aside a sale *before confirmation*, upon an offer of an advance of ten per cent. upon the price. That is also the English rule.' S. P. In the matter of *Bost* and others, 56 N. C. 482; *Wood v. Parker*, 63 N. C. 379. In *Daniel*, Ch. Pr. 1465, we find the English rule laid down as follows: 'When estates are sold before a master under the decree of a court of equity, the court considers itself to have greater power over the contract than it would have were the contract made between party and party; and as the chief aim of the court is to obtain as great a price for the estate as can possibly be got, it is in the habit, after the estate has been sold, of "opening the biddings," that is, of allowing a person to offer a larger price than the estate was originally sold for, and, upon such offer being made, and a proportionate deposit paid in, of directing a re-sale of the property.' And again, on page 1466 of the same book, it is said, 'that the mere advance of price, if the report of the purchaser being the last bidder is not absolutely confirmed, is sufficient to open the biddings, and that they may be opened more than once.' The purchasers insist there was error in receiving the advance bid of Arrington, who was *present at the sale and bid for the property*. It is true, that is an objection that has been sometimes entertained on the ground that it tends to prevent a proper competition, but the objection having been taken before Lord Eldon, in the case of *Tyndale v. Warre*, cited in *Daniel*, Ch. Pr. 1460, he held, that although the court looks with jealousy upon the offer of such a person, yet the largeness of the bid offered will be taken as a compensation for a loss that may have arisen from a want of competition at the sale." See "Executors and Administrators," *Century Dig.* §§ 1400-1403, 1539; *Decennial and Am. Dig. Key No. Series* §§ 337, 376.

VASS v. ARRINGTON, 89 N. C. 10, 14-15. 1883.

Status of Bidder Before and After Confirmation. Date at Which the Purchaser's Title Is Fixed.

[Action to foreclose a mortgage. Decree of sale. Sale made on May 1st, 1883, reported to June term, 1883. At the time of the sale, the state, county, and city taxes assessed on June 1st, 1883, amounted to \$79. The court confirmed the sale and adjudged that these taxes be paid out of the proceeds of sale. Defendant appealed. Reversed as to this point.]

ASHE, J. . . . Where land is sold under decree of court, the purchaser acquires no independent right. He is regarded as

a mere proposer until confirmation. *Attorney Gen. v. Roanoke Nav. Co.*, 86 N. C. 408. But when confirmation is made, the bargain is then complete, and it relates back to the day of sale. *Rorer on Jud. Sales*, § 122. The case of *McArlan v. McLaughlin*, 88 N. C. 391, is an adjudication on this point, which, it seems to us, is decisive of the question. There, a creditor of one McLeod, who died in May, 1870, brought action against his administrator and recovered judgment for a considerable amount, and then sought to have the land of McLeod subjected to the payment of his demand. The land had been sold under a decree of sale for partition on the 3rd of November, 1871, and the deeds to the purchasers were executed after two years from the granting of letters of administration, and the question presented to this court was whether the title of the purchasers accrued from the date of the deeds, or from the sale. Mr. Justice Ruffin, speaking for the court, said: "The court thinks and so declares, that the defendants (who were the purchasers) took the lands from the commissioner in the same plight and condition they were in at the moment of the sale, and subject, as they were, to the payment of the decedent's debts."

Applying the principle there announced to our case: By the confirmation of the report of the commissioner, the purchaser acquired title to the house and lot by relation to the day of sale, and takes them in the same plight and condition they were in at the moment of the sale on the 1st day of May, 1883, subject to the taxes due in that year. The judgment must therefore be reformed so as to eliminate therefrom so much as relates to the charge of the taxes of 1883 upon the proceeds of the sale, and in all other respects it is affirmed.

While the principal case is one of foreclosure of a mortgage, the ruling applies to all judicial sales. See "*Judicial Sales*," *Century Dig.* § 90; *Decennial and Am. Dig. Key No. Series* § 50.

MOORE v. GIDNEY, 75 N. C. 34. 1876.

Effect of Plaintiff's Counsel Advising Defendants.

[Special proceeding to make real estate assets. A guardian ad litem was appointed for certain infant defendants, which appointment was made the day before the proceeding was commenced. This guardian filed an answer admitting the allegations of the complaint. This answer was written by the plaintiff's counsel, at his own suggestion and without any charge for his services. In doing this no impropriety was intended. Judgment for a sale of the land. Sale made, reported, and confirmed. The judgment confirming the sale was rendered on April 16th, 1875. Some time thereafter the guardian ad litem moved in the cause, before the clerk of the superior court, to set aside the judgment for the sale and the confirmation thereof, on the ground that such judgments were void. The clerk refused to vacate the judgments and the guardian ad litem appealed to the judge of the superior court, who ruled that the whole proceeding was void and gave judgment accordingly. Appeal by the administrator, *Gidney*. Affirmed.]

The following additional facts were found by the judge of the superior court. The summons in the special proceeding was not served on the infants until October 14th, 1874, though it was served on their guardian ad litem on September 10th, 1874. The order of sale was entered October 5th, 1874. The land sold for a fair price. (The case on appeal states that the summons was served on the infants on September 14th, 1874, but as it is stated, in both the case on appeal and in the opinion, that the service was after the judgment for sale, it is evident that September 14th is a mistake for October 14th in giving the date of the service on the infants.)]

BYNUM, J. . . . In this case the guardian ad litem was appointed before the infants were brought into court by summons. No summons or copy of the complaint was served on them until after the decree of sale. In law, they were undefended. Their rights and property were attempted to be adjudicated upon and taken from them under the sanction of law, but in violation of its letter and spirit. They had no day in court, and, as to them, the proceedings were irregular, and subject to be set aside.

It may be, and it is alleged, that inasmuch as the estate is insolvent, and the proceeds of the sale of lands must all be applied in payment of the debts of the intestate, the infants have no substantial interest to be affected by the decree and are, therefore, not injured. But as they were not in court, and could not be heard, these alleged facts do not appear to us judicially, and we cannot assume them to be true. What they may be able to show in defense of this proceeding when they are properly brought in court, and are represented by a guardian, duly constituted, who will discharge his duty to them, we cannot anticipate. Sufficient for the day is the evil thereof.

This application is treated as a motion in the original proceeding for the sale of the land (which action is still pending), to set aside for irregularity the decree of sale and all subsequent proceedings. We have disposed of the case as far as the infants are concerned. We next proceed to examine it so far as it affects the widow herself. She filed no answer in her own right, but answered in right of the infants only. She alleges that she was not, at the time of her answer, apprised of the facts which constitute her equitable right to the largest tract of land, to-wit: the Wilson tract. She further alleges that her answer to the petition for the sale of the land was filed for her by the attorney of the plaintiff; and that she was at the time so troubled and distressed in mind by the recent death of her husband, as to be disqualified for business, and thus was induced to assent to the answer, without knowledge of her rights. These allegations are not directly denied. But it is denied that the counsel of the plaintiff acted as the defendant's counsel, farther than in drawing up her answer; and we are satisfied that no improper influence was intended. Yet the law does not tolerate that the same counsel may appear on both sides of an adversary proceeding, even colorably; and in general will not permit a judgment or decree so affected to stand if made the subject of exception in due time by the parties injured thereby.

The presumption, in such cases, is that the party was unduly influenced by that relation, and the opposite party cannot take the benefit of it. It does not appear affirmatively in this case that Mrs. Moore, the defendant, was not influenced to her prejudice and thrown off her guard thereby. The purity and fairness of all judicial proceedings should so appear when drawn in question.

See also *Ellis v. Massenburg*, 126 N. C. 129, 35 S. E. 240, as to the necessity for avoiding even the appearance of evil in the matter of representing two sides of a case, especially where infants are concerned. As to the necessity of making proper parties to proceedings to make real estate assets, and how, when, and by whom such sales may be attacked after confirmation, see *Perry v. Adams*, 98 N. C. 167, 3 S. E. 729; *Rackley v. Roberts*, 147 N. C. 201, 60 S. E. 975; *Lanier v. Heilig*, 149 N. C. 384, 63 S. E. 69. This last case is far more conservative than many of its predecessors in the matter of protecting the rights of purchasers. It holds that the attack upon such sales, unless it be for fraud, must be by motion in the cause even though a final judgment has been rendered; even when a judgment for sale of land is set aside for irregularities, the rights of innocent parties will be protected; it is only where the judgment is void because of want of jurisdiction of the persons or subject-matter, that rights acquired will be disturbed; and even in these cases, if the purchase money has been applied in exoneration of the land, *the purchaser will be subrogated to the rights of the creditors*. "This is common learning and manifest equity." See *Speer v. James*, 94 N. C. 417, for several valuable points on these proceedings.

For a general discussion of the history and practice in these proceedings and for many points decided with reference thereto, see *Mordecai's L. L.* 1161 et seq., 1176, 908-919, 530; *Woerner's American Law of Administration*, secs. 463-488; *Croswell's Extrs. & Admsrs.* pp. 280-301; 18 *Cyc.* pp. 674-846. See "Attorney and Client," *Century Dig.* § 229; *Decennial and Am. Dig. Key No. Series* § 113.

SEC. 7. CREDITORS' BILLS.

HANCOCK v. WOOTEN, 107 N. C. 9, 19-24, 12 S. E. 199. 1890.

True Character of a General Creditors' Bill. Judgment Creditors' Bill. Rules of Equity Practice. Present Rules of Practice under the Code. Necessity for a Judgment at Law. Priorities.

[Wooten and his wife made a deed of trust for the benefit of creditors, by which a certain creditor was preferred for so large an amount as practically to absorb the trust estate. Hancock Bros. brought an action against Wooten to recover a debt, and several other creditors brought similar actions. Other creditors jointly sued Wooten and the trustee in the deed of trust for the recovery of debts and for the purpose of having the deed of trust declared void in so far as it affected their interests. In this action an attachment was issued and levied on the personality embraced in the trust deed. About the same time sundry other actions were brought by other creditors, in which actions attachments were issued and levied on the personality. Then other creditors obtained judgments in magistrates' courts and caused some of the personality to be sold under execution. The proceeds of such sales were held by the sheriff. By an order of the superior court in term, all of these actions

were consolidated with the case of Hancock Bros. v. Wooten et al. The order was as follows: "It appearing that the above action, pending in this court, is a creditors' bill, and that there are creditors of the defendant, W. J. Wooten, other than the plaintiffs, it is now ordered, on motion of defendant's counsel, that notice be issued by the clerk of this court to the following creditors of W. J. Wooten (naming the present parties plaintiff), to appear at the next term . . . and make themselves parties to this action. It is further ordered that publication of this notice be made for all creditors of said W. J. Wooten for six weeks successively in (a certain paper), to appear at next term of this court and make themselves parties plaintiff."

Thereafter Hancock Bros. and their co-plaintiffs filed a complaint in "behalf of themselves and all other creditors of W. J. Wooten who may become parties." The defendants answered denying all the material allegations of the complaint. An issue as to whether or not the deed of trust was fraudulent as to creditors, was submitted to a jury, and the verdict was in the affirmative. Thereupon the trustee was ordered to render an account and to pay over the assets in his hands to a receiver; and the sheriff was ordered to do the like with the proceeds of the trust property sold by him. The deed of trust was adjudged to be void, and a referee was appointed to report "the debts to which said money should be applied, the amount of said debts, and the pro rata share of each debt to be paid out of said fund, and the balance due them, etc." Acting under these orders, the referee proceeded to perform the duties imposed upon him, and the receiver paid out some money. Thereafter Simeon Wooten filed, in the cause, an application for permission to prove certain claims. This was opposed and the judge refused to permit the claims to be proven because, *inter alia*, in the opinion of the court, the applicant was too late, it being shown that he was a party defendant to this action and had once offered to file his claims with the referee but, upon objection being made thereto, had withdrawn them. From this ruling Simeon Wooten appealed. There were other objections made by other defendants to the disposition of the whole case, which being overruled, they also appealed. Affirmed.

Simeon Wooten being a defendant in the action allied himself with those who defended the fraudulent assignment.]

SHEPHERD, J. . . . The second exception is to the ruling of the court declining (after the deed was found to be fraudulent) to allow Simeon Wooten to prove his debt, and prorate with the plaintiff creditors in the proceeds of the property conveyed therein. It does not appear that the said Wooten participated in the fraudulent intent of the trustor, but he claimed under the deed, and united with the trustee in defending it against the just claims of the plaintiffs. He has never abandoned his adverse position, and is, even now, insisting upon a new trial upon the issue involving the validity of the said trust. Occupying this antagonistic position, he seeks to share in the fruits of the plaintiff's recovery, and the question is, shall he be permitted to do so? In order to determine this point, it is necessary to consider the true character of this action. It is claimed that it is in the nature of a creditors' bill, and that in such actions all creditors may, at any time before final decree, be allowed to come in and prove their claims. Undoubtedly, such is an incident of what is ordinarily called a "general creditors' bill." Such bills are usually instituted for the purpose of winding up the insolvent estates of deceased persons or the affairs of a corporation. These may be illus-

trated by the cases of Pegram v. Armstrong, 82 N. C. 326; Wordsworth v. Davis, 75 N. C. 159; Long v. Bank, 81 N. C. 41; Glenn v. Bank, 80 N. C. 97; Dobson v. Simonton, 93 N. C. 268. In such cases there are many parties standing in the same situation as to their rights or claims upon a particular estate or fund, and the shares of a part cannot be determined until the rights of all the others are settled or ascertained. Of this nature, also, are bills brought to enforce trusts or assignments for creditors, and other instances where there is a community of interest, or where the law devolves upon the court the duty of taking a fund into its custody, and distributing it according to the respective interests of the parties. In such cases, no priority can be acquired by one party suing or making himself a party before the others; and, perhaps, one who has vainly endeavored to defeat the purposes of the action, may, upon proper terms, be allowed his share in the fund. Such creditors' bills, however, are totally different from those instituted by an unsecured creditor (or several creditors if they choose to unite) against a living debtor. Here the field is open to all, and he who first secures a priority shall reap the reward of his diligence. Such bills are often said to be in the nature of an equitable *fi. fa.* or equitable levy (Bisp. Eq. § 528), and under them the vigilant creditor may acquire a priority as he does when he pursues the analogous remedy of execution at law. Bills of this kind are called "judgment creditors' bills" (see Harv. Law Rev. Oct., 1890), and are so familiar in our practice that it is hardly necessary to illustrate them by a reference to actual cases. They were entertained in equity for the purpose of subjecting equitable and other interests which could not be reached and sold under execution, and also for the purpose of removing obstructions to legal remedies, as by setting aside fraudulent conveyances and the like. Under the former practice, in either of the last-mentioned cases, it was necessary before a resort could be had to a court of equity that the creditor should first obtain judgment and show that the legal remedy by execution was ineffectual; but this, under the decision of this court in Bank v. Harris, 84 N. C. 206, is now unnecessary, and both causes of action may be included in one suit. This decision by no means ignores the distinct character of a judgment creditors' bill. On the contrary, it expressly recognizes it as it formerly existed, dispensing only with the necessity of obtaining a judgment in an independent action. The result of the decision is to render the proceeding still more efficacious, as we think that, by its institution, it creates a preference by way of an equitable lien whether the interest sought to be subjected be legal or equitable. This view is supported by Wait in his *Fraudulent Conveyances*, § 85, who, in commenting upon Bank v. Harris, says that, upon the principle of the case, "it would seem to follow that the usual incidents of a [judgment] creditor's suit would attach to the proceeding." It is believed that any other rule would be attended with inextricable confusion, and conflict as to priorities among various creditors pursuing their

remedies in other actions and jurisdictions. Even if this were not so as to legal assets, yet, if we assimilate in its effect the judgment, when actually obtained, to an execution at law (and as, we think, must surely follow from the principle of *Bank v. Harris*, supra, and especially in view of the system of judgment liens adopted by the Code), the plaintiffs in this action would still have priority, as they have all obtained judgments, and Simeon Wooten has none. He and the plaintiffs have been fighting at arms-length, each endeavoring to establish a priority over the other. The plaintiffs have been victorious, and the deed having been declared fraudulent and void, as to them, their preference must be recognized, and the claim of the losing party postponed. This, as we have said, would, perhaps, have been otherwise if there had been such a community of interest in the property as to make it the subject of a general creditors' bill, but no such result as contended for can follow where there is no such common interest, and where the property is open and subject to the action of the most vigilant creditor. *Lex vigilantibus favet*. In coming to this conclusion we are but applying in one action the same principles which were formerly administered in the divided jurisdictions of law and equity. The true spirit of equity in cases of this character is, we think, fully reflected by the remarks of Chancellor Walworth in *Edmeston v. Lyde*, 1 Paige, 637. He says: "On further examination, it may seem unjust that the creditor who has sustained all the risk and expense of bringing his suit to a successful termination should, in the end, be obliged to divide the avails thereof with those who have slept upon their rights, or have intentionally kept back that they might profit by his exertion." To the same effect is the language of Chancellor Kent in *McDermutt v. Strong*, 4 Johns. Ch. 691. It is urged that the order made at spring term, 1887 (consolidating the various actions and requiring notice to be published for all creditors to come in and make themselves parties), had the effect of converting this into a general creditors' bill. If we are correct in the view we have taken, such an order could not have been made over the objection of the plaintiffs if its effect was to deprive them of the priority they had attained by the commencement of the action, nor could the consolidation of other pending suits produce such a result. The order, however, was not objected to, and its effect, as to questions of priority among the plaintiffs, is not before us, as there seems to be no conflict between them. Conceding, however, that the order placed all who availed themselves of its provisions upon an equal footing, it amounted to no more than if they had united in the first instance, for the property involved was not, as we have seen, the subject of a general creditors' bill, and the action in its essential features still retained its original characteristics. The order certainly cannot be extended so as to embrace those who, instead of accepting its terms, allied themselves with the defenders of the fraudulent assignment in their efforts to defeat the sole purpose of the action. Our attention has been called to the case of Means

v. Dowd, 128 U. S. 273, 9 Sup. Ct. Rep. 65. In that case the creditors secured by the fraudulent assignment were permitted to file their claims, because they were actual creditors and the estate of the bankrupt was in the custody of the law, and in this respect, as in many others, a proceeding in bankruptcy is in the nature of a general creditors' bill. The entire estate had to be settled among all of the creditors, and there seems to be no positive rule of law or equity which makes the misconduct of a creditor a cause of forfeiture of his debt. The decision, therefore, is not applicable to an action like ours. For the reasons given, we are of the opinion that his honor committed no error in declining to allow Simeon Wooten to file his claim and share, equally, with the plaintiffs in the proceeds of the property included in the fraudulent assignment. . . . Affirmed.

As to priorities, see *Butler v. Jaffray*, 12 Ind. 504; *Smith v. Summerfield*, 108 N. C. 284, 12 S. E. 997; *Fisher v. Bank*, 132 N. C. 769, 44 S. E. 601.

Whatever may be the sum demanded, the superior court has jurisdiction of a creditors' bill based thereon. Therefore, a creditor whose claim is less than \$200 may file a creditors' bill in the superior court, and this is true although his claim is not reduced to judgment. *Bank v. Harris*, 84 N. C. 206; *Mebane v. Layton*, 86 N. C. at p. 574. For an exhaustive review of the authorities upon conditions precedent to equitable remedies of creditors, see 23 L. R. A. (N. S.) 1-123. See "Creditors' Suits," Century Dig. § 210; Decennial and Am. Dig. Key No. Series § 53.

NATIONAL TUBE WORKS CO. v. BALLOU, 146 U. S. 517, 522, 13 Sup. Ct. 165. 1892.

Necessity for a Judgment at Law. U. S. Courts.

[Creditors' bill filed in the United States circuit court, in equity. There was no averment in the bill that the plaintiff had recovered any judgment in the state in which the suit was brought—either in a state or federal court—upon the debt which was made the basis of the suit. Defendant demurred. Demurrer sustained, and decree against the plaintiff dismissing the bill. Plaintiff appealed. Affirmed.]

Mr. Justice BLATCHFORD. . . . In *Claffin v. McDermott*, 20 Blatchf. 522, 12 Fed. 375, it was held that a creditor's bill, founded on a judgment recovered against a debtor in a state court in California, would not lie in a circuit court of the United States in New York, to set aside a fraudulent transfer of personal property made by the debtor in California, by means of collusive judgments and sales under executions issued thereon, no judgment having been obtained or execution issued in such circuit court or in any state court of New York. The case of *Tarbell v. Griggs*, 3 Paige, 207, was cited as authority, where the court of chancery of the state of New York refused jurisdiction of a creditor's bill filed to obtain satisfaction of a judgment rendered in the circuit court of the United States for the southern district of New York.

and upon which an execution had been returned unsatisfied, the judgment being treated as a foreign judgment, and as standing on the same footing with the judgments of a court of another state. The principle invoked was that the plaintiff's remedy at law had not been exhausted by the issuing and return of an execution on a foreign judgment, and *McElmoyle v. Cohen*, 13 Pet. 312, was referred to as authority.

The bill in the present case is defective in that respect. It alleges only the recovery of a judgment against the corporation in Connecticut, and the issuing and return there of an execution unsatisfied. It does not allege any judgment in New York, or any effort to obtain one, nor does it aver that it is impossible to obtain one. It alleges merely that the corporation has no fund or assets wherewith to pay the claim of the plaintiff.

Where it is sought by equitable process to reach equitable interests of a debtor, the bill, unless otherwise provided by statute, must set forth a judgment in the jurisdiction where the suit in equity is brought, the issuing of an execution thereon, and its return unsatisfied, or must make allegations showing that it is impossible to obtain such a judgment in any court within such jurisdiction. *Taylor v. Bowker*, 111 U. S. 110, 4 Sup. Ct. Rep. 397; *Webster v. Clark*, 25 Me. 313; *Parish v. Lewis*, Freem. Ch. 299; *Brinkerhoff v. Brown*, 4 Johns. Ch. 671; *Dunlevy v. Tallmadge*, 32 N. Y. 457; *Terry v. Anderson*, 95 U. S. 628; *Smith v. Railroad Co.*, 99 U. S. 398, 401; *Hawkins v. Glenn*, 131 U. S. 319, 334, 9 Sup. Ct. Rep. 739; *McLure v. Benceni*, 2 Ired. Eq. 513, 519; *Farned v. Harris*, 11 Smedes & M. 366, 371, 372; *Patterson v. Lynde*, 112 Ill. 196. Decree affirmed.

If the creditor has a trust in his favor, or a lien for the security of his claim, he may go into equity before exhausting his remedies at law. *Case v. Beauregard*, 101 U. S. 688. The ruling of the principal case is not affected by the practice of the courts of the state in which the federal court is held, for the equity jurisdiction and practice of the federal courts must remain distinct from the legal jurisdiction and practice. *Scott v. Neely*, 140 U. S. 106, 11 Sup. Ct. 712; *Mississippi Mills v. Cohn*, 150 U. S. 202, 14 Sup. Ct. 75; *Hollins v. Brierfield*, 150 U. S. 371, 14 Sup. Ct. 127. See "Creditors' Suit," Century Dig. § 56; Decennial and Am. Key No. Series § 11.

RICHMOND v. IRONS, 121 U. S. 27, 51-54, 66, 7 Sup. Ct. 788. 1886.

Amendment Converting a Bill by One Creditor into a Creditors' Bill. Suspension of the Statute of Limitations. Contest of the Claim of One Creditor by Another Creditor. What Creditors Can Participate in the Fund.

[Bill filed by the plaintiff, who was a judgment creditor of the defendant, to subject the assets of a suspended bank to the satisfaction of the plaintiff's judgment. At various times subsequent to the filing of the bill, other judgment creditors of the bank were, upon their application, joined as co-complainants. On the final hearing, the bill was amended, by permission of the court, so as to allege that it was filed on behalf of the complainant and all other creditors of the defunct bank.

To this amended bill various defendants—who were defendants because of their being stockholders in the bank—filed separate answers setting up the statute of limitations. Plea overruled, and decree against defendants. The decree included among the creditors directed to be paid out of the assets, persons who had not been made parties and had not proved their claims before the master. Defendants appealed. Reversed. Only so much of the opinion as bears upon certain points of practice in Creditors' Bills, is here inserted.]

MATTHEWS, J. . . . Mr. Daniel (Ch. Pr. 4th ed. c. 5, § 1, p. 245) says: "The court will generally at the hearing allow a bill, which has been originally filed by one individual of a numerous class in his own right, to be amended so as to make such individual sue on behalf of himself and the rest of the class." Our conclusion on this point is that the court below committed no error in permitting the amendments complained of to be made.

The assignment of error next to be considered arises upon the defense made on behalf of the defendants below, of the statute of limitations. The limitation relied upon is that prescribed by an act of Illinois, which provides that "actions on unwritten contracts, expressed or implied, or on awards of arbitration, or to recover damages for an injury to property, real or personal, or to recover the possession of personal property, or damages for the detention or conversion thereof, and all civil actions not otherwise provided for, shall be commenced within five years next after the cause of action accrued." Rev. St. Ill. 1881, 675.

It is not necessary to decide in this case whether the statute of Illinois relied upon is applicable, because, in the view which we have already taken of the nature of the amended bill filed in October, 1876, the statute, if applicable, ceased to run against the creditors of the bank entitled to the benefit of the decree, at that date. That amended bill is to be considered, from the date of its filing, as a bill on behalf of all the creditors of the bank who should come in under it and prove their claims. When any creditor appeared during the progress of the cause to set up and establish his claim, it was necessary for him to prove that at the time of filing the bill he was a creditor of the bank. Any defense which existed at that time to his claim, either to diminish or defeat it, might be interposed either before the master or on the hearing to the court. The creditor, having established his claim, became entitled to the benefit of the proceeding as virtually a party complainant from the beginning, and the time that had elapsed from the filing of the bill to the proof of his claim would not be counted as a part of the time relied on to bar the creditor's right to sue the stockholders. In other words, if he proves himself to be a creditor with a valid claim against the bank, he becomes a complainant by relation to the time of the filing of the bill. This being so, it is not disputed that in October, 1876, the bar of the statute had not taken effect, even on the supposition that the statute applied.

In the case of *In re General Rolling-stock Co., Joint stock Discount Co.'s Claim*, L. R. 7 Ch. 616 Mellish, L. J. stated that in a case where the assets of a debtor are to be divided among creditors,

whether in bankruptcy or in insolvency, or under a trust for creditors, or under a decree of the court of chancery in an administration suit, "the rule is that everybody who had a subsisting claim at the time of the adjudication, the insolvency, the creation of the trust for creditors, or the administration decree, as the case may be, is entitled to participate in the assets, and that the statute of limitations does not run against his claim; but, as long as assets remain unadministered, he is at liberty to come in and prove his claim, not disturbing any former dividend."

Mr. Daniel (1 Ch. Pr. 4th ed. c. 15. par. 2, p. 643) states that "a decree for the payment of debts under a creditor's bill for the administration of assets is also considered as a trust for the benefit of creditors, and will in like manner prevent the statute from barring the demand of any creditor coming in under the decree. The creditor's demand, however, must not have been barred at the time when the suit was instituted; for, if the creditor's demand would have been barred by the statute before the commencement of the suit, the statute may be set up. It is to be remarked, upon this point, that it has been held that it was the decree only which created the trust, and that the mere circumstance of the bill having been filed, although it might have been pending six years, would not take the case out of the statute, but, according to the later decisions, it seems that the filing of the bill will operate by itself to save the bar of the statute, though the plaintiff by delay in prosecuting the suit may disentitle himself to relief." He also says (Ch. 29. par. 1, p. 1210): "It may be observed here that where a person, not a party to the suit, carries in a claim before the master under the decree, the party representing the estate out of which the claim is made has the right to the benefit of any defense which he could have made if a bill had been filed by the claimant in equity or an action had been brought at law to establish such claim. Therefore, as we have seen, an executor may, in the master's office, set up the statute of limitations as a bar to a claim by a creditor under the decree, provided such claim was within the operation of the statute before the decree was pronounced."

The authorities abundantly sustain the proposition, also, that a creditor who comes in under and takes the benefit of a decree is entitled to contest the validity of the claim of any other creditor, except that of the plaintiff whose claim is the foundation of the decree. 2 Daniel, Ch. Pr. c. 29, § 1, p. 1210, note 4, and cases cited.

In *Sterndale v. Hankinson*, 1 Sim. 393, decided in 1827, it was stated by Vice Chancellor Leach that "every creditor has to a certain extent an inchoate interest in a suit instituted by one on behalf of himself and the rest, and it would be attended with mischievous consequences to estates of deceased debtors if the court were to lay down a rule by which every creditor would be obliged either to file his bill or bring his action." . . .

It is also objected to the decree that it included, among the claims directed to be paid out of the assessment upon the shareholders, an amount, alleged to be about \$5,000, in behalf of per-

sons assumed to be creditors, but who did not appear in the cause or before the master to file and prove their claims. This was erroneous. No person is entitled to recover as a creditor who does not come forward to present his claim. The only proof in reference to such claims in the present case consisted in affidavits made by Henry B. Mason, one of the attorneys of the receiver, that he had "made a personal investigation of all the claims against the Manufacturers' National Bank, and, from the evidence introduced in the cause, and from outside knowledge confirmatory thereof, states that the Manufacturers' National Bank of Chicago is justly indebted to the several persons mentioned in the schedule hereunto annexed, and made part of this affidavit, in the principal sums set opposite their several names, with interest thereon from March 12, 1875, at the rate of six per cent. per annum in each case," etc. No one appeared as claimant, and no authority is shown to any one to act for him or in his own name. These claims should have been disallowed. . . .

See 5 L. R. A. (N. S.) 89, and note (removal of creditors' suits to United States courts); 2 Ib. 988, and note (effect of statute of limitations on right to file creditors' bill). See "Creditors' Suit," Century Dig. §§ 210-212; Decennial and Am. Dig. Key No. Series §§ 52-54; "Limitation of Actions," Century Dig. § 541; Decennial and Am. Dig. Key No. Series § 124.

GLENN v. FARMERS' BANK, 80 N. C. 97. 1879.

Precedent for Advertising for Creditors. Letting in Belated Creditors.

[Action, in the nature of a creditors' bill, seeking to subject the assets of a defunct bank to the payment of its debts.

"In the progress of the cause, and in order to ascertain the names of the creditors and the amount of the indebtedness of the bank, the court at spring term, 1876, appointed two commissioners to take proof of the debts, with authority to limit the time within which such proof could be made. The commissioners accordingly advertised in the Greensboro Patriot for more than six weeks for the creditors of the bank to come in and prove their claims at a certain place in Greensboro on or before the 6th of August, 1876, or they would be debarred from participating in the distribution of the fund. The report of the commissioners was made to spring term, 1877, and confirmed; and it was declared and adjudged by the court that all such creditors as had made the required proof should share in the assets of the bank, and those failing to do so be excluded therefrom."

On May 24th, 1876, Calvin J. Cowles, through his counsel, deposited some bills of the bank with the clerk and caused an entry to be made on the docket that he was made a party to the action. At December term, 1877, Cowles filed a formal petition in the cause, praying to be made a party and to be allowed to prove his claim, and stating that he had failed to see the advertisement for creditors. He made a similar application at December term, 1878, to prove a larger claim. Both applications were refused, the last upon the ground that Cowles failed to prove his claim before the expiration of the time fixed by the published notice, and "that the matter had been already adjudicated." Cowles appealed. Reversed.

At the time of the adverse ruling upon Cowles's applications, there had been *no distribution of the fund*, nor was such fund in a condition to be distributed.]

SMITH, C. J. The correctness of the ruling of the court by which the appellant was excluded from sharing in the assets is the only point presented for our consideration upon the appeal. Had the appellant a right upon his statement of the facts and according to the practice governing in such case, to be admitted among the suing creditors and afforded an opportunity to show that he had and held valid claims against the bank?

If the appellant had no information of the advertisement limiting the time for proofs and is not chargeable with negligence in bringing forward his claims, his application should have been granted, and it was the duty of the judge to ascertain and determine these precedent facts before giving a peremptory refusal. This inquiry he does not seem to have made, and puts his decision on the simple ground of the appellant's omission to make proof within the restricted time, and that (referring as we suppose to the first petition) the matter was already adjudicated.

It was objected in the argument here that the bills held by the appellant are barred by the statute of limitations, and he is not, therefore, entitled to be admitted among the creditors. The objection is not tenable for two sufficient reasons: 1. It is not apparent upon the face of the complaint, and if it was, it must be taken by answer. *Green v. N. C. R. R. Co.*, 73 N. C. 524. 2. The appellant only asks an opportunity to prove his debt, and if allowed, this or other sufficient legal defense may be set up, when the proof is offered by the other creditors or any one of them. *Wordsworth v. Davis*, 75 N. C. 159.

The rules prevailing in the courts of chancery applicable to cases like the present one are well established and understood. In *Gillespie v. Alexander*, 3 E. Ch. R. 326, Lord Eldon thus states the practice: "Although the language of the decree, when an account of debts is directed, is that those who do not come in shall be excluded from the benefit of that decree, yet the course is to permit a creditor, he paying the costs of the proceedings, to prove his debt as long as there happens to be a residuary fund in court or in the hands of an executor, and to pay him out of that residue. If a creditor does not come in till after the executor has paid out the residue, he is not without remedy though he is barred the benefit of that decree." So in *Lashley v. Hogg*, 11 Ves. Ch. R. 601, the same eminent judge declared that "though the time" (for proving the debt), "had elapsed, yet the court will let in creditors at any time while the fund is in court." An application on behalf of a creditor for permission to prove his debt after the money had been apportioned among the creditors, and transferred to an officer to be paid to them, was allowed by Vice Chancellor Plumer, who remarked: "The creditor must pay the costs of this application, and the expense incident to the same in recasting the apportionment of the property amongst the creditors." *Angel v. Had-*

den, 1 and 2 Mad. Ch. R. 285. The same principle is laid down in Story, Eq. Pl. § 106, and in Adams' Eq. 262, and is recognized and acted on in Williams v. Gibbs, 17 How. 239, and other cases cited in the brief of the appellant's counsel.

We think, therefore, the judge erred in summarily rejecting the application without inquiring into the facts, and if the appellant, in the language used by the court in the last mentioned case, "was not guilty of wilful laches or unreasonable neglect," he ought not to be concluded by the decree from the assertion of his right, as a creditor, to share in the common fund. Reversed.

See Daniel's Chan. Prac. pp. 1203 et seq.; 2 Wait's Act. & Def. 411; 6 Pom. Eq. Jur. secs. 871 et seq.; and 12 Cyc. 5-65, for the general subject of Creditors' Bills. See "Creditors' Suits," Century Dig. §§ 211, 212; Decennial and Am. Dig. Key No. Series § 54.

SEC. 8. REMEDY OF CREDITORS UNDER 13 ELIZABETH.

SOUTHERLAND v. HARPER, 83 N. C. 200. 1880.

The Several Remedies of Creditors at Law and in Equity. Jurisdiction to Restrain Execution Sale by Creditor.

[Action to restrain the threatened sale of plaintiff's land under an execution. Injunction refused. Appeal by plaintiff. Affirmed.

The plaintiff's mother once owned the land and conveyed it to the plaintiff. The grantor was indebted to Harper at the time of such conveyance. Harper obtained judgment against the mother and was about to sell the land which had been conveyed by her to the daughter, under execution. Harper took this step because he claimed that the conveyance to the plaintiff was fraudulent and void as to him under 13 Elizabeth.]

DILLARD, J. From the view taken of the case by this court, it was not necessary that his honor nor that we should find from the affidavits any facts other than those hereinbefore recited, as we are of opinion that the plaintiffs, on their own showing, were not entitled to a continuance of the injunction.

It is a fact shown by the plaintiffs and admitted by the defendant, that the tract of land mentioned in the pleadings was conveyed by Elizabeth Mobley before the recovery of judgment by defendant, and this being so, the deed was good between the parties and had the operation to pass the legal title to the feme plaintiff, as against the grantor and all volunteers by, through or under her, and also as against the then existing creditors of the grantor, unless they had ground to treat the same as void under the 13th of Elizabeth copied in our laws, or to put it out of their way by decree of a court as in equity. The plaintiffs say the deed was made to the female plaintiff bona fide and in consideration of a true debt from the grantor to the grantee equal to the value of the land, and the defendant denies this and alleges it was executed mala fide in respect to creditors and upon voluntary con-

sideration, and the validity or invalidity of the conveyance as against creditors depended on how these facts were.

If the grant were bona fide and on the consideration contended for by the plaintiffs, the title was entirely good against any sale by defendant under his execution against the grantor; but if executed with intent to hinder, delay and defraud creditors, or upon voluntary consideration, as contended for by defendant, then in either case it was void as against an existing creditor, provided in the case of the voluntary consideration since the act of 1840, the donor at the time of the gift retained property sufficient and available to pay existing creditors and had in that case no intent to defraud, to be submitted as an open question of fact to the jury. *Black v. Sanders*, 46 N. C. 67; *Houston v. Bogle*, 32 N. C. 496.

The creditor, as before remarked, when courts of law and courts of equity were separate, had his *election*: (1) To reduce his debt to judgment and by execution take, hold, and sell property given away by the debtor, and, on purchase and sheriff's deed, to bring ejectment and to have the title of the donee held as void and the full legal title as vested in the purchaser; (2) or he might instead go into the court of equity and on the notion of bringing the property to sale under fair circumstances, have the fraud adjudged and a sale had by a decree of that court. *Thigpen v. Pitt*, 36 N. C. 79. The right of the creditor to proceed at law and to sell the property of the debtor conveyed on voluntary consideration was a legal right under the statute of Elizabeth and when once exercised no court of equity would interpose at the instance of the purchaser to pass upon the legal title of the donee on the idea of removing a cloud from his title, nor at the instance of the donee on the idea that the deed to the purchaser was a cloud on his title. It was but a controversy between legal titles to land, to the trial of which courts of law were adapted, and hence equity did not interfere. The practice of non-interference for the purchaser to adjudge upon the alleged fraudulent title of the donee was expressly decided in the case of *Thigpen v. Pitt*, *supra*, and non-interference at the instance of the donee to declare the purchaser's title a cloud on his title and remove the same, was settled in the case of *Dameron v. Gold*, 17 N. C. 17. In the last case, Chief Justice Ruffin says: "A person in possession under a legal title cannot sue another out of possession upon the ground of a pretended distinct title and to have it declared invalid, unless there be a fraud imputed to it or some other matter peculiarly within this jurisdiction. These are pure questions of law and the party in possession may well be content with the advantage that possession gives him."

Just so we think it is under our present system where the superior courts exercise both legal and equitable powers. The creditor has the right to sell the land of his debtor, *Elizabeth Mobley*, by execution, and if he does and buys it himself or another, then there will be the case of conflicting claims to the same property

upon distinct legal titles, and the purchaser will soon have the title settled by an action to recover the land; or if he do not, the plaintiff, in the language of Judge Ruffin, may well be content with the advantage of her present possession, or in case of a danger of the loss of evidence to sustain her title, or of the use of the sheriff's deed by the purchaser to hinder the sale of the property, she may possibly make a case of equitable intervention by way of perpetuating evidence or a decree against the validity of the purchaser's title under the head of removal of cloud upon the title. But the plaintiff's rights have not been interfered with, and may never be in any way other than what is legitimate by the purchaser when there shall be one.

Granting it to be admissible for the court to adjudge upon the title deed of a purchaser after the sale is had, if instead of speedily asserting his title by action, he shall use it to impair the value of the land to the plaintiffs in the sale of it or otherwise, still we must hold there is no such case made by the complaint in this case. The embarrassment and irreparable injury alleged cannot at present be more than a mere expression of evil, as no sale has been made, and it may be the evil will never come, but whether it shall come or not, it is not in our opinion competent to restrain defendant from selling the land, as he has a right to do, lest a rival title grow up. There is no error, and the judgment of the court below is affirmed.

In *Hillyer v. LeRoy*, 179 N. Y. at p. 375, 72 N. E. at p. 238, it is said: "The property of a debtor, which has been transferred by him in fraud of creditors, still remains, as to them, the debtor's property and the lien of the creditor's judgment attaches to the real estate. The judgment creditor may enforce his judgment by a sale of the land under execution; or he may bring an action to remove the obstruction caused by the debtor's fraudulent act and proceed to enforce his judgment by a sale of the land unembarrassed by the cloud of the transfer." In *Cleland v. Taylor*, 3 Mich. 201, it is held that a creditor may obtain judgment, sell the land fraudulently conveyed, and he, or whoever happens to be the purchaser, may bring ejectment for the same—in which action the purchaser may attack the title of the fraudulent grantee. If he does so successfully, he will recover. But, if the creditor prefer it, he may sue in equity to set aside the fraudulent conveyance and subject the land thereby conveyed to his claim. See also *Malford v. Patterson*, 35 N. J. L. at pp. 132, 133. "In cases where the legal title to the property is such that it cannot be seized under execution, resort to equity is necessary—as where the legal title never has been in the debtor, having been conveyed by a third person directly to another, in secret trust for the benefit of the debtor with a design fraudulently to screen it from his creditors." But where the legal title has been in the debtor and he fraudulently conveys it, judgment, sale under execution, and ejectment may be resorted to if preferred. *Ibid.* at p. 133.

One who purchases land sold under execution, may go into equity to attack the title of the fraudulent vendee of the person whose land was thus purchased and sold. *Gerrish v. Moore*, 9 Gray (Mass.) 235; see also 15 L. R. A. 784, briefs and notes; but see *Thigpen v. Pitt*, 64 N. C. 49, as to the proposition in 9 Gray, 235. Can life insurance be reached by creditors? 4 L. R. A. (N. S.) 454, and note; 79 N. C. 293. *Revised* §§ 4771, 4772. For right of husband's creditors to reach the fruits of his management of, or services in connection with, his wife's separate

estate or business, see 23 L. R. A. (N. S.) 1124, and note; Mordecai's L. L. 291; 21 L. R. A. 629, and note. See "Execution," Century Dig. § 510; Decennial and Am. Dig. Key No. Series § 171; "Fraudulent Conveyances," Cent. Dig. §§ 660-664; Dec. and Am. Dig. Key No. Series § 230.

GENTRY v. HARPER, 55 N. C. 177. 1855.

Land Purchased by the Debtor, But Title Made to a Third Person.

[Bill to subject the equitable estate in certain lands to the payment of the debts of William Harper. William Harper being indebted contracted to purchase the land from Jacob Waters. It was charged in the plaintiff's bill, that Harper, with intent to defraud his creditors, caused Waters to contract to convey the land to Elizabeth, Harper's infant daughter, instead of to William Harper who bought it and paid for it.

No conveyance had been made by Waters at the time this suit was brought. William Harper, Elizabeth Harper and Waters were all made defendants. William Harper demurred, and the cause was transferred to the supreme court for trial. Demurrer overruled.]

PEARSON, J. From the principles decided in Gowan v. Rich, 23 N. C. 533, and Dobson v. Erwin, 18 N. C. 570, it is clear that the debtor has not such an equitable or trust estate as is liable to be sold under an execution at law; and it is equally clear that he has such an interest in the land as a court of equity will subject to the claims of creditors, upon the broad ground, that it is against conscience for debtors to attempt in any way to withdraw property or effects from the payment of debts. If the courts of common law cannot reach the debtor's interest, a court of equity will. Demurrer overruled.

Under the present statutes of North Carolina, it is held that a docketed judgment is not a lien on land purchased by a judgment debtor, if the title be made to a third person with intent to defraud creditors of the real purchaser. The creditors can subject such land by an action. Dixon v. Dixon, 81 N. C. 323. See "Fraudulent Conveyances," Century Dig. § 662; Decennial and Am. Dig. Key No. Series § 230.

BURTON v. FARINHOLT, 86 N. C. 260. 1882.

Remedy When Fraudulent Grantor Is Dead.

[Action by an administrator to subject funds in the hands of his intestate's next of kin and assigns, to the payment of intestate's debts. Substantially, the complaint alleged that the fund in question arose from chattel property given to defendants by the intestate at a time when the intestate owed debts, and that the intestate did not retain, at the time of the gift, assets sufficient to satisfy such debts. Defendants demurred. Demurrer overruled, and defendants appealed. Reversed.

Several questions were raised by the demurrer and upon the argument—one of which was: "Whether the plaintiff as administrator can maintain this action, or whether he is estopped by the assignment of his

intestate?" Only that part of the opinion which bears upon this question, is here inserted.]

RUFFIN, J. . . . In *Coltraine v. Causey*, 38 N. C. 246, cited by counsel for the defendants, this court ruled that an administrator could not maintain a bill for setting aside a deed on the ground that it was given by his intestate to defraud creditors, for that, he occupied the exact relation to the deed that his intestate did, and was equally estopped thereby, but that the defrauded creditors might have their action against the fraudulent alienee as executor de son tort. To the same effect are the cases of *McMoline v. Storey*, 20 N. C. 329, and *Sturdivant v. Davis*, 31 N. C. 365. But the most striking instance of the application of the rule is found in *Norfleet v. Riddick*, 14 N. C. 221, in which case a regular administrator, who held property of his intestate under a conveyance fraudulent as to his creditors, was sued by them, as executor de son tort. And their action was sustained. In discussing its propriety, Chief Justice Henderson said, it must be so from necessity; that the conveyance operated alike as an estoppel on the intestate and his administrator, but did not bind the creditors as to whom it was void; and as they could not reach the property through the defendant as administrator, they must be allowed to have their action against him as executor *in his own wrong*, or else there must be a failure of justice. From a resolution of the court, so explicitly pronounced and reiterated, we do not feel at liberty to depart because of any difficulty that may exist (as is suggested) in enforcing it under the present law touching the administration of deceased persons' estates; at least, not without some more specific expression of the legislative will to that effect than is to be found in any law yet enacted.

Winchester v. Gaddy, 72 N. C. 115, and *Henry v. Willard*, 73 N. C. 35, were both actions, brought under the present system, against the defendants as executors de son tort; and while the plaintiff failed in both, on other grounds, there was no suggestion in either case of any difficulty in maintaining such actions because of the law which directs a pro rata application of the assets, and we cannot suppose so important a matter was overlooked.

Whether in such an action, instituted at this day, the plaintiff will be permitted to sue in his own name and thereby acquire a preference in the particular assets recovered, or whether he shall sue, as in a creditor's bill, for himself and all others alike interested, are questions not now necessary to be determined, and too important to be lightly determined, especially as we do not find ourselves in the present state of the argument fully in accord with regard to them. But be it either way, we apprehend it will be found in actual practice to interfere with the general administration of estates by lawful representatives, less frequently and seriously than seems to be supposed, and certainly not sufficiently so to justify the court in dispensing with a long and well established principle of law.

The plaintiff being estopped by his intestate's act of assignment to deny the title of the defendants to the policy or its proceeds, cannot maintain this action, and the judgment of the court below is therefore reversed, and the demurrer sustained. Reversed.

The personal representative may now, in North Carolina, maintain an action in such cases as that presented by the principal case. This was first introduced into the law of the state by the Revisal of 1905, sec. 50. The personal representative was empowered to subject *lands* fraudulently conveyed by his decedent by the act of 1846—the remedy being by proceedings to make real estate assets. See *Rhem v. Tull*, 35 N. C. 57, for a construction of that act. The act of 1846 as now incorporated into the statutes, is Revisal, sec. 72. See *McCaskill v. Graham*, 121 N. C. 190, 28 S. E. 264.

That there is a conflict of authority as to the ruling of the principal case, see *Woerner's Am. L. of Adm.* sec. 296, where the two lines of authority are given. See "Executors and Administrators," *Century Dig.* § 309; *Decennial and Am. Dig. Key No. Series* § 57; *Century Dig.* § 290; *Decennial and Am. Dig. Key No. Series* § 96.

CHAPTER X.

EXTRAORDINARY REMEDIES.

SEC. 1. HABEAS CORPUS.

This remedy has been sufficiently treated in Chap. 5, § 8, a; Chap. 6, § 1, a, and § 2, a.

SEC. 2. PROHIBITION.

CONNECTICUT RIVER R. R. v. COUNTY COMRS., 127 Mass. 50, 57-60. 1879.

The Remedy by Prohibition Explained.

[Petition for a writ of prohibition, filed in the supreme court and there disposed of. The manager of Troy and Greenfield R. R. and Hoosac Tunnel, a corporation, acting under a statute, filed a petition for the condemnation of certain lands of the Connecticut River R. R. under eminent domain. The proceeding was filed before the defendants, and was in accordance with the statute referred to. The Connecticut River R. R. having been served with notice to appear before the defendants to answer such proceedings, objected to the jurisdiction of defendants. The defendants overruled such objection but postponed the hearing to a future day. Thereupon this petition for a writ of prohibition was filed against the defendants, upon the ground that the statute under which they were acting was unconstitutional. The court granted the petition and ordered the writ to issue. Only so much of the opinion as discusses the remedy by writ of prohibition, is here inserted.]

GRAY, C. J. . . . A writ of prohibition issuing from the *highest* court of common law is the appropriate remedy to restrain a tribunal of *peculiar, limited, or inferior* jurisdiction from taking judicial cognizance of a case not within its jurisdiction. 3 Bl. Com. 112; Washburn v. Phillips, 2 Met. 296. The power of issuing the writ was habitually exercised by the *principal* courts of common law in England, and by the superior court of judicature of Massachusetts under the Province Charter. The earlier acts of the Province establishing the superior court of judicature were disallowed by the king in council. Prov. Sts. 1692-3 (4 W. & M.), c. 33; 1697 (9 Will. 3), c. 9; 1 Prov. Laws (State ed.), 72, 73, 284, 285; Anc. Chart. 217, 221. But the act of 1699-1700 (11 Will. 3), c. 3, under which that court existed until the American Revolution, conferred upon it a very extensive jurisdiction of pleas of the crown and civil actions, "and generally of all other matters, as fully and amply to all intents and purposes whatsoever as the

courts of King's Bench, Common Pleas and Exchequer within his Majesty's kingdom of England have or ought to have." 1 Prov. Laws, 370, 371; Anc. Chart. 330. Under that act, the superior court of judicature frequently issued writs of prohibition to the court of Vice Admiralty. See, for examples of this, *Thomas v. Calley*, Rec. 1716, fol. 143; *Hutchinson v. Wybourne*, Rec. 1716, fol. 169; *Harming v. Wyre*, Rec. 1717, fol. 177; *Manderson v. Hughs*, Rec. 1718, fol. 259; *Tilton's case*, Rec. 1720, fol. 338; *Dummer's Defense of New England Charters* (1721), 63, 64; *Seollay v. Dunn* (1763), *Quiney*, 74. . . .

In the present case, if the proceedings for the assessment of damages had gone on to final judgment, they might indeed have been quashed by writ of certiorari. *Charlestown Branch Railroad v. County Comrs.*, 7 Met. 78; *Charles River Branch Railroad v. County Comrs.*, 7 Gray, 389; *Farmington River Water Power Co. v. County Comrs.*, 112 Mass. 206. But the fact that the remedy by petition for writ of certiorari will be open to the landowner after final judgment affords no reason why the court should now refuse a writ of prohibition, and thereby put the petitioner to the trouble, expense and delay of a trial before a tribunal which has no jurisdiction of the case, and to whose jurisdiction the petitioner has objected at the outset of the proceedings. *Gould v. Gapper*, 5 East, 345, 367, 371; *Burder v. Veley*, 12 A. & E. 233, 263, 265, 313, 314; *Vermont & Massachusetts Railroad v. County Comrs.*, 10 Cush. 12. The relief sought by bill in equity in *Talbot v. Hudson*, 16 Gray, 417, was to restrain the pulling down of a mill-dam by executive officers, not to prevent a judicial hearing and determination by a tribunal transgressing its jurisdiction.

The fact that an agent of the commonwealth is the adverse party in the proceedings before the county commissioners affords no reason for refusing the writ. A writ of prohibition, like a writ of mandamus or of certiorari, is properly sued out in the *name of the crown or the state; the only necessary defendant is the tribunal whose proceedings are sought to be restrained, controlled or quashed*; and there is no class of cases in which the authority to issue writs of prohibition is better established than in those cases of courts martial, ecclesiastical courts, or inferior courts of common law, assuming to take cognizance, in excess of their jurisdiction, of criminal prosecutions. *Washburn v. Phillips*, above cited; *Grant v. Gould*, 2 H. Bl. 69; *Com. Dig. Prohibition*, F. 6; *Searle v. Williams*, Hob. 288; *The Queen v. Herford*, 3 El. & El. 115; *Zylstra v. Corporation of Charleston*, 1 Bay. 382. Writ of prohibition to issue.

See "Prohibition," *Century Dig.* § 31; *Decennial and Am. Dig. Key No. Series* § 6.

STATE v. WHITAKER, 114 N. C. 818, 19 S. E. 376. 1894.

Prohibition. Explanation of the Remedy Continued.

[Application filed in the supreme court by the defendants in a case pending before the mayor's court of the city of Raleigh—the case being entitled *State v. Whitaker et al.* The application to the supreme court was that a writ of prohibition might issue to the mayor's court to stop further proceedings in the case. The grounds assigned for the application were: (1) That the ordinance, for the violation of which the defendants were prosecuted, was invalid; (2) Because a jury trial had been denied.]

CLARK, J. The defendants apply for a writ of prohibition to issue to Thomas Badger, mayor of the city of Raleigh, upon the ground that the city ordinance, for the violation of which they are being tried, is invalid, and because a trial by jury had been refused them.

The writ of prohibition existed at common law, and is also authorized by the constitutional provision (article 4, § 8) which gives the supreme court "power to issue any remedial writs necessary to give it a general supervision and control over the proceedings of the inferior courts." In this state this writ can issue only from the supreme court. *Perry v. Shepherd*, 78 N. C. 83.

The writ of prohibition is the converse of mandamus. It prohibits action, while mandamus compels action. It differs from an injunction, which enjoins a party to the action from doing the forbidden act, while prohibition is an extraordinary judicial writ, issuing to a court from another court having supervision and control of its proceedings, to prevent it from proceeding further in a matter pending before such lower court. It is an original remedial writ, and is the remedy afforded by the common law against the encroachment of jurisdiction by inferior courts, and to keep them within the limits prescribed by law. 19 Am. & Eng. Enc. Law, 263, 264; High. Extr. Rem. § 762. It is settled that this writ does not lie for grievances which may be redressed, in the ordinary course of judicial proceedings, by appeal, or by recordari or certiorari in lieu of an appeal. Nor is it a writ of right, granted *ex debito justitiæ*, like habeas corpus, but it is to be granted or withheld according to the circumstances of each particular case. Being a prerogative writ, it is to be used, like all such, with great caution and forbearance, to prevent usurpation, and secure regularity, in judicial proceedings, where none of the ordinary remedies provided by law will give the desired relief, and damage and wrong will ensue pending their application. High. Extr. Rem. §§ 765, 770.

In the present case the mayor's court has jurisdiction of the persons of the defendants, and of the subject matter, which is the alleged violation of a town ordinance. If the ordinance in question is invalid, that matter can be determined on appeal to the superior court, and by a further appeal, if desired, thence to this court. This has been often done. There is no palpable usurpation

of jurisdiction, or abuse of its authority, nor likelihood of injury to defendants, which calls for the extraordinary process of this court, by prohibition, to stop the action of the lower court. It is more orderly to proceed in the regular way,—to have an alleged error of this kind corrected on appeal. The writ might properly issue where the court below has no jurisdiction of the subject-matter, as, for instance, if a justice of the peace should attempt to try a defendant for larceny, or decree foreclosure of a mortgage; but even in that case it would rest in the discretion of the supreme court whether the matter should be left to correction by appeal, or by treating such judgment as a nullity.

As to the denial of a jury trial by the mayor, it is pointed out by Smith, C. J., in *State v. Powell*, 97 N. C. 417, 1 S. E. 482, that under the present constitution (article I, § 13) the legislature is authorized to vest the trial of petty misdemeanors in inferior courts, without a jury, if the right of appeal is preserved. It was otherwise under the former constitution, under which *State v. Moss*, 47 N. C. 66, was decided. The guaranty of a trial by jury in the sixth and seventh amendments to the constitution of the United States applies only to the federal courts, and is not a restriction on the states, which may provide for the trial of criminal and civil cases in their own courts, with or without jury, as authorized by the state constitution. *Cooley, Const. Lim.* (6th ed.) 30; *Walker v. Sauvinet*, 92 U. S. 90; *Munn v. Illinois*, 94 U. S. 113. There are instances, though infrequent, when this writ has been invoked. It has been granted where, after a conviction for felony, the court has, at a subsequent term, granted a new trial upon the merits, without any legal authority for so doing. *Quimbo Appo v. People*, 20 N. Y. 531. It is also the appropriate remedy, pending an appeal from an inferior to a superior court, to prevent the former from exceeding its jurisdiction by attempting to execute the judgment appealed from, or to prevent a circuit court exceeding its powers by issuing an unauthorized writ of error and supersedeas to a county court, and interfering improperly with the jurisdiction of the latter. *Supervisors v. Gorrell*, 20 Grat. 484. Also, to prevent an inferior court's interfering with, or attempting to control, the records and seal of the superior court by injunction. *Thomas v. Mead*, 36 Mo. 232. It lies to prevent a probate court exercising jurisdiction over the estate of a deceased person when it cannot lawfully do so. *U. S. v. Shanks*, 15 Minn. 369 (Gil. 302). Or where justices of the peace are proceeding, without authority of law, to abate a supposed nuisance, prohibition lies to stay their action. *Zylstra v. Charleston Corp.*, 1 Bay. 382. These are cited as illustrations, but in each case it is in the discretion of the supreme court whether the writ shall be granted. Prohibition does not issue to restrain ministerial acts, but only to restrain judicial action where the latter would be a usurpation and cannot be adequately remedied by an appeal. 19 Am. & Eng. Enc. Law, 268, 269. It issues to and acts upon courts as an injunction acts upon parties, and, like an injunction, it

does not lie where adequate remedy can be had by the ordinary process of the courts. When entertained, the usual course, unless prior notice of the petition has been given, is to issue a notice to the lower court to show cause why the writ should not issue, and to order a stay of proceedings in the mean time. Id. 280, 281. In the present case, if the defendants are convicted upon an invalid ordinance, there is ample remedy by appeal. The constitution does not guaranty a jury trial in such case, since the defendants have the right of appeal. If there is aught in the charter of the city which grants the defendants a trial by jury, if demanded, the error in the refusal could be corrected by a jury trial in the superior court. There is no emergency which requires the court to issue the writ prayed for. Petition denied.

For the superintending control of inferior tribunals by writs of prohibition, mandamus, etc., and of courts martial by civil courts, see 51 L. R. A. 33, and elaborate note; 20 Ib. (N. S.) 413, 942, and notes. That the writ has been but little used in North Carolina, see *Perry v. Shepherd*, 78 N. C. 83. It does not lie to interfere with a de facto officer in the discharge of his duties during the pendency of a controversy over the title to the office. *State v. Allen*, 24 N. C. 183. It is never used as a remedy for acts already done, but only to prohibit the commission of an act threatened. *United States v. Hoffman*, 4 Wallace, 158. The present practice in North Carolina is pointed out in *Railroad Co. v. Newton*, 133 N. C. 126, 45 S. E. 549. The writ issues from the *supreme court alone*; its issue in any case is a matter of sound discretion and is confined to cases of extreme necessity. *Ibid.* For a general discussion of the remedy, see 9 L. R. A. 59 and note; *Hughes on Proc.* 1096; 32 Cyc. 598-632. See "Prohibition," *Century Dig.* §§ 4-19; *Decennial and Am. Dig. Key No. Series* § 3.

SEC. 3. MANDAMUS.

REX v. BARKER, 3 Burrows, 1265, 1267. 1762.

Nature of Remedy. When Mandamus Will and Will Not Issue. Practice. Lord Mansfield's Form of the Rule to Show Cause.

[On Wednesday, 10th of June, 1761, Mr. Norton moved for a mandamus to be directed to the surviving trustees under a deed of release, made by one Charles Vinsen to John Enty, a dissenting minister of Plymouth, and other trustees, settling a then new-built meeting-house, etc., requiring them to admit Christopher Monds to the use of the pulpit thereof, as pastor, minister or preacher there; he, the said Christopher Monds, having been duly elected to such position. Mr. Norton produced an affidavit of the facts and of Mr. Monds' election, and of a demand and refusal of the use of the meeting-house.]

LORD MANSFIELD. A mandamus is a prerogative writ, to the aid of which the subject is entitled, upon a proper case previously shown to the satisfaction of the court. The original nature of the writ and the end for which it was framed, direct upon what occasions it should be used. It was introduced to prevent disorder from a failure of justice, and defect of police. Therefore it ought to be used upon all occasions where the law has established no

specific remedy, and where in justice and good government there ought to be one. Within the last century, it has been liberally interposed for the benefit of the subject and advancement of justice. The value of the matter, or the degree of its importance to public police, is not scrupulously weighed. If there be a right, and no other specific remedy, this should not be denied.

Writs of mandamus have been granted, to admit lecturers, clerks, sextons, scavengers, etc.; to restore an alderman to precedence, an attorney to practice in an inferior court, etc. Since the act of toleration, it ought to be extended to protect an endowed pastor of protestant dissenters, from analogy and the reason of the thing. The right itself being recent, there can be no direct ancient precedent, but every case of a lecturer, preacher, schoolmaster, curate, chaplain is in point.

The deed is the foundation or endowment of the pastorship. The form of the instrument is necessarily by way of trust: for the meeting-house, and the land upon which it stands, could not be limited to Enty and his successors. Many lectureships and other offices are endowed by trust-deeds. The right to the function is the substance, and draws after it every thing else as appurtenant thereto. The power of the trustees is merely in the nature of an authority to admit. The use of the meeting-house and pulpit, in this case, follows, by necessary consequence, the right to the function of the minister, preacher, or pastor; as much as the insignia do the office of a mayor; or the custody of the books, that of a town-clerk.

Lord Mansfield directed the following rule to be drawn up: It is ordered, That the first day of next term be given to Pentecost Barker, Richard Dunning, Philip Cockey, and Elias Lang, to show cause why a writ of mandamus should not issue, directed to them, requiring them to admit Christopher Monds to the use of the pulpit in a certain meeting-house appointed for the religious worship of protestant dissenters commonly called Presbyterians, in Plymouth in the county of Devon, as pastor, minister or preacher there. And it is further ordered, That the said Pentecost Barker, Richard Dunning, Philip Cockey, and Elias Lang, do at the same time acquaint this court, "Whether they insist upon the validity of the election of John Hanmer," and if not "Whether they are willing to proceed to a new election of a minister, pastor or preacher there;" the prosecutor of this rule having declared his consent "To waive his claim, in order to a new election." And it is further ordered, That notice of this rule be given to the said John Hanmer, to the intent that he may be heard, as he shall be advised; and that he may acquaint this court "Whether he insists upon the validity of his election," and "Whether he is willing to have it tried in a feigned issue."

Mr. Thurlow and Mr. Dunning now gave answer, by direction of their clients, "That Pentecost Barker, Richard Dunning, Philip Cockey, and Elias Lang, do insist upon the validity of the election of John Hanmer, and that they are not willing to proceed to

a new election, etc. And that the said John Hammer does insist upon the validity of his election, and is not willing to have it tried in a feigned issue." After which Mr. Thurlow and Mr. Dunning were heard again, in general, and argued strenuously against granting a mandamus. They knew the election of Hammer could not be supported upon a trial. The election of Monds seems liable to objection as irregular. But, if the matter was proper for a mandamus, they were aware that in case neither was elected, the court would issue a mandamus "To proceed to an election;" in which case, the majority of the congregation were inclined to Monds. The trustees therefore obstinately persisted in opposing a mandamus and refusing a trial.

Lord Mansfield. Every reason concurs here for granting a mandamus. We have considered the matter fully, and we are all clearly for granting it. I have made a collection of cases on this subject, since the last argument; but I have it not here at present. Here is a function with emoluments; and no specific legal remedy. The right depends upon election; which interests all the voters. The question is of a nature to inflame men's passions. The refusal to try the election in a feigned issue, or proceed to a new election, proves a determined purpose of violence. Should the court deny this remedy, the congregation may be tempted to resist violence with force: a dispute "Who shall preach Christian charity," may raise implacable feuds and animosities; in breach of the public peace, in the reproach of the government, and the scandal of religion. To deny this writ, would be putting protestant dissenters and their religious worship out of the protection of the law. This case is entitled to that protection; and cannot have it in any other mode, than by granting this writ. The defendants have refused either to go to a new election, or to try it in a feigned issue. We were all of opinion, when a trial was proposed to them, that a mandamus ought to issue, in case of refusal. Their answer ought to be put into the rule as prefatory to it; and I do this, with a view that their refusal may be authentically given in evidence to the jury upon the trial. Many cases have gone as far as this, or farther. Mr. Justice Denison, Mr. Justice Foster, and Mr. Justice Wilmot, all declared themselves of the same opinion. The court ordered a mandamus to issue.

In the report of this case in 1 W. Blackstone's Reports, 352, the following is given as Lord Mansfield's opinion: "I think I have seen it in the books, that the first instance of a mandamus in the case of a corporation, was *Bazze's case*. And yet that was no objection to the granting it. A mandamus is certainly a prerogative writ, flowing from the king himself, sitting in this court, superintending the police and preserving the peace of this country; and will be granted, wherever a man is entitled to an office or a function, and there is no other adequate legal remedy for it. Therefore it is not grantable for a living, because there the law has provided a specific remedy; but for a lectureship, where a profit or endowment is annexed to it, it is. Since the Act of Toleration, dissenters are entitled to all manner of legal protection. Charities to their mode of worship have been established since the revolution,

though held to be superstitious before." For *quo warranto* to try title to an office in a *private corporation*, see *Hankins v. Newell*, section 4 post, and note to that case. See 12 L. R. A. (N. S.) 49, and note. See "Mandamus," Century Dig. § 263; Decennial and Am. Dig. Key No. Series § 128.

LA GRANGE v. THE STATE TREASURER, 24 Mich. 468, 476-479. 1872.

Mandamus Explained. When It Is the Appropriate Remedy.

[Application for a mandamus, brought in the name of the People on the relation of the Township of La Grange v. The State Treasurer. "The relator having obtained an order on respondent to show cause why certain municipal bonds, deposited with him under the railroad aid laws, should not be delivered up, he returns that he has been served with a subpoena in a case in equity, issued out of the circuit court of the United States under a bill filed by John E. Young against respondent, relator, and the Michigan Air Line Railroad Company, to obtain the same bonds for the company. This return being demurred to, the respondent relies upon two principal grounds: 1. That mandamus is not a proper remedy in such cases; and, 2. That the pendency of the chancery suit should stay it." Only so much of the opinion as bears upon the first ground of demurrer, is here inserted.]

CAMPBELL, J. . . . In these cases of municipal bonds, the townships cannot be made to suffer for the legally wrongful action of their officers, and they have a right to recall the unauthorized securities. The duty of the treasurer is not discretionary. It is their absolute right to demand, and his absolute duty to surrender, what is held in the files of the office in their wrong. The duty is unconditional and it is clear. We are then to consider whether a mandamus is the proper remedy for a refusal to comply with this duty.

It was urged on the argument that this writ will only lie where there is a positive statutory duty and an entire absence of any other remedy. And it is claimed that the decisions heretofore made sustain this view. We do not know of any such doctrine, and have never understood it to have been established in this state, or elsewhere. In the frequent instances of application for this writ, the occasion has quite as often been to enforce duties not imposed by statute, as obligations which were statutory. There may very possibly be found isolated expressions, which, apart from their context and the occasion of their utterance, might favor one of the grounds claimed. Thus, in *People v. Judges of the Branch Circuit Court*, 1 Doug. Mich. 319, it was said there must be "no other remedy." In that case there was a better remedy in the ordinary course of law which reached all that could be desired. But in *People v. Judge of the Wayne Circuit Court*, 19 Mich. 296, the doctrine was laid down more guardedly, that a relator must show "a clear legal right, and that there is no other adequate remedy." And in *People v. State Insurance Company*, 19 Mich. 392, it was expressed more fully that the writ might issue for a specific duty where there is no other "specific and adequate remedy."

Blackstone very clearly defines the jurisdiction in a few words. He says it lies "where the party hath a right to have any thing done, and hath no other specific means of compelling its performance." 3 Bl. Com. 110. In *Rex v. Windham*, Cowp. 377, Lord Mansfield adopts a statement of Mr. Kenyon, "that where there is no other legal specific remedy to attain the ends of justice, the course must be by mandamus, which is a prerogative writ." In *Rex v. Barker*, 3 Burr. 1265, he says: "Therefore it ought to be used upon all occasions where the law has established no specific remedy, and where, in justice and good government, there ought to be one. Within the last century it has been liberally interposed for the benefit of the subject, and the advancement of justice. The value of the matter, or the degree of its importance to the public police, is not scrupulously weighed. If there be a right, and no other specific remedy, this should not be denied." And in *Rex v. Vice Chancellor of Cambridge*, 3 Burr. 1647, he says again: "This is the very reason of the court's issuing the prerogative writ of mandamus, because there is no other specific remedy." The other judges were equally emphatic.

For most rights the ordinary legal remedies are ample to prevent a failure of justice, as upon private contracts a judgment for damages will usually suffice. But there are cases where, if contracts cannot be enforced specially, there will be a failure of justice; and as the law can give no specific remedy in such cases parties are compelled to resort to equity. If the law had the requisite machinery, no doubt it would so interfere as to render a resort to equity needless. And in all cases where it can enforce rights specifically, and no other relief is adequate, it certainly would be unjust not to do so. Unfortunately its powers are limited. But in cases where the right is clear and specific, and public officers or tribunals refuse to comply with their duty, a writ of mandamus issues for the very purpose, as declared by Lord Mansfield, of enforcing specific relief. It is the *inadequacy, and not the mere absence, of all other legal remedies, and the danger of a failure of justice without it*, that must usually determine the propriety of the writ. Where none but specific relief will do justice, specific relief should be granted if practicable. And where a right is single and specific it is usually practicable.

The question then arises whether there is any other adequate, specific, legal remedy. Courts of law do not, in deciding such questions, take into account remedies in equity. They may be regarded in determining the exercise of discretion in allowing the writ, but they cannot affect the jurisdiction. There is no case where a court of law has its jurisdiction cut off by the existence of equitable remedies. The rule is the reverse—that equity will not interfere if legal remedies are adequate. There is the strongest possible reason why a party should not be turned over to the tedious and dilatory process of a long suit, when there are no issues that need it. The only question that could arise in the class of

cases now before us is, whether the bonds are in the possession of the respondent. If they are, the right to have them restored is a legal conclusion not open to question.

The same reasons would apply to render it improper to turn a party over to a suit in replevin, if there were not still more serious objections to it, as well as doubts of its applicability. The remedy would not only involve a needless legal contention, but it is not a proper or lawful thing to allow a sheriff, on such a writ, to intermeddle with public papers. The policy of the law requires them to be guarded by their official custodian, and it would be a monstrous abuse if the state offices could be exposed to the visitation of ministerial officers who might be commanded by a writ, issued without the previous order or supervision of a court, to seize upon and deliver over to any one who should sue out the process, any document or muniment to be found there. Such a claim would be preposterous. A mandamus is the only admissible writ to command public officers to produce and give up papers in their custody. The writ must be granted as prayed. And we trust it will not be necessary hereafter to interpose for the same purpose.

For the distinction between Mandamus and Quo Warranto, see *Brown v. Turner*, 70 N. C. at p. 104. Mandamus is no longer a prerogative writ. *Ibid.* at p. 105. If the relief sought be, to get possession of an office—official position—*already filled by another*, the remedy is *quo warranto*; if to get possession of—be inducted into—an official position *not filled by another*, the remedy is *mandamus*. *Lyon v. Comrs.*, 120 N. C. 237, 26 S. E. 929, and see also *Cunningham v. Sprinkle*, 124 N. C. 638, 33 S. E. 138, 1 L. R. A. (N. S.) 588, 13 Ib. 661, 19 Ib. 49, and notes. If a term of office to which the plaintiff or relator seeks to be inducted, expires before final judgment, the court must dismiss the action. *Colvard v. Comrs.*, 95 N. C. 515. See “Mandamus,” Cent. Dig. §§ 8, 135; Dec. and Am. Dig. Key No. Series §§ 3, 73.

SQUIER v. GALE, 6 N. J. L. 157. 1822.

Mandamus From a Superior to an Inferior Court.

[Upon an application to the supreme court for a mandamus to the court of common pleas to compel that court to grant a new trial in the above entitled action which had been finally determined in that court, a rule was issued that the court of common pleas show cause why the mandamus should not issue. The judges of the court of common pleas answered the rule, and stated that after a verdict in the case a new trial was moved for on the sole ground that the verdict was against the weight of the evidence; that the motion was overruled because to grant it was beyond the powers of the court, in the court's opinion.]

KIRKPATRICK, C. J. In this case the court are of opinion—
1. That though a mandamus will lie to an inferior court to command them to proceed to judgment, yet it will not lie to command them to proceed to any particular judgment; and much less to command them to set aside a verdict and grant a new trial, or even to grant a rule to show cause for that purpose. 2. That the

courts of common pleas have, by the constitution of the said courts, and by the principles of the ancient common law, a right to set aside verdicts and grant new trials: and that they have this right, as well in cases of appeal under statute as in other cases.

In *Hudson v. Parker*, 156 U. S. at p. 288, 15 Sup. Ct. at p. 454, it is said: "The discretion of a judge, indeed, in a matter entrusted by law to his judicial determination, cannot be controlled by writ of mandamus. But if he declines to exercise his discretion or to act at all, when it is his duty to do so, a writ of mandamus may be issued to compel him to act. For instance, a writ of mandamus will lie to compel a judge to settle and sign a bill of exceptions, although not to control his discretion as to the frame of the bill." Several authorities are cited from the United States Reports for this position.

For the law generally as to when the writ will issue to judges and courts, see *In re Blake et als.*, 175 U. S. 114, 20 Sup. Ct. 42; *Biggs ex parte*, inserted at section 8, post; 26 Cyc. 188. For when the writ will or will not issue to the executive department or to the officers thereof, see *People ex rel. Broderick v. Morton*, 156 N. Y. 136, 50 N. E. 791; *Rose's Notes* to U. S. Rep. vol. 6, p. 623, and Vol. 10, p. 536; *White v. Ayer*, 126 N. C. 570, 36 S. E. 132; *Keim v. United States*, 177 U. S. 290, 20 Sup. Ct. 574. The writ will not issue against the legislature or its officers. *Scarborough v. Robinson*, 81 N. C. 409. For when it will issue to a private corporation, see *Am. Ry. Frog Co. v. Haven*, 3 Am. Rep. at p. 383; 26 Cyc. 338; *Hughes v. N. C. Bapt. Church*, 75 N. J. L. 167, 67 Atl. 66, which last case holds, that the writ will issue to re-instate one turned out of a church membership. For other instances of the use of mandamus, see 6 L. R. A. (N. S.) 750, 12 Ib. 166, and notes (to executive department); 6 Ib. 782, and note (to officers of municipal corporation to enforce franchises granted by the corporation); 7 Ib. 525, and note (to control the discretion of municipal officers); 20 Ib. 801, and note (to force municipal officers to perform contracts); 1 Ib. 963, 3 Ib. 153, 13 Ib. 1084, and notes (to public service corporations to enforce duties to individuals); 3 Ib. 1115, 20 L. R. A. 355, and notes (to medical colleges, etc., to compel the issuing of a diploma).

For statutory provisions in North Carolina, see *Pell's Revisal*, secs. 822-824, and notes. That a mandamus will not issue as a substitute for a writ of error or certiorari to review the judgment of a court, see *Biggs ex parte*, inserted at sec. 8, post. That mandamus is no longer a prerogative writ in North Carolina, see *Brown v. Turner*, 70 N. C. at p. 105. See note to *State v. Whitaker*, 114 N. C. 818, inserted in sec. 2, ante. See "Mandamus," *Century Dig.* § 64; *Decennial and Am. Dig. Key No. Series* § 28.

LUTTERLOH v. BOARD OF COMRS. OF CUMBERLAND CO., 65 N. C. 403. 1871.

Practice. Alternative and Peremptory Mandamus.

[The plaintiff obtained a number of judgments against the defendants, who constituted the board of county commissioners of Cumberland county, on the indebtedness of the county to the plaintiff—the judgments being, in effect, against the county as a municipal corporation. As the judgments were not paid, and as executions issued thereon were returned unsatisfied, the plaintiff undertook, to obtain a mandamus from the superior court of Cumberland county to force the county commissioners to levy a tax sufficient to pay his judgments. A rule to show cause, why the mandamus should not issue, was served on the defendants. They moved to dismiss the proceeding. Motion refused, and a peremptory

mandamus was ordered, commanding the defendants to levy the tax, etc. Defendants appealed. Affirmed.]

DICK, J. The plaintiff has established his debt against the county of Cumberland by judgment duly docketed; and as he cannot enforce payment by an execution, he is entitled to a writ of mandamus against the board of commissioners to compel them to levy a tax for the satisfaction of said judgment. *Gooch v. Gregory*, 65 N. C. 142.

There is no provision in the C. C. P., regulating the proceedings in writs of mandamus, and in such cases "the practice heretofore in use may be adopted, so far as may be necessary, to prevent a failure of justice." C. C. P. § 392. The writ of mandamus is an extraordinary remedy, and can only be used by the express order of a court of superior jurisdiction, and is not governed by the rules prescribed for the prosecution of ordinary legal remedies. *State v. Jones*, 23 N. C. 129. It is not embraced in the rule established in *Tate v. Powe*, 64 N. C. 644, which defines the distinction between civil actions and special proceedings.

This high prerogative writ may be obtained from the superior court, and the applicant must show by petition or affidavit that he has a specific legal right, and has no adequate legal remedy to enforce it. If the case presented by the applicant shows that the rights of the parties are unadjusted, and there may be facts in dispute, the first process is an alternative mandamus, or a rule to show cause, which is in the nature of an alternative mandamus. In all cases the defendant is entitled to reasonable notice to make his defense; and the manner of service and the day of return are matters within the discretion of the court. When the rights and liabilities of the parties are ascertained and determined by the judgment of a court of superior jurisdiction, and the judgment cannot be enforced by an execution, there is no reason why the court may not grant a peremptory mandamus in the first instance, upon a rule to show cause, etc. In our case there are judgments of the court establishing the rights of the plaintiff; those rights cannot be enforced by execution; the motion for a rule to show cause was founded upon affidavits; service of the rule was accepted by the defendants, and only a technical defense was made. We think his honor was right in granting a peremptory mandamus, and the judgment is affirmed.

See "Mandamus," Century Dig. §§ 325, 405; Decennial and Am. Dig. Key No. Series §§ 159, 180.

FRY v. COMMISSIONERS OF MONTGOMERY, 82 N. C. 304. 1880.

Practice. Alternative and Peremptory Mandamus.

[Plaintiff sued the defendants upon a debt of the county, and asked judgment for the debt and that a mandamus issue to compel defendants to levy a tax and apply the amount so collected to the satisfaction of his claim. Defendants did not answer, and judgment by default was entered for the debt and that a mandamus issue as prayed for—such man-

damus to issue at the expiration of six months. The writ was issued and served, but no attention was paid thereto by the defendants. Thereupon notice was issued to the defendants to show cause, if any they had, why a peremptory mandamus should not issue commanding them to levy the tax and satisfy the plaintiff's judgment. The defendants answered that they had levied all the taxes they were empowered to levy, and that the money so raised was entirely consumed in the payment of the current expenses of the county, etc. Thereupon the judge ordered an alias peremptory mandamus to issue commanding the defendants to levy the tax and pay the plaintiff's judgment. From this order the defendants appealed. Affirmed.]

DILLARD, J. It is settled by the decisions of this court that a party may sue to recover a debt from a county, and in the same action may demand a mandamus for its payment. *McLendon v. Comrs. of Anson*, 71 N. C. 38; *Lutterloh v. Comrs. of Cumberland*, 65 N. C. 403. The mandamus issued on the *establishment of a debt by judgment* is usually an *alternative* mandamus and on *insufficient cause shown* for non-compliance therewith the course is to issue a *peremptory* mandamus. *Tucker v. City of Raleigh*, 75 N. C. 272. . . .

Unquestionably a creditor of a county having an action to reduce his debt to judgment, is entitled to some means to enforce payment. He cannot have a *fi. fa.* effectual as on a judgment against a natural person, and in such case the writ of mandamus in the nature of an execution is the only means by which to have any fruit of his recovery. On the rendition of the judgment the creditor generally has an alternative mandamus to which a return is to be made, and if good cause be not shown for failing to do the thing required, then a peremptory mandamus issues. And if a peremptory writ issue and the return thereto do not set forth obedience or a good legal excuse therefor, it is the creditor's right to move for compulsory obedience by process of attachment (for contempt).

In this case the first writ issued was in form peremptory, but the creditor treated it as an alternative writ in the form of his notice calling on defendants to show cause against the issue of a peremptory one, and so was it regarded by his honor; and thus defendants had the same opportunity of defense against the issuing of the last writ, as if the first had been technically an alternative mandamus. This writ, we have said, is in the nature of an execution, by means of which payment is to be had. It is for the creditor's benefit and may be issued or not, as he may ask. The creditor may enforce a return to the writ or not, and may waive or insist on process of attachment for disobedience. The court will not be an actor and *ex mero motu* compel the earliest possible raising of the money in the case of an individual creditor, but will apply the law and award whatsoever process the law allows, if moved so to do by the party to be benefited.

No good reason appears to us why the plaintiff, even if the first writ were a peremptory mandamus, might not waive application for process of attachment on the coming in of the return thereto.

and have an alias peremptory writ, thus giving defendants another opportunity to obey the command of the law.

Upon the question of the sufficiency of the cause shown by defendants in answer to plaintiff's notice for the writ to authorize process of attachment, it is not necessary to express any opinion, as the creditor did not ask for, nor did his honor pass upon his right to have such process. The complaint made of his honor's order for a peremptory mandamus on the motion of the plaintiff, instead of proceeding of his own motion as for contempt by attachment, seems to us most unreasonable. The writ as issued was an indulgence to defendants, and gave further day of obedience, and it seems singular that defendants or any debtor should complain of not being forced to pay a debt as quickly as strict law might permit.

We think there was no error in ordering the alias peremptory mandamus as moved for by plaintiff, and the judgment below is affirmed.

"It is settled that, ordinarily, the only remedy of a judgment creditor of a county is a writ of mandamus to compel its commissioners to levy a tax to pay the debt. *Gooch v. Gregory*, 65 N. C. 142; 2 *Dillon on Mun. Corp.* (3rd ed.) secs. 855, 856; *Pegram v. Comrs.*, 64 N. C. 557; *Lutterloh v. Comrs.*, 65 N. C. 403; *Rogers v. Jenkins*, 98 N. C. 129. Where a plaintiff brings his action to recover the debt, and, in his complaint, demands a mandamus, as well as a judgment for the debt, the courts issue first an alternative mandamus, and if the answer thereto be insufficient, a peremptory mandamus is allowed. *Fry v. Comrs.*, 82 N. C. 304." *Hughes v. Comrs.*, 107 N. C. at p. 605, 12 S. E. 465. See further on this subject, 26 Cyc. 470, 487. For the general practice in North Carolina in mandamus proceedings, see *Pell's Revisal*, secs. 822-824, and notes. "The rule of *res judicata* applies to the judgment for a peremptory writ of mandamus, and all questions raised, or which could have been raised, in opposition to granting the writ, are concluded by the issue of the writ, and cannot be raised again in resisting obedience, or in justification of disobedience." 26 Cyc. 496. See "Mandamus," *Century Dig.* § 231; *Decennial and Am. Dig. Key No. Series* § 111.

SEC. 4. QUO WARRANTO.

REX v. MARSDEN ET ALS., 3 Burrows, 1812, 1817. 1765.

Definition and Nature of the Writ of Quo Warranto. Is It a Civil or Criminal Proceeding?

[Sir Fletcher Norton moved for an information in the nature of a quo warranto against the defendants for holding a public fair or market at Wakefield. Among other things, it was said by Wilmot, J.:]

The present question is "whether the crown's name can be made use of at the instance of a subject, for this particular purpose." The immediate injury is to the crown; the rest is consequential. The old writ of quo warranto is a civil writ, at the suit of the crown; it is not a criminal prosecution. It probably dropped with eires; which is the more likely, because the quo warranto was

to be determined in eire. But be that as it may, this was the true old way of inquiring of usurpations upon the crown, by holding fairs or markets: viz. by writs of quo warranto. Then information in the nature of a quo warranto came into use, and supplied their place.

See "Quo Warranto," Century Dig. § 28; Decennial and Am. Dig. Key No. Series § 26.

AMES v. KANSAS, 111 U. S. 449, 460, 461, 4 Sup. Ct. 437. 1883.

History. Definition. Practice. Criminal or Civil?

[A resolution of the legislature of Kansas directed the attorney general of that state to institute proceedings "in the nature of quo warranto against the Kansas Pacific Railroad Co. for an abandonment, etc., of its powers as a corporation, and to institute similar proceedings against the Union Pacific Railway Co. for usurping, holding, etc., the powers, etc., of the Kansas Pacific Railway Co. in the state of Kansas." Under this resolution the attorney general proceeded against these corporations in the supreme court of Kansas. The railroad companies filed petitions to remove the proceedings from the state court to the circuit court of the United States. Each case was docketed in the circuit court of the United States, but that court remanded the cases to the state court, and the railroad companies carried the cases to the supreme court of the United States by writ of error. Reversed. Only so much of the opinion as discusses the nature of the remedy by quo warranto, is here inserted. If the proceeding was of a *civil* nature at law or in equity, it was removable, in this instance, under the acts of congress, otherwise if the proceedings were *criminal* in their nature.]

WAITE, C. J. . . . The original common-law writ of quo warranto was a civil writ, at the suit of the crown, and not a criminal prosecution. *Rex v. Marsden*, 3 Burr. 1817. It was in the nature of a writ of right by the king against one who usurped or claimed franchises or liberties to inquire by what right he claimed them (Com. Dig. "Quo Warranto," A), and the first process was summons. *Id.* C. 2. This writ, however, fell into disuse in England centuries ago, and its place was supplied by an information in the nature of a quo warranto, which, in its origin, was "a criminal method of prosecution, as well to punish the usurper by a fine for the usurpation of the franchise as to oust him, or seize it for the crown." 3 Bl. Comm. 263. Long before our revolution, however, it lost its character as a criminal proceeding in everything except form, and was "applied to the mere purposes of trying the civil right, seizing the franchise, or ousting the wrongful possessor; the fine being nominal only." 3 Bl. Comm. *supra*; *The King v. Francis*, 2 Term R. 484; *Bac. Abr.* tit. "Information," D; 2 Kyd. Corp. 439. And such, without any special legislation to that effect, has always been its character in many of the states of the Union. *Com v. Browne*, 1 Serg. & R. 382; *People v. Richardson*, 4 Cow. 102, note; *State v. Hardie*, 1 Fred. 48; *State Bank v. State*, 1 Blackf. 272; *State v. Lingo*, 26 Mo. 498. In some of the states, however, it has been treated as criminal in form, and nat-

ters of pleading and jurisdiction governed accordingly. Such is the rule in New York, Wisconsin, New Jersey, Arkansas, and Illinois, but in all these states it is used as a civil remedy only. *Atty. Gen. v. Utica Ins. Co.*, 2 Johns. Ch. 377; *People v. Jones*, 18 Wend. 601; *State v. West Wisconsin Ry. Co.*, 34 Wis. 213; *State v. Ashley*, 1 Ark. 279; *State v. Roe*, 2 Dutch. 217. This being the condition of the old law, it seems to us clear that the effect of legislation like that in Kansas, as to the mode of proceeding in quo warranto cases, is to relieve the old civil remedy of the burden of the criminal form of proceeding with which it had become incumbered, and to restore it to its original position as a civil action for the enforcement of a civil right. The right and the remedy are thus brought into harmony, and parties are not driven to the necessity of using the form of a criminal action to determine a civil right. This has been the construction put upon similar laws in other states. *State v. McDaniel*, 22 Ohio St. 361; *Central & G. R. Co. v. Taylor*, 5 Colo. 42; *Com. Bank of Rodney v. State*, 4 Smedes & M. 490, 504. These suits are therefore of a civil nature.

See "Quo Warranto," Century Dig. § 28; Decennial and Am. Dig. Key No. Series § 26.

REX v. LEIGH, 4 Burrows, 2143, 2145. 1768.

Quo Warranto, or Proceedings in the Nature of Quo Warranto, by the Crown. Burden of Proof.

[Information in the nature of quo warranto. Twelve issues were taken, and five were withdrawn by the prosecutor. The defendant claimed the office in controversy under two titles, i. e., by prescription and by charter, but he relied, in his plea, upon the prescription only, and that was found against him. There was a motion in arrest of judgment on the ground that it appeared upon the whole record that defendant's title to the office was good under the charter, and therefore no judgment could be entered against him, even if the jury had found against him on the title claimed by prescription. The other side insisted that the defendant, having set up title by prescription and having failed to set up the title by the charter, could not now, after verdict, set up any defense growing out of the charter. Motion in arrest of judgment overruled.]

Lord Mansfield asked if they [the defendant's counsel] could cite any case where judgment had been refused to the crown upon an information in nature of quo warranto, where the defendant failed in the title he had set up. And it seemed acknowledged, that there was none. At least, none were mentioned.

Whereupon his lordship proceeded to observe, that in *civil* cases, if the plaintiff have no cause of action, he cannot have judgment. But this manner of proceeding is quite different. *For if the defendant has usurped the franchise without a title, the king must have judgment. The defendant therefore is obliged to show a title; and the king has no need to traverse any thing but the*

title set up. If any one material issue is found for the crown, the crown must have judgment. . . .

Mr. Justice Yates proceeded—*The defendant in quo warranto is called upon to show his title; to show "quo warranto he claims the franchise."* He accordingly shows his title. The crown has only to answer this particular claim. He must at once show a complete title. If he fails in it, or in any chain of it, judgment must be given against him. Here, the defendant has set up a particular title; this title, upon which he grounds his claim to the franchise, is found against him. He cannot now depart from it. Therefore the crown is here entitled to judgment. . . .

See "Quo Warranto," Century Dig. § 63; Decennial and Am. Dig. Key No. Series § 55.

SAUNDERS v. GATLING, 81 N. C. 298. 1879.

To Try Title to a Public Office, Under the Code Practice. Nature of the Common Law Remedy. Quo Warranto and Mandamus Distinguished.

[Action to try the title to a public office. Judgment against the plaintiff, and he appealed. Affirmed. The action was brought by the plaintiff in his own name and not by the attorney general in the name of the people, upon the relation of the plaintiff. The facts appear in the beginning of the opinion.]

ASHE, J. This is an action brought by the plaintiff in his own name against the defendant, to determine the question of title to the office of clerk of the superior court for the county of Hertford; and the court is asked to oust the defendant and have the plaintiff inducted, and give him a judgment for the fees and emoluments of the office.

We think the plaintiff has mistaken his remedy, and it is not competent for the court to give him the relief he seeks by this action. Questions as to the title and possession of offices at common law were determined by the writ of quo warranto, which was the appropriate remedy in such cases. It was originally a high prerogative writ issued out of chancery, and was used by the crown of Great Britain unjustly and oppressively upon its subjects, until it was modified and stripped of many of its harsher features by what were called the statutes quo warranto; and then, after the justices in eyre were displaced by the judges of the superior courts, it fell into disuse, and the information in nature of a writ of quo warranto obtained in its stead, and has ever since been the remedy in England and in this country by which the title to an office can be established by judicial determination. It is the only appropriate and efficacious remedy, sanctioned by an overwhelming current of authority both in this state and in England. High on Ex Leg Rem sees 49, 53, 77; Ex parte Daughtry, 28 N. C. 155; State v. Hardie, 23 N. C. 42. But the original writ of quo warranto, as well as proceedings by information in the nature of quo warranto, has been abolished, C. C. P. s. 362; but it is therein

provided that the remedies heretofore obtainable in those forms may be obtained by civil actions under the provisions of chapter 2, tit. 15.

What are these provisions? Section 366 provides "that an action may be brought by the attorney general in the name of the people of the state upon his own information, or upon the complaint of any private party against parties offending in the following cases: 1. When any person shall usurp, intrude into or unlawfully hold or exercise any public office, civil or military, or any franchise within this state, or any office in a corporation created by the authority of this state; or, 2. When any public officer, civil or military, shall have done or suffered an act which, by the provisions of law, shall make a forfeiture of his office; or 3. When any association or number of persons shall act within this state as a corporation without being duly incorporated." By section 368, amended by the act of 1874-75, ch. 76, it is provided that when an action shall be brought by the attorney general on the relation or information of a person having an interest in the question, the name of such person shall be joined with the state as plaintiff, and in every such case the attorney general shall require, as a condition for bringing such action, that satisfactory security shall be given to indemnify the state against costs, etc. And section 369 provides how, at the instance of the attorney general, the defendant may be arrested and held to bail.

So that, although the proceeding by information in nature of the writ of quo warranto has been abolished, it will be seen from these sections of the Code that the remedy to be pursued, whenever the controversy is as to the validity of an election or the right to hold a public office, is by an action in the nature of a writ of quo warranto. *It is not merely an action to redress the grievance of a private person who claims a right to the office, but the public has an interest in the question which the legislature by these provisions of the Code seems to have considered paramount to that of the private rights of the person aggrieved:* Hence, the requirement that such action must be brought by the attorney general in the name of the people of the state, and upon his own information without the relation of a private person when the person aggrieved does not see proper to assert his right; and when the claimant does seek redress, he must be joined in the action, but still it must be brought by the attorney general in the name of the people. Such is the construction which has been given to these sections of the Code by numerous decisions of this court, *Patterson v. Hubbs*, 65 N. C. 119; *Tuck v. Hunt*, 73 N. C. 24; *People v. Hilliard*, 72 N. C. 169; *People v. McKee*, 68 N. C. 429; *Brown v. Turner*, 70 N. C. 93. One of the headnotes to this last case is calculated to mislead. It reads, "Any person having a right to an office can, in his own name, bring an action for the purpose of testing his right as against one claiming adversely;" but in looking into the case it will be found that the court did not entertain any such proposition, but just the reverse. That was an

application for a *mandamus*, where the *party aggrieved may bring the action in his own name*, and the court held that *where the right or title to an office is put in issue, mandamus is not the proper remedy*, but the appropriate remedy is by an *action in the nature of a quo warranto*; and Mr. Justice Bynum, who delivered the opinion in the case, says that "no stress is laid upon the fact that the action is not on the relation of the attorney general, for we are of opinion that under the liberal provisions of the Code of Civil Procedure, any party having a right can sue in his own name in all cases, except when otherwise expressly provided. In modern practice, *mandamus* is not a prerogative writ, but an ordinary process in cases to which it is applicable, and every one is entitled to it when it is the appropriate process for asserting the right claimed." In that case, the action being an application for *mandamus*, the action was properly brought, so far as the parties thereto were concerned, by the plaintiff in his own name; but in our case it is otherwise expressly provided—it falls within the exception mentioned by Mr. Justice Bynum, and the provisions of the Code in that respect should have been followed.

In the view we have taken of this case, we deem it unnecessary to consider it upon its merits, but dismiss the action and leave the plaintiff to resort to his appropriate remedy. The judgment of the court below is affirmed.

See notes to *La Grange v. State Treasurer*, 24 Mich. 468, inserted in sec. 3, ante. See "*Quo Warranto*," Century Dig. § 13; Decennial and Am. Dig. Key No. Series § 11.

HANKINS v. NEWELL, 75 N. J. L. 26, 66 Atl. 929. 1907.

Quo Warranto for Usurping Office in a Private Corporation.

[Proceeding in the name of the state of New Jersey upon the relation of Hankins et al. against the defendants who held offices in a cemetery association which *was a private corporation*. The proceeding was a petition for a writ of *quo warranto*. Writ granted.]

GARRISON, J. A petition for a writ of *quo warranto* was filed and a rule thereon made requiring the respondents to show cause by what authority they claimed to have, use, and enjoy the office and privileges of trustees of the Bordentown Cemetery Association: the petitioners claiming to have been elected to such office of trustees and that the defendants have usurped the said office.

The respondents contend in limine that the writ of *quo warranto* cannot go to inquire into an alleged usurpation of an office in a private corporation.

Such is the English rule. Shortt on Quo War. p. 129.

The American rule differs in this respect from the English. Mr. High, in his work on *Quo Warranto*, says: "The propriety of an information in the nature of a *quo warranto* as a remedy for an unlawful usurpation of an office in a merely private corporation

Remedies—51.

was formerly involved in some doubt, but the question may now be regarded as settled in this country. This species of remedy being generally employed in England in cases of public or municipal corporations, the English precedents are inapplicable to this particular question and its solution must be referred to the more general principles underlying the jurisdiction in question. Tested by these principles, an intrusion into an office of a merely private corporation may in this country be corrected by information with the same propriety as in cases of public or municipal corporations, since there is in both cases an unfounded claim to the exercise of a corporate franchise amounting to a usurpation of the privilege granted by the state." High on Extraord. Leg. Rem. § 653.

As early as the year 1827 the writ of quo warranto was so used in this court. *State v. Crowell*, 9 N. J. Law, 390.

The provisions of the forty-second section of the corporation act for a summary review of corporate elections have no bearing upon the present question for the reason that such provisions when taken in connection with the other requirements of the act are confined to elections in corporations having stock. In re Election of Cedar Grove Cemetery Company, 61 N. J. Law, 422, 39 Atl. 1024.

The principal case holds directly contrary to the ruling in *Eliason v. Coleman*, 86 N. C. 235. See Pell's Revisal, sec. 827 et seq. and note that the statute construed in 86 N. C. 235, is the same as the present statute as to quo warranto for offices held in a private corporation. For *mandamus* to induct one into office in a private association or corporation, see *Rex v. Barker*, ante, section 3. See "Quo Warranto," Century Dig. § 21; Decennial and Am. Dig. Key No. Series § 20.

THE STATE v. THE PATERSON AND HAMBURG TURNPIKE CO.,
21 N. J. L. 9. 1847.

Quo Warranto Against Usurpers of Corporate Franchises. Private Corporations.

[Application by private individuals for leave to file an information in the nature of a quo warranto in the name of the attorney general, upon the relation of Sydney Ford et als., against the defendant corporation, for an alleged violation of its charter "and for the purpose of seizing its privileges into the hands of the state." The defendant was a turnpike company, and the casus belli was its inefficiency in constructing and maintaining its turnpike. Application denied.]

CARPENTER, J. This is a private application in behalf of relators, and not a proceeding instituted by the attorney general. Private individuals ask the permission of the court to use the name of the state and the process of the law. If the attorney general on behalf of the state was about to institute this proceeding, he need not ask the permission of this court for that purpose. The institution of proceedings of this character at the instance of relators, under the leave of the court, is authorized by statute, and only by statute. No instance, said Lord Mansfield, in *R. v. Mars-*

den. 1 W. Bl. 580, has been produced of information in nature of quo warranto before the statute of 9 Anne, unless filed by the attorney general. The courts at common law and in cases not within the statute, have no authority to direct such information and leave the matter to the discretion of the attorney general. *Ibbotson's Case*, cas. temp. Hardw. 261; *Sir Wm. Lowther's Case*, 2 Ld. Raym. 1409.

Our act (Rev. L. 206) is copied substantially from the statute of 9 Anne, c. 20. The English statute provides for the case when any persons shall usurp etc., any corporate office or franchise; the language of our statute is more extensive, and applies to the intrusion into, or unlawful holding of any office or franchise within this state. In regard to the present question, we apprehend the same construction applies to both statutes. An information for the purpose of dissolving a corporation, or seizing its franchises, cannot be prosecuted in the name of the state, at the relation of private persons, though leave be asked of the court. Such proceeding can be instituted only by the attorney general on the part of the state, either merely *ex officio*, or under special direction from the proper authority. The statute of 9 Anne extends only to individuals usurping offices or franchises in a corporation, and not to the corporation as a body. *Com. v. Union Ins. Co.*, 5 Mass. 230; *Com. v. Fowler*, 10 Mass. 295; *R. v. Carmarthen*, 2 Bur. 869, 1 W. Bl. 187; *R. v. Ogden*, 10 B. & C. 230; *R. v. White*, 5 Ad. & El. 613; *Bac. Abr. tit. "Information," D.* This distinction is well settled, and is a safe and proper rule. The state, said *C. J. Parsons* in a case cited, may waive any breaches of any condition express or implied, on which the corporation was created; and the court cannot (or ought not) to give judgment for the seizing of the franchise of any corporation unless the state itself be a party in interest in the suit, and thus assents to the judgment.

Who can bring quo warranto against private corporation? 1 L. R. A. (N. S.) 826; for when such proceeding is barred by laches, see 14 *Id.* 336, and note. See *Pell's Revisal*, sec. 1198, and notes, for the practice in North Carolina in such cases. See "*Quo Warranto*," *Century Dig.* § 41; *Decennial and Am. Dig. Key No. Series* § 34.

CAIN v. BROWN, 111 Mich. 657, 658, 661, 7 N. W. 337 1897.

Quo Warranto to Dissolve a Municipal Corporation.

[Attempt to dissolve a municipal corporation by quo warranto. The nature of the proceeding is set out in the beginning of the opinion. The lower court gave judgment against the defendant. Reversed.]

The corporation attacked was a village duly chartered by the legislature. The plaintiff's ground of attack was an alleged repeal of the charter in 1891 by popular vote. An act of the legislature permitted the inhabitants of the village to vacate its charter by popular vote. There was a vote taken but the respondent, Brown, denied that the vote was legally taken, because of irregularities set out in his answer. The plaintiff failed to show a compliance with the statute authorizing the dissolution by popular vote.]

MONTGOMERY, J. This proceeding originated in the circuit court of Lapeer county, where an application was made by the relators for a writ of mandamus, directed to the respondent, requiring him to file an information in the nature of a quo warranto against David Donaldson and other officers of the village of Attica, in Lapeer county. The writ of mandamus was directed to issue by the circuit judge, and that order is brought before us for review on certiorari. . . . In Dill. Mun. Corp. § 112, the rule is laid down that: "Unless otherwise specially provided by the legislature, the nature and constitution of our municipal corporations, as well as the purposes they are created to subserve, are such that they can only be dissolved by the consent of the legislature. They may become inert or dormant, or their functions may be suspended, for want of officers or of inhabitants; but dissolved, when created by an act of the legislature, and once in existence, they cannot be, by reason of any default or abuse of the powers conferred, either on the part of the officers or inhabitants of the incorporated place. As they can exist only by legislative sanction, so they cannot be dissolved or cease to exist except by legislative consent or pursuant to legislative provision." This, we think, is a correct statement of the law upon the subject, and it follows from this that the relators, before invoking the aid of the court, should be prepared to show that the village of Attica was dissolved in 1891, by action taken, according with the provisions of the statute. . . .

See 28 Cyc. 252; 1 L. R. A. (N. S.) 826, 21 Ib. 685, and notes. For the history of the celebrated quo warranto proceedings against the city of London during the reign of Charles 2, see Camp. Lives C. J's, vol. 2, pp. 321-326. For the remedy by quo warranto in North Carolina, as regulated by statute, see Pell's Revisal, secs. 826-845, and notes. See "Quo Warranto," Century Dig. §§ 9, 63; Decennial and Am. Dig. Key No. Series §§ 8, 55.

SEC. 5. INJUNCTION.

THE ROGERS LOCOMOTIVE AND MACHINE WORKS v. THE ERIE R.WY. CO., 20 N. J. Eq. 379. 1869.

Nature of the Remedy by Injunction. In What Cases Injunction Will Issue. Different Kinds of Injunction. Mandatory Injunction.

[Motion in the court of chancery for a preliminary injunction. Cause heard upon the bill and an affidavit on behalf of the defendants, replying to the allegation in the bill that the defendant corporation was insolvent. The preliminary injunction was ordered in so far as to restrain defendants from agreeing together or doing anything else to prevent or hinder the transportation of plaintiff's locomotives; but the court *refused to grant a preliminary mandatory injunction* requiring defendants to restore certain chattels to the plaintiff and to transport plaintiff's locomotives at the rates prescribed by law.

The facts disclosed by the bill were: That the Erie Railway Co. was a common carrier; that it refused to transport plaintiff's locomotives in flagrant violation of law; that such refusal was the outcome of a corrupt combination between the directors of the defendant corporation and

others; that the plaintiff had two trucks used in handling its locomotives, which trucks were put into the possession of the defendant railway company for the purpose of transporting plaintiff's locomotives, and that, being so in possession, the defendant railway company carried the trucks into another state and refused to return them to plaintiff; that such conduct was also the outcome of a fraudulent combination among the defendants with intent to prevent the transportation of plaintiff's locomotives; that new trucks could not be obtained by plaintiff "under several months." There was a charge, also, that the defendant railway company was insolvent, but that charge was rebutted—the court finds as a fact that the company was not insolvent nor was it likely to become so.]

ZABRISKIE, Chancellor. . . . Although the injury is proved, and the subject matter is such that a court of equity will not refuse relief on the ground that there is adequate relief at law, the question remains, whether the injunction here applied for can be granted, or any part of it. There are injuries which this court cannot redress, although there may be no satisfactory remedy at law, and those which this court can redress, for which no preliminary injunction can issue.

The two chief objects for which the injunction is asked are to compel the railway company to return to the complainant its trucks, and to compel it to transport the locomotives of the complainant from Paterson to Long Dock at the legal rates of freight. These are to compel the company to act, not to refrain from acting. And the act commanded is the whole duty of the company, and its performance is the whole right of the complainant. It is not the case of a prohibition of keeping up a structure or maintaining some material object, the erection and continuance of which is the act that deprives the complainant of his right, and the destruction or removal of which would restore the enjoyment of it.

It is contended by the defendants that a mandatory injunction, or one which commands the defendant to do some positive act, will not be ordered, except upon final hearing, and then only to execute the decree or judgment of the court, and never on a preliminary or interlocutory motion. Or that, if it ever does so issue, it is only in cases of obstruction to easements or rights of like nature, in which a structure erected and kept as the means of preventing such enjoyment will be ordered to be removed, as part of the means of restraining the defendant from interrupting the enjoyment of the right. Although there is some conflict in the authorities and decisions, I am of opinion, after examining into them, that this position, with the limitation, is the established doctrine of the courts of equity, and that it is a proper and discreet limitation of the use of the preliminary injunction, as well as sustained by the weight of authority.

Justice STORY, in 2 Eq. Jur. sec. 861, says: "A writ of injunction may be described to be a judicial process, whereby a party is required to do a particular thing, or to refrain from doing a particular thing, according to the exigency of the writ. The most

common form of injunction is that which operates as a restraint upon the party in the exercise of his real or supposed rights, and is sometimes called the remedial writ of injunction. The other form, commanding an act to be done, is sometimes called the judicial writ, because it issues after a decree, and is in the nature of an execution to enforce the same." Mr. Eden begins his treatise on injunctions by saying "An injunction is a writ issuing by the order and under the seal of a court of equity, and is of two kinds. The one is the *writ remedial*, for, in the endless variety of cases in which a plaintiff is entitled to equitable relief, if that relief consists in restraining the commission or continuance of some act of the defendant, a court of equity administers it by means of the writ of injunction. The other species of injunction is called the *judicial writ*, and issues subsequent to a decree, and is properly described as being in the nature of an execution." In Drewry on Injunctions, p. 260, it is laid down: "It seems settled that equity has not jurisdiction to compel, on motion, the performance of any substantive act." In 3 Dan. Chan. Prac. 1767, it is said: "It is to be observed that the court will not, by injunction granted upon interlocutory application, direct the defendant to perform an act, but might, upon motion, order the defendant to pull down a building which was clearly a nuisance to the plaintiff."

Lord Hardwicke, in an anonymous case in 1 Ves. Jun. 140, restrained the further digging of a ditch, but refused, on motion before answer, to order the part dug to be filled up. Chancellor Vroom, in the *Atty. Gen. v. The New Jersey Railroad Co.*, 2 Green's Ch. 141, says: "The injunction is a preventive remedy. It interposes between the complainant and the injury he fears or seeks to avoid. If the injury be already done, the writ can have no operation, for it cannot be applied correctively, so as to remove it." In that case, the injury done was driving piles for a bridge, so as to obstruct navigation; a mandatory injunction to remove them would have remedied the whole evil. In *Hooper v. Broderick*, 11 Sim. 47, a preliminary injunction to restrain a tenant from discontinuing to keep an inn was dissolved, on the ground that it was mandatory—the same as if he was commanded to keep an inn. In *Blakeman v. Glamorganshire Canal Nav. Co.*, 1 Myl. & Keene, 154, Lord Brougham, after a review of the cases (p. 183) and quoting with approbation what Lord Hardwicke said in *Ryder v. Bentham*, that "he had never known an order to pull down, on motion, and but rarely by decree," refused so much of the injunction prayed for as directed the defendant, Powell, to fill up the collateral pond. The cases of *The East India Co. v. Vincent*, 2 Atk. 82; *Spencer v. London and Birmingham Railway Co.*, 8 Sim. 193; and of *Durell v. Pritchard*, 1 Ch. App. (E. L. R.) 244, are to the same effect. And in the last case, Lord Romilly, M. R., held that the court, upon final hearing, could not issue a mandatory injunction, directing a wall to be taken down, yet the Lords Justices, on appeal, held that it had the power, but that in

the case before them it should not be exercised, and dismissed the appeal.

There are cases in which mandatory injunctions have been issued on motion, but they are all, or nearly all, cases in which some erection placed and maintained by the defendant to effect the injury complained of was ordered to be removed, or its maintenance forbidden, on the ground that the defendant effected the act he was restrained from doing, by continuing such erection. In *Robinson v. Lord Byron*, 1 Bro. C. C. 588, which is referred to as the leading case for mandatory injunction, Lord Thurlow ordered an injunction to restrain defendant from using his dams and other erections, so as to prevent the water from flowing to the complainant's mill in such quantities as it had ordinarily done before April 4th, 1785. The effect of this may have been to compel the removal of the part erected after 1785. But as the case states the injury complained of to be that Lord Byron so used his dam and gates as to let the water flow irregularly, to the complainant's injury, I do not see in the report any direction, express or implied, to take down anything, or to do any act whatever. In *Lane v. Newdigate*, 10 Ves. 192, the object of the injunction was to compel the restoring of a stop-gate which was wrongfully removed. Lord Eldon would not order it to be restored, but restrained the preventing the use of the water by complainant by the removal of a stop-gate, which was equivalent to an order to restore it, and was so intended. In *Ranken v. Huskisson*, 4 Sim. 13, the court restrained the defendant from permitting the erection to remain, this was equivalent to an order to remove it. But it is like the others; simply removing that by which the defendant continued the nuisance to be restrained. In *Mexborough v. Bower*, 1 Beav. 127, Lord Langdale ordered an injunction to restrain permitting the communication complained of (by which complainant's mine was flooded) to remain open. The injunction was to prevent the flowing of the mine, by restraining or removing the means by which the defendant continued to do it.

In the *North of England Railway Co. v. The Clarence Railway Co.*, 1 Coll. 507, the injunction prayed for was against maintaining a wall, and after the rights of the parties had been referred to, and settled in the court of the Exchequer, V. C. Bruce hesitated to grant the injunction, although he held, p. 521, that mandatory injunctions might be granted; yet he referred the case to Lord Chancellor Lyndhurst, who, it is stated, granted the injunction in nearly the terms of the prayer; but whether it included this mandatory part does not distinctly appear. The case established the right of the complainant to build a bridge over the railway of the defendant, and to rest the supports of the scaffolding on the soil; and the mandatory prayer was that defendants should remove a wall placed on their grounds to hinder it. In *Greatrex v. Greatrex*, 1 De Gex & Sm. 692, the injunction was against preventing the plaintiffs from having access to the books of the firm, and

against removing them from, or keeping them at any other place than the place of business of the partnership, as the defendant had removed the books; this was equivalent to an order to restore them, yet it did not command any act to be done. In *Heraey v. Smith*, 1 Kay & J. 389, the injury enjoined was covering with tiles the chimneys from the butler's pantry of the complainant; Lord Hatherly (the present Lord Chancellor, then Vice Chancellor, Sir W. P. Wood), on the authority of *Robinson v. Lord Byron*, granted an injunction, the effect of which was, and was intended to be, to compel the defendant to remove the tiles; but he declined to adopt the mandatory form, but restrained the defendant from doing any act to prevent the smoke from arising. The substance of the judgment is grounded on the power of the court to remove an erection made by the defendant to effect the injury to be redressed, when that erection is the means by which the defendant continues to inflict the injuries from which the court intended to restrain; and the form of it is an acknowledgment of the general principle that an interlocutory injunction should not command the doing of any positive act.

A number of authorities and cases were cited on the argument to show that courts of equity will, in certain cases, decree the restitution of particular chattels. But these are all cases where it was so ordered upon *final* hearing. There is no case of any interlocutory injunction being granted or even applied for, for such purpose. It would be a simple and easy substitute for the action of replevin. And there is nothing in this case to warrant such order, even upon final decree. The value of these trucks can be fully recovered at law, and as to the use of them in the meantime, new ones could be built sooner than a suit in equity could be brought to final hearing.

I feel, therefore, constrained to refuse the injunction so far as these mandatory prayers are concerned; as to so much of the prayer as asks to restrain James Fisk, Jun., and the other defendants named in it, from entering into any agreement, or doing anything to prevent or hinder the Erie Railway Company transporting the complainant's locomotives, I think the injunction ought to be granted. They are conspiring with the Erie Railway Company to injure the complainants in a way for which the redress at law is not adequate, and therefore should be enjoined from doing any acts to that end. I do not intend to intimate any opinion upon the question whether this court has power on the final hearing, to give the complainants the relief they seek, by compelling the Erie Railway Company to transport their locomotives at the established fares.

"It has been said in some American decisions that a mandatory interlocutory injunction will never be granted. This doctrine is not only opposed to the overwhelming weight of authority, but is contrary to the principle which regulates the administration of preventive relief, and is manifestly absurd." 4 Pom. Eq. Juris. § 1359, note 1; and see also 22 Cvc. 742, 743. See "Injunction," Century Dig. § 302; Decennial and Am. Dig. Key No. Series § 132.

HART v. LEONARD, 42 N. J. Eq. 416, 7 Atl. 865. 1886.

General Principles and Rules Governing Injunctions. Nine Cases in Which Injunctions Issue.

[Bill in equity to restrain the obstruction of a private way. The vice chancellor advised that a perpetual injunction be decreed, and the defendant appealed. Reversed. The facts appear in the beginning of the opinion.]

DIXON, J. The bill in this case avers that the complainant is the owner of a wood and pasture lot containing 3.37 acres of land, and that he and his predecessors in title have, by adverse user for over twenty years, acquired a right of way across the land of the defendant from a certain public road to said lot; that the defendant now obstructs said way; and the bill therefore prays a decree that the complainant is entitled to the way, and for a mandatory injunction commanding the defendant to remove the obstruction, and allow the complainant to pass through at his pleasure. The answer denies the complainant's right.

The complainant's testimony tends to show user for over twenty years. The defendant's testimony tends to show that the user was not adverse, but was by his express permission, as an act of neighborly accommodation. The vice-chancellor advised a decree and injunction according to the prayer of the bill. Hence this appeal.

From the foregoing statement it appears that the claim set up is to a purely legal interest in land, resting upon a purely legal basis. Before attempting to determine the validity of the claim, it is proper to consider whether the question presented comes within the cognizance of a court of equity. No doubt many cases arise in which courts of equity may, by decree and injunction, protect and enforce legal rights in real estate. So far as they are exemplified in our chancery practice, these cases can, I think, be classified under the following heads:

(1) Cases where the legal right has been *established* in a suit at law, and the bill in equity is filed to ascertain the extent of the right, and enforce or protect it in a manner not attainable by legal procedure. Quackenbush v. Van Riper, 3 N. J. Eq. 350.

(2) Cases where the legal right is *admitted*, and the object of the bill is the same as in the class just mentioned. Carlisle v. Cooper, 21 N. J. Eq. 576; Shivers v. Shivers, 32 N. J. Eq. 578, 35 N. J. Eq. 562; Johnson v. Hyde, 33 N. J. Eq. 632.

(3) Cases where the legal right, *though formally disputed*, is *yet clear*, on facts which are not denied, and legal rules which are well settled, and the object of the bill is as before stated. Shreve v. Voorhees, 3 N. J. Eq. 25; Hulme v. Shreve, 4 N. J. Eq. 116; Morris C. & B. Co. v. Establishing Society, etc., 5 N. J. Eq. 203; Earl v. De Hart, 12 N. J. Eq. 281; Dodd v. Flavell, 17 N. J. Eq. 255; Johnson v. Jaqui, 25 N. J. Eq. 410, 27 N. J. Eq. 526; Demarest v. Hardham, 34 N. J. Eq. 469; Higgins v. Flemington W. Co., 36 N. J. Eq. 538.

(4) Cases where one attempts to appropriate the land of another, under color of statutory authority, without complying with the legal conditions precedent. *Ross v. Elizabeth, T. & S. R. Co.*, 2 N. J. Eq. 422; *Browning v. Camden & W., etc., Co.*, 4 N. J. Eq. 47; *Higbee v. Camden & A. R. Co.*, 19 N. J. Eq. 276; *Folley v. Passaic*, 26 N. J. Eq. 216; *Morris C. & B. Co. v. Jersey City*, Id. 294. [See ch. 3, § 15, ante.]

(5) Cases where the object of the bill is to stay waste. *Capner v. Flemington Min. Co.*, 3 N. J. Eq. 467; *Bank of Chenango v. Cox*, 26 N. J. Eq. 452. [See ch. 3, § 9, ante.]

(6) Cases where the object of the bill is to prevent an injury which will be destructive of the inheritance, or which equity deems irreparable; i. e., one for which the damages that may be recovered according to legal rules do not afford adequate compensation. *Morris C. & B. Co. v. Jersey City*, 11 N. J. Eq. 13; *Franklinite Co. v. Zinc Co.*, 13 N. J. Eq. 215; *Zinc Co. v. Franklinite Co.*, Id. 322; *Zinc Co. v. Franklinite Co.*, 15 N. J. Eq. 418; *Southmayd v. McLaughlin*, 24 N. J. Eq. 181; *Manko v. Chambersburgh*, 25 N. J. Eq. 168; *Johnson v. Hyde*, Id. 454; *Thomas Iron Co. v. Allentown Min. Co.*, 28 N. J. Eq. 77; *Fulton v. Graeen*, 36 N. J. Eq. 246; *Lord v. Carbon I. M. Co.*, 38 N. J. Eq. 452. [See ch. 3, § 14, ante.]

(7) Cases where the object of the bill is to protect one's dwelling from injuries which render its occupancy insecure or uncomfortable. *Brakely v. Sharp*, 10 N. J. Eq. 206; *Holsman v. Boiling Spring B. Co.*, 14 N. J. Eq. 335; *Ross v. Butler*, 19 N. J. Eq. 294; *De Veney v. Gallagher*, 20 N. J. Eq. 33; *Cleveland v. Citizens' Gas-light Co.*, Id. 201; *Babcock v. New Jersey Stockyard Co.*, Id. 296; *Attorney General v. Steward*, Id. 415, 21 N. J. Eq. 340; *Meigs v. Lister*, 23 N. J. Eq. 199; *De Luze v. Bradbury*, 25 N. J. Eq. 79; *Kana v. Bolton*, 36 N. J. Eq. 21; *Williams v. Osborne*, 40 N. J. Eq. 235; *Pennsylvania R. Co. v. Angel*, 41 N. J. Eq. 316, 7 Atl. Rep. 432; *Lenning v. Ocean City Ass'n*, 41 N. J. Eq. 606, 7 Atl. Rep. 491. [See ch. 3, § 11, ante.]

(8) Cases where the right to be protected or enforced grows out of the expressed or implied terms of a contract, so that the court can entertain jurisdiction by virtue of its power to compel specific performance. *Robeson v. Pittenger*, 2 N. J. Eq. 57; *Armstrong v. Potts*, 23 N. J. Eq. 92; *Jaqui v. Johnson*, 26 N. J. Eq. 321; *Shimer v. Morris C. & B. Co.*, 27 N. J. Eq. 364; *Iszard v. Mays' Landing W. P. Co.*, 31 N. J. Eq. 511; *Pope v. Bell*, 35 N. J. Eq. 1; *Sutphen v. Therkelson*, 38 N. J. Eq. 318; *Gawtry v. Leland*, 40 N. J. Eq. 323; *Lennig v. Ocean City Ass'n*, 41 N. J. Eq. 606, 7 Atl. Rep. 491. [See ch. 8, § 9, ante.]

(9) Cases where the object of the bill is to prevent a multiplicity of suits, otherwise rendered necessary by the fact that many persons are interested in the controversy. *Britton's Adm'rs v. Hill*, 27 N. J. Eq. 389. [See § 6, post.]

Outside of these classes there is no jurisdiction in a court of equity over the mere invasion of mere private legal rights in land. The appropriate remedy is by suit at law.

The case in hand does not come within any of these classes. It bears no trace of resemblance to any except those of the third or those of the sixth class. But the third class does not include it, because the evidence shows a substantial dispute over the facts of adverse user, which the defendant is entitled to have settled by the verdict of a jury; and the sixth class does not cover it, because the temporary obstruction of a way to a small wood and pasture lot can be fully paid for by the damages recoverable according to legal rules.

The decree below should be reversed, and the bill should be dismissed.

See "Injunction," Century Dig. § 77; Decennial and Am. Dig. Key No. Series § 35.

JARMAN v. SAUNDERS, 64 N. C. 367, 369-371. 1870.

Common Injunction and Special Injunction Distinguished. How It Is Under the Code Practice.

[Motion to vacate an injunction. Motion allowed. Appeal by plaintiff. Reversed. The complaint alleged that plaintiff was sued by the defendant on a note; that plaintiff had a good defense but failed to plead it because the defendant assured him that he would not take judgment; that defendant did take judgment against the plaintiff in violation of such agreement; that the defendant had sued out execution against the plaintiff. The relief asked was, inter alia, a perpetual injunction against proceeding on the execution. The answer positively denied the alleged agreement.]

RODMAN, J. . . . How is this equity of the plaintiff affected by the answer which positively denies the agreement upon which it is founded? The distinction between what used to be called a common injunction, and a special injunction, is stated in Heilig v. Stokes, 63 N. C. 612, on the authority of the cases there referred to. The former is said to be when a defendant sets up an equitable defense to the action at law, which by the constitution of the law court, he could not then avail himself of. If an injunction was granted on a bill setting up such an equity, upon the coming in of an answer denying the facts constituting the equity, the injunction was dissolved of course, unless some special reason was alleged for a continuance of it. A special injunction was founded, not on an equity existing in the controversy at law between the parties, but on something collateral to it; as, for example, the necessity of protecting the property in dispute, pending the litigation. The injunction to which the plaintiff in this case is entitled, is evidently of the latter sort, and will not be dissolved merely on the defendant's denial, if, in the opinion of the court, it appears reasonably necessary to protect the plaintiff's right until the controversy between him and the defendant can be determined. Here it seems to us that there are matters in controversy between the parties, and that the present plaintiff is entitled to make his defense to the original action, and consequently to have the pres-

ent execution restrained. It may be said that under the definition of a common injunction above given, it is difficult to conceive how, now when legal and equitable demands are tried in the same court and in the same form of action, and when every equitable defense can be made in the original action, a case for common injunction can ever arise.

There is another observation which it may be well enough to make. Under the former system it was settled doctrine that a court of law could not set aside its regular judgment at a subsequent term. If the enforcement of the judgment became inequitable for any reason which a court of equity could take notice of, it would be enjoined. Now that the same court exercises the jurisdiction both of a court of law and of a court of equity, and that without any difference of form founded on the difference between law and equity, it would seem to follow that the rule alluded to no longer exists, to the extent of prohibiting a superior court from setting aside its judgment at a subsequent term, for any sufficient cause which could have been, and, by accident or fraud, was not, pleaded in bar of the judgment, and that the proper way to apply for such relief is by motion, supported by affidavits, in the original cause. Such we consider this to be. A motion may be put in the form of a petition; indeed, such is the proper form. 3 Dan. Ch. Pr. 1787-1801. In fact, as is there stated, the difference is in form only, and not in substance or effect; the petition being in writing, and the motion not. 3 Dan. Ch. Pr. 1781. Of course we have no opinion on the merits of the original controversy between the parties. The order below is reversed. . . .

[The court ordered the judgment in controversy to be set aside upon plaintiff's giving bond with sufficient sureties to abide and perform the judgment, should another be rendered. Upon giving such bond, the plaintiff was to be allowed to defend the action. The defendant in this action was enjoined from proceeding further under his execution, until allowed so to do by the superior court.]

The distinction between common and special injunctions was abolished in England by 15 and 16 Vict. c. 86, sec. 58. See Dan. Ch. Pr. p. 164, note 1. Injunctions are further classified as provisional (also called preliminary or interlocutory) and perpetual (also called final). Foster's Fed. Pr. § 226. For further explanation of the distinction between common and special injunctions, see *Ib.* § 227. See "Judgment," Century Dig. § 825; Decennial and Am. Dig. Key No. Series § 436.

ATTORNEY GENERAL ET AL. v. CITY OF PATERSON, 9 N. J. Eq. 624, 625, 628. 1854.

Interlocutory or Preliminary Injunctions.

[The attorney general, on the relation of the board of freeholders of Bergen, the inhabitants of Saddle River township, J. S. Van Riper, and others, filed a bill against the city of Paterson, seeking to enjoin the city officials from erecting a poor-house and a work-house upon a certain parcel of land, upon the ground that a nuisance would thereby be cre-

ated, etc. The answer admitted the intent to use the land for the purpose alleged, but denied that a nuisance would be thereby created, and claimed a charter right to proceed with the acts complained of. The chancellor refused to order an injunction, but gave leave to the plaintiffs to renew their application after an indictment for nuisance, pending against defendants, was tried, or at the final hearing of this cause. Affirmed.]

WILLIAMSON, Chancellor. I do not feel myself at liberty to grant a preliminary injunction in this case. There are important principles of law, as well as important facts, involved in the issue. The object of a preliminary injunction is to prevent some threatening, irreparable mischief, which should be averted until opportunity is afforded for a full and deliberate investigation of the case. The defendants have purchased the farm, and removed the paupers, and have nearly completed an expensive building on the premises. To interrupt the progress of the defendants in completing their building, can be of no advantage to the complainants; but such interference might greatly injure the defendants, in a pecuniary point of view, by interfering with their contract for buildings, and in other respects. . . .

GREEN, C. J. . . . Several important questions of law and fact are involved in the controversy, and have been ably discussed upon the argument, viz.: Whether a city or town may establish a poor-house without its own territorial limits; whether a poor-house, established in a populous neighborhood, be in itself a nuisance; whether this particular poor-house is so conducted as to be a nuisance.

The chancellor decides neither of these questions. He simply declines to interfere by a temporary injunction. He intimates, indeed, that the questions of law and of fact should be settled in a court of law, before the allowance of an injunction. But his *decision* is simply that he will not grant a temporary injunction before the final hearing of the cause. The granting or refusal of the temporary injunction, during the pendency of the cause, was a matter of discretion with the chancellor. It concluded no right of the parties, or of either of them. The order is in no sense a final order. Costs are not adjudged. It is not an order from which an appeal will properly lie. *Garr v. Hill*, 1 Halst. Ch. 639; *Trustees of Huntington v. Nicoll*, 3 John. 566. Clearly no irremediable injury can result from a denial of the injunction, nor can the subject matter in controversy be withdrawn from the jurisdiction of the court. . . . Appeal dismissed.

See "Injunction," Century Dig. §§ 307-309; Decennial and Am. Dig. Key No. Series § 127.

COBB v. CLEGG, 127 N. C. 152, 158, 159, 49 S. E. 80. 1904

Common and Special Injunction Under the Code Practice. Rules as to Granting and Dissolving Restraining Orders or Interlocutory Injunctions.

[Plaintiff sued to restrain the defendant from using a room in a hotel as a café in violation of an alleged covenant by the defendant not to do

so. A restraining order was issued and upon its return it was continued to the hearing. Defendant appealed. Affirmed. Only so much of the opinion as distinguishes between common and special injunctions, is here inserted.]

WALKER, J. . . . We have stated the contentions of the respective parties for the purpose of showing the impracticability of deciding upon the ultimate merits of the controversy in this, the preliminary stage of the case. This court should, when feasible, always avoid expressing an opinion which will anticipate the decision of the case at the final hearing, and when the facts have not been found by the tribunal appointed by law to pass upon them. The practice in this respect seems to have been long since well settled in applications for injunctions. It was based at first upon the distinction between common and special injunctions. The former was granted in aid of or as secondary to another equity, as in the case of an injunction to restrain proceedings at law, in order to protect and enforce an equity which could not be pleaded, and it issued, of course, upon the coming in of the bill, without notice. As soon as the defendant answered, he could move to dissolve the injunction, and it was then for the court, in the exercise of its sound discretion, to say whether, on the facts disclosed by the answer, or, as it is technically termed, upon the equity confessed, the injunction should be dissolved or continued to the hearing. If the facts constituting the equity were fully and fairly denied, the injunction was dissolved, unless there was some special reason for continuing it. Not so with a special injunction, which is granted for the prevention of irreparable injury, when the preventive aid of the court of equity is the ultimate and only relief sought, and is the primary equity involved in the suit. In the case of special injunctions the rule is not to dissolve upon the coming in of the answer, even though it may deny the equity, but to continue the injunction to the hearing, if there is probable cause for supposing that the plaintiff will be able to maintain his primary equity, and there is a reasonable apprehension of irreparable loss unless it remain in force, or if, in the opinion of the court, it appears reasonably necessary to protect the plaintiff's right until the controversy between him and the defendant can be determined. It is generally proper, when the parties are at issue concerning the legal or equitable right, to grant an interlocutory injunction to preserve the right in statu quo until the determination of the controversy, and especially is this the rule when the principal relief sought is in itself an injunction, because a dissolution of a pending interlocutory injunction, or the refusal of one, upon application therefor in the first instance, will virtually decide the case upon its merits, and deprive the plaintiff of all remedy or relief, even though he should be afterwards able to show ever so good a case. The principles we have attempted to state are, we think, well supported by the authorities upon the subject. 1 High on Injunction (3d ed.), § 6; *Jarman v. Saunders*, 64 N. C. 367; *Heilig v. Stokes*, 63 N. C. 612; *Blackwell Durham Tobacco Co. v. McElwee*, 94 N. C. 425;

Purnell v. Daniel, 43 N. C. 9; Bispham's Eq. (6th ed.) § 405. The cases of Marshall v. Commissioners, 89 N. C. 103, Lowe v. Commissioners, 70 N. C. 532, and Capehart v. Mhoon, 45 N. C. 30 would seem to be directly in point.

The injunction sought in this case is special, and we must be governed by the established rule applicable to that class of injunctions in deciding the question now presented. The Code provides expressly for such an injunction. Code, § 338 (2). Judge Bryan has merely granted a provisional injunction to the hearing so that the controverted matters may then be settled by a jury, and the plaintiffs' right to a perpetual injunction be thus determined upon the merits. As said by Justice Bynum in *Lowe v. Commissioners*, *supra*, "The novel and important questions raised by the pleadings, and ably discussed before us, do not come up for decision now." We decide nothing upon the merits, but simply hold that the facts should be found in the ordinary way, so that we may consider and decide the case, if it again comes before us, on all of the facts as ascertained, and not merely upon facts now disputed, which may never be found by the jury.

Without passing upon the controverted facts, we are of the opinion that, in the present state of the pleadings and proofs, there was no error in the ruling of the court below, and the injunction should be continued to the hearing. This is in accordance with the practice in such cases as stated in *Erwin v. Morris* (at this term), 49 S. E. 53. No error.

See "Injunction," *Century Dig.* §§ 5, 374-384; *Decennial and Am. Dig. Key No. Series* §§ 6, 172.

DIGGS v. WOLCOTT, 4 Cranch, 179. 1807.

Injunction from U. S. Court to Stay Proceedings in State Court.

This was an appeal from a decree of the circuit court for the district of Connecticut, in a suit in chancery.

The appellants, Diggs and Keith, had commenced a suit at law against Alexander Wolcott, the appellee, in the county court for the county of Middlesex, in the state of Connecticut, upon two promissory notes given by Wolcott to one Richard Matthews, for the purchase of lands in Virginia, and by him indorsed to the appellants; whereupon Wolcott filed a bill in chancery in the superior court of the state, against the appellants Diggs and Keith, and also against Robert Young and Richard Matthews, praying that Diggs and Keith might be compelled to give up the two notes to be cancelled, or be perpetually enjoined from proceeding at law for the recovery thereof, etc.

This suit in chancery was removed by the appellants from the state court into the circuit court of the United States for the district of Connecticut, where it was decreed that Diggs and Keith should, on or before a certain day, deliver the notes to the clerk of the court, and in default thereof should forfeit and pay to Wol-

cott \$1,500; and that they should be perpetually enjoined, etc., and that Robert Young should repay to the appellee the amount of principal and interest which the latter had paid on account of the purchase of the lands; and that the appellee should deliver up to the clerk the surveys of the lands, and the bond of conveyance; and in default thereof should pay to R. Young the sum of \$20,000.

The case was argued upon its merits by C. Lee and Swann, for the appellants, and by P. B. Key, for the appellee; but the court being of opinion that a circuit court of the United States had not jurisdiction to enjoin proceedings in a state court, reversed the decree.

For a full discussion of the proposition contained in the principal case, see 1 Gould & Tucker's Notes, p. 191, sec. 720, and 1 Rose's Notes, 275. See "Courts," Century Dig. §§ 1418-1430; Decennial and Am. Dig. Key No. Series § 508; "Injunction," Century Dig. § 72.

TYLER v. HAMMERSLEY, 44 Conn. 419, 26 Am. Rep. 479. 1877.
Injunction Against Proceeding at Law; Against Judgment and Execution at Law; to Stay Money in the Hands of a Sheriff, etc.

[Bill for an injunction, reserved for advice of the supreme court. Injunction denied and bill dismissed.]

The bill alleged that the superior court had issued a peremptory mandamus, commanding a railroad company to stop its trains at a certain station; that a writ of error was sued out before the mandamus was served; that the plaintiffs were directors of the railroad company, and had not obeyed the mandamus because they considered its operation superseded by the writ of error; that thereupon they were adjudged in contempt and ordered to be sent to jail for disobedience to such writ unless they obeyed it within twenty days; that the directors sued out a writ of error to reverse this order. The prayer was that the execution of the contempt order be restrained until the writs of error above mentioned were disposed of.]

HOVEY, J. Courts of equity are clothed with jurisdiction to restrain, by injunction, proceedings at law in all cases where, by fraud, accident, mistake, or otherwise, a party has obtained an advantage in a court of law, which must necessarily make that court an instrument of injustice. In cases of that description the restraint may be imposed to stay trial, and after trial and verdict to stay judgment, and after judgment to stay execution, and after execution to stay money in the hands of the officer. But after a judgment an injunction will not be granted to stay its execution, unless there has been fraud or collusion in obtaining it or the verdict upon which it was founded, or where the party has been unable to defend himself effectually at law without any fault or negligence of his own, or where the plaintiff has possessed himself of something by means of which he has obtained an unconscionable advantage. When an injunction is granted to stay proceedings in the courts of law, it is in no just sense a prohibition to

these courts in the exercise of their jurisdiction. It is not addressed to them and does not even affect to interfere with them. The process is directed only to the parties. It neither assumes any superiority over the court in which the proceedings are had, nor denies its jurisdiction. It is granted on the sole ground that from certain equitable circumstances of which the court granting the process has cognizance, it is against conscience that the party inhibited should proceed in the cause. The object, therefore, really is to prevent an unfair use being made of a court of law, in order to deprive another party of his just rights or subject him to some unjust vexation or injury which is wholly irremediable by a court of law. Mitf. Eq. Pl. by Jeremy, 127, 128, 131; Eden on Injunc. ch. 2, p. 4; 2 Dan Ch. Pr. 1623; Earl of Oxford's Case, 1 Ch. Rep. 1; 3 Lead. Cas. in Eq., by Hare & Wallace, 3d Am. Ed., 155. The case stated in the bill before us does not come within either of these principles. . . . Bill dismissed.

No injunction will issue to prevent the enforcement of a judgment at law because of mere *error*; but it will issue to prevent the enforcement of such judgments if obtained by *fraud and other foul means*. In such cases the decree is, that the party shall consent to a new trial in the court of law and that, until such trial be had, the party be restrained from enforcing his judgment. *Stockton v. Briggs*, 58 N. C. at p. 314. See further as to the ruling in the principal case, *Chambers v. Penland*, 78 N. C. 53; *Jones v. Cameron*, 81 N. C. 154; *Southerland v. Harper*, 83 N. C. 200; *Cunningham v. Bell*, *Ib.* 328; *Walker v. Gurley*, *Ib.* 429; *Grant v. Moore*, 88 N. C. 77; *Albright v. Albright*, *Ib.* 238; *Turner v. Cuthrell*, 94 N. C. 239; *Stout v. McNeill*, 98 N. C. 1, 3 S. E. 915. For when one can be restrained from suing in another state, see *Wierse v. Thomas*, 145 N. C. 261, 59 S. E. 58, 15 L. R. A. (N. S.) 1008, and note. See "Injunction," *Century Dig.* §§ 24-65; *Decennial and Am. Dig. Key No. Series*, §§ 25-28.

HARGETT v. BELL, 134 N. C. 394, 46 S. E. 749. 1904.

Injunction to Prevent Commission of a Crime; to Test Validity of Town Ordinances.

[Action in the nature of Quo Warranto and for an Injunction to restrain defendant from further selling liquor contrary to a statute prohibiting such sale. A restraining order was issued and dissolved. From the order of dissolution the plaintiff appealed. Whole cause dismissed.]

CLARK, C. J. . . . The sole question is as to the validity of this license which the relator claims to be void. That matter can properly be determined, as to defendant, only by a criminal prosecution. When the license is set up as a defense, the court will pass upon its validity. The defendant, if he is selling liquor without a valid license, is entitled to a trial by jury, and cannot be deprived of it by a proceeding for contempt for violation of an injunction commanding him not to commit the crime. An injunction was held invalid to test the validity of a town ordinance in *Paul v. Washington* (at this term, 134 N. C. 363, 47 S. E. 793; *Smith v. Smith*, 121 N. C. 94, 28 S. E. 64; *Wardens v. Washington*, 100 Remedies—52.

N. C. 21, 13 S. E. 700; *Cohen v. Commissioners*, 77 N. C. 2, in which READE, J., says: "We are aware of no principle or precedent for the interposition of a court of equity in such cases."

There is no equitable jurisdiction to enjoin the commission of crime. 1 High, Inj. (3d ed) § 20. The court of equity cannot enjoin the judge and solicitor from the enforcement of the criminal law, and an adjudication between the parties to this action would be a vain thing, for the solicitor could notwithstanding proceed in the criminal action, in which the validity of the alleged license must still be determined. On this ground, injunction against an alleged illegal sale of liquor was denied. *Atty. Gen. v. Schweickardt*, 109 Mo. 515, 19 S. W. 47. In *Patterson v. Hubbs*, 65 N. C. 119, PEARSON, C. J., says that an injunction is "confined to cases where some private right is a subject of controversy." As is above said, if an injunction to prevent the commission of a crime could issue, the violation of the order—the crime—could be punished by proceedings for contempt by the judge without a jury, but the constitution guarantees to one charged with crime the right of trial by jury. Article 1, § 13. The method here attempted, if sustained, would be "government by injunction."

The court below properly dissolved the restraining order, and, there being no cause of action stated, the court here will, *ex mero*, dismiss the action. Action dismissed.

See ch. 5, sec. 2; 21 L. R. A., 84, and note. Compare 11 L. R. A. (N. S.) 1060, and note. See also 21 Ib. 585, and note. See "Injunction," *Century Dig.* § 102; *Decennial and Am. Dig. Key No. Series* § 176; "Intoxicating Liquors," *Century Dig.* § 397; *Decennial and Am. Dig. Key No. Series* § 258.

GREEN v. GRIFFIN, 95 N. C. 50. 1886.

Effect of Appeal Upon an Order for an Injunction.

[Rule upon Griffin to show cause why he should not be attached for contempt for disobeying an Interlocutory Injunction. Respondent adjudged guilty of contempt and fined and imprisoned. Appeal by respondent. Affirmed.]

There was an interlocutory order made and served on Griffin, forbidding him to join his wall to that of the plaintiff. From this order Griffin appealed to the supreme court and perfected his appeal. Being of the bona fide opinion that the appeal vacated the order of injunction, and acting under the advice of counsel that such was the law, Griffin proceeded to disobey the order. Only that part of the opinion which discusses the effect of the appeal, is here inserted.]

SMITH, C. J. The record raises only two questions: 1. The effect of the appeal upon the interlocutory order; and, if still operative, 2. The sufficiency of the defense, that the act of alleged contempt was done with the advice of counsel, and in full assurance that it was not in violation of the order. Both of these proposi-

tions, in an affirmative form, have been strenuously maintained in the argument of appellant's counsel, and are before us for consideration.

The defendant insists that the appeal, when perfected, annulled the order for all purposes, and left the parties against whom it was directed as free to act as before it was made. If this were so, it is manifest the right to arrest the action of one committing irreparable damage, by a restraining order, could be easily defeated by taking an appeal and consummating what was intended, before it could be acted upon in the higher court. Shade trees could be cut down, property removed out of the jurisdiction of the court, beyond recovery, or any other wrong, intended to be prevented, perpetrated, so that when a final judgment or perpetual injunction was rendered, it would be vain and useless. The remedy sought by the process might thus become illusory, and success in the suit be followed by no benefit to the aggrieved party.

The cases cited in support of so unreasonable a contention, *Bledsoe v. Nixon*, 69 N. C. 81, and *Isler v. Brown*, *Ib.* 125, followed in *Skinner v. Bland*, 87 N. C. 168, decide that the whole cause is removed by an appeal from a final judgment disposing of the controversy and constituted in the appellate court, when it has been regularly and legally perfected. But while the judgment is vacated for the purpose of effectuating the transfer from one court to another, the cases do not decide that the restraining order becomes thereby wholly inoperative, and that the mandate contained in it may be avoided. The other cases cited, of appeals from a subsidiary order, made during the progress of the cause and necessary to secure the fruits of an ultimate recovery, simply declare that the *ruling* of the court is withdrawn from the jurisdiction of the judge, and must remain without addition, modification, or other change, to be passed on by the appellate court. *MeRae v. Comrs.* 74 N. C. 415; *Coates v. Wilson*, 94 N. C. 174.

The appeal, like a writ of error, does not disturb the interlocutory order, but suspends action on it, intended to carry it into effect, until its legality is tested in the court above, and this being decided and certified to the superior court, then, if sustained, that court is directed to proceed upon the judgment as already existing; or if declared erroneous, to reverse or modify it, in conformity to the law declared. The injunction requires no positive action, but that a party refrain from doing what is inequitable and injurious to another. "An appeal from a decree dissolving an injunction," remarks a recent author, "does not have the effect of reviving and continuing the injunction itself, since the process of the court, when once discharged, can only be revived by a new exercise of judicial power. An appeal being merely *the act of the party*, cannot of itself affect the validity of the order of the court, nor can it give new life and force to an injunction which the court has decreed no longer exists." *High on Inj.* sec. 893. As the ap-

peal does not vacate the decree of dissolution, but leaves the order to which it applies in force, so, for reasons equally strong, the appeal does not neutralize the order for the injunction.

The current of adjudications is in this direction. In *Sixth Ave. R. R. Co. v. Gilbert E. R. R. Co.*, 74 N. Y. 430, determined in the Court of Appeals, it is said: "By the appeal with stay of proceedings on the part of the plaintiff, in enforcing the judgment, the judgment was not annulled or its obligation upon the defendant impaired. But its execution was stayed, that is, the plaintiff was prohibited from issuing process in execution of it. . . . But this did not affect the validity or effect of the judgment pending the appeal, so far as it bore upon and restrained the action of the defendant, its servants or agents. It did not absolve them from the duty of obedience, and permit them to do that which the judgment absolutely prohibited, and the doing of which would, as judged by the court, cause irreparable mischief to the plaintiff, or an injury which could not certainly be compensated in damages." "A stay of proceedings pending an appeal," in the language of the court in *Mer. Min. Co. v. Fremont*, 7 Cal. 130 "has the legitimate effect of keeping them in the condition in which they were when the stay of proceedings was granted." *Yocum v. Moore*, 4 Ky. 221. So in the *Slaughter House* cases, 10 Wall. 273-297, CLIFFORD, J., says, "it is quite certain that neither an injunction, nor a decree dissolving an injunction, passed in the circuit court, is reversed or nullified by an appeal or writ of error before the cause is heard in this court."

While an appeal, upon a final adjudication, in ordinary cases, transfers the cause to the appellate court, where, if not erroneous, it is ultimately rendered and becomes, as has been often held, the judgment of that court, yet pending the removal, it is not for all purposes a nullity. It remains, as decided in *Bledsoe v. Nixon*, sufficiently in force to warrant an execution, to which a judgment is essential, in case no supersedeas appeal undertaking has been given. So when such undertaking has been executed, "the court in which such judgment has been recovered," may "direct an entry to be made by the clerk on the docket of such judgment, that the same is secured on appeal, and thereupon it shall cease, pending said appeal, to be a lien on the real property of the judgment debtor, as against purchasers and mortgagees in good faith." The Code, sec. 435.

This is an evident statutory recognition of the efficacy of the judgment appealed from, even when such full security is furnished, for some purposes at least, and that its vitality is not extinguished altogether while the appeal is undetermined. Surely, if for any purpose the judgment should remain in force [it should be], to prevent such evasions as the present disregard of the order would sanction, and to secure the rights of a litigant. In the exceptional cases of an appeal from a collateral order, the rule is more necessary in its application, and the judgment, from necessity and to sustain the ends of justice, must so far subsist as to

authorize the court to preserve the status ante quem, and to prevent any material change in it, before the appeal is determined. Still more forcibly must the principle apply, when a temporary restraining order is found to be necessary in the progress of the cause, and its validity is to be reviewed. *Hinson v. Adrian*, 91 N. C. 372. . . . Affirmed.

See, also, *In re Griffin*, 98 N. C. 225, 3 S. E. 515; *Fleming v. Patterson*, 99 N. C. at p. 407, 6 S. E. 396. For the extent to which one may be punished for disobedience, see *In re Patterson*, 99 N. C. 407, 6 S. E. 643. As an appeal does not dissolve an injunction, so, if an injunction be dissolved, an appeal does not keep it in force. *Reyburn v. Sawyer*, 128 N. C. 8, 37 S. E. 954; *Harrington v. Rawls*, 131 N. C. at p. 41, 42 S. E. 461. For what notice of an injunction is sufficient to render one guilty of contempt in disobeying it, see 23 L. R. A. (N. S.) 1295.

For Injunctions against Waste, see ch. 3, sec. 9; against Nuisances, ch. 3, sec. 11; against Trespasses, ch. 3, sec. 14; against Invasion of Marital Rights, ch. 5, sec. 2; in matters of Libel, Slander, Privacy, etc., ch. 5, sec. 7. See "Appeal and Error," *Century Dig.* § 2278; *Decennial and Am. Dig. Key No. Series* § 488.

SEC. 6. BILLS OF PEACE AND QUIA TIMET.

SHARON v. TUCKER, 144 U. S. 533, 541-544, 12 Sup. Ct. 720. 1891.

Bills of Peace and Bills Quia Timet Explained. Bills to Establish and Quiet Title to Realty. Multiplicity of Actions by Different Plaintiffs.

[Suit in equity to establish, as a matter of record, the complainant's title to certain real estate, and to enjoin the defendants from asserting title thereto as heirs of the former owner. Decree against plaintiff, dismissing his bill, and he appealed. Reversed.]

The lot had once belonged to the ancestor of defendants, who died intestate as to such lot. The plaintiff claimed by the adverse possession of himself and his assignors from 1861—a period sufficient to vest title under the statute of limitations. The defendants insisted and relied solely upon the defense that a court of equity could afford no relief to the complainants, because the defendants were not in actual possession of the locus in quo when this suit was commenced.]

MR. JUSTICE FIELD. . . . In the present case the adverse possession of the grantors of the complainants sufficient to bar the right of previous owners, is abundantly established within the most strict definition of that term. The objection of the defendants to the jurisdiction of a court of equity in this case arises from confounding it with a *bill of peace* and an ordinary *bill quia timet*, to neither of which class does it belong, nor is it governed by the same principles. Bills of peace are of two kinds: First, those which are brought to establish a right claimed by the plaintiff, but controverted by numerous parties having distinct interests originating in a common source. A right of fishery asserted by one party and controverted by numerous riparian proprietors on the river, is an instance given by Story where such a bill will lie. In such cases a court of equity will interfere and bring all the claimants before it in one proceeding to avoid a multiplicity

of suits. A separate action at law with a single claimant would determine nothing beyond the respective rights of the parties as against each other, and such a contest with each claimant might lead to interminable litigation. To put at rest the controversy and determine the extent of the rights of the claimants of distinct interests in a common subject the bill lies, which is thus essentially one for peace. Second, bills of peace of the other kind lie where the right of the plaintiff to real property has been unsuccessfully assailed in different actions, and is liable to further actions of the same kind, and are brought to put an end to the controversy. "The equity of the plaintiff in such cases arose," as we said in *Holland v. Challen*, 110 U. S. 15, 19, 3 Sup. Ct. 495, 496, "from the protracted litigation for the possession of the property which the action of ejectment at common law permitted. That action being founded upon a fictitious demise, between fictitious parties, a recovery in one action constituted no bar to another similar action or to any number of such actions. A change in the date of the alleged demise was sufficient to support a new action. Thus the party in possession, though successful in every instance, might be harassed and vexed, if not ruined, by a litigation constantly renewed. To put an end to such litigation and give repose to the successful party, courts of equity interfered and closed the controversy. To entitle the plaintiff to relief in such cases the concurrence of three particulars was essential: He must have been in possession of the property, he must have been disturbed in its possession by repeated actions at law, and he must have established his right by successive judgments in his favor. Upon these facts appearing, the court would interpose and grant a perpetual injunction to quiet the possession of the plaintiff against any further litigation from the same source. It was only in this way that adequate relief could be afforded against vexatious litigation and the irreparable mischief which it entailed. *Adams on Equity*, 202; *Pomeroy's Equity Jurisprudence*, sec. 248; *Stark v. Starrs*, 6 Wall. 402; *Curtis v. Sutter*, 15 Cal. 259; *Shepley v. Rangeley*, 2 Ware, 242; *Devonsher v. Newenham*, 2 Schoales & Lef. 199." It is only where bills of peace of this kind—more commonly designated as bills to remove a cloud on title and quiet the possession to real property—are brought, that proof of the complainant's actual possession is necessary to maintain the suit. *Frost v. Spitley*, 121 U. S. 552, 556, 7 Sup. Ct. 1129.

There is no controversy such as here stated in the present case. The title of the complainants is not controverted by the defendants, nor is it assailed by any actions for the possession of the property, and this is not a suit to put an end to any litigation of the kind. It is a suit to establish the title of the complainants as matter of record, that is, by a judicial determination of its validity, and to enjoin the assertion by the defendants of a title to the same property from the former owners, which has been lost by the adverse possession of the parties through whom the complainants claim. The title by adverse possession, of course, rests on the

recollection of witnesses, and, by a judicial determination of its validity against any claim under the former owners, record evidence will be substituted in its place. Embarrassments in the use of the property by the present owners will be thus removed. Actual possession of the property by the complainants is not essential to maintain a suit to obtain in this way record evidence of their title to which they can refer in their efforts to dispose of their property.

The difference between this case and an ordinary bill *quia timet* is equally marked. A bill *quia timet* is generally brought to prevent future litigation as to property by removing existing causes of controversy as to its title. There is no controversy here as to the title of the complainants. The adverse possession of the parties, through whom they claim, was complete, within the most exacting judicial definition of the term. It is now well settled that by adverse possession for the period designated by the statute, not only is the remedy of the former owner gone, but his title has passed to the occupant, so that the latter can maintain ejectment for the possession against such former owner should he intrude upon the premises. In several of the states this doctrine has become a positive rule, by their statutes of limitations declaring that uninterrupted possession for the period designated to bar an action for the recovery of land shall, of itself, constitute a complete title. *Leffingwell v. Warren*, 2 Black, 599; *Campbell v. Holt*, 115 U. S. 620, 623, 6 Sup. Ct. 209. . . .

As the complainants have the legal title to the premises in controversy, and as no parties deriving title from the former owners can contest that title with them, there does not seem to be any just reason why the relief prayed should not be granted. Such relief is among the remedies often administered by a court of equity. It is a part of its ordinary jurisdiction to perfect and complete the means by which the right, estate or interest of the parties, that is, their title, may be proved or secured, or to remove obstacles which hinder its enjoyment. *Pom. Eq. Jurisp.* vol. 1, sec. 171. The form of the remedy will vary according to the particular circumstances of each case. "It is absolutely impossible," says *Pomeroy*, in his treatise, "to enumerate all the special kinds of relief which may be granted, or to place any bounds to the power of the courts in shaping the relief in accordance with the circumstances of particular cases. As the nature and incidents of proprietary rights and interests, and of the circumstances attending them, and of the relations arising from them, are practically unlimited, so are the kinds and forms of specific relief applicable to these circumstances and relations.

Many authorities to the same purport might be cited. They are only illustrative of the remedies afforded by courts of equity to remove difficulties in the way of owners of property using and enjoying it fully, when, from causes beyond their control, such use and enjoyment are obstructed. The form of relief will always be adapted to the obstacles to be removed. The flexibility of de-

erces of a court of equity will enable it to meet every emergency. Here the embarrassments to the complainants in the use and enjoyment of their property are obvious and insuperable except by relief through that court. No existing rights of the defendants will be impaired by granting what is prayed, and the rights of the complainants will be placed in a condition to be available. The same principle which leads a court of equity upon proper proof to establish by its decree the existence of a lost deed, and thus make it a matter of record, must justify it upon like proof to declare by its decree the validity of a title resting in the recollection of witnesses, and thus make the evidence of the title a matter of record.

It is, therefore, ordered that the decree of the court below be reversed, and the cause remanded to that court with directions to enter a decree declaring the title of the complainants to the premises described in their complaint, by adverse possession of the parties through whom they claim, to be complete, and that the defendants be enjoined from asserting title to the said premises through their former owner. Each party to pay his own costs.

Bill of peace when a number of people have separate causes of action growing out of the same tort. 20 L. R. A. (N. S.) 848, and note.

See *White v. Cooper*, 53 N. C. 48, inserted at ch. 3, sec. 2, and note to that case; ch. 3, sec. 6, Removal of Cloud upon Title and Quieting Title; and ch. 3, sec. 7, Confusion of Boundaries and Processioning. Compare *Henderson v. Bates*, 3 Blackf. 461, inserted at ch. 12, post. See "Quieting Title," Century Dig. §§ 8-11; Decennial and Am. Dig. Key No. Series §

THIRD AVE. R. R. CO. v. THE MAYOR, ETC. OF NEW YORK, 54 N. Y.
159. 1873.

Injunction Against Multiplicity of Actions by the Same Plaintiff. Consolidation of Actions.

[Action brought by plaintiff to restrain defendants from prosecuting more than one of twenty-seven actions, which they had commenced against the plaintiff in a justice's court, until one of such actions could be finally determined. Each of the actions in question had been brought at the same time to recover a separate and distinct penalty of \$50 imposed by law for running street cars, within certain limits, without a license. Demurrer by defendants. Demurrer overruled, and judgment against defendants, from which they appealed. Affirmed.]

LORT, Ch. C. The jurisdiction of a court of equity to prevent, by injunction, a multiplicity of suits is unquestionable, and, according to my understanding of the points of the appellants' counsel, is not denied by him; but he claims that "an injunction to restrain the proceedings in another suit, either in the same court or in another court having equal power to grant the relief sought, will no longer be granted." Conceding the general rule to be as claimed by him, it does not apply to the facts stated in, nor to the case made by, the plaintiff's complaint. To make it applicable, it must appear that the justice's court, in which the

actions sought to be restrained are pending, has power to grant the relief asked by the complaint in this action. This is not claimed by the counsel. That court is also without a very important power, possessed by courts of record, which if it existed in reference to actions pending therein, would have rendered the present action unnecessary. Any court of record has the power, whenever several suits are pending in it by the same plaintiff against the same defendant for causes of action which may be joined, to order the several suits to be consolidated into one action. 2 Rev. Stat. p. 383, sec. 36. The supreme court has also the power, if one or more of such suits be pending in the supreme court and others be pending in any other court, to order the suits in other courts to be consolidated with that in the supreme court. *Ibid.* sec. 37.

The above provisions, it will be seen, do not reach the suits sought to be restrained, and the justice's court in which they were pending had not, as I have stated, the power of consolidating them. The plaintiff must, therefore, have been subjected to the cost and expense of the defense of all of those actions, if it had not obtained relief under its complaint in this suit.

It is material to bear in mind, in consideration of the questions raised by the demurrer to the complaint, that it is not asked to restrain the defendants from obtaining a decision by the justice's court of the question involved in the actions pending therein; but the continuance of the prosecution of one of them is suffered and permitted, and an injunction to restrain and forbid the proceedings in the others of them is only asked until that which shall be proceeded in can be finally heard and determined, and the injunction granted by the judgment appealed from is to that extent only. The question to be decided in all of the suits is the same, and a single one, depending on the same facts. The decision made in the one which is to be prosecuted will, in its effect, be a decision of all of them. The injunction asked and granted does not operate as an absolute but a temporary stay only of the actions to which it applies, and the plaintiff has offered in the complaint to give any security required for the payment to the defendants of the sum claimed in all of the said actions if it should be finally decided that it is liable for the penalty by said ordinance prescribed, and for the expense of prosecuting such action or actions as might be necessary to determine the same. The case is different from those of *West v. The Mayor, etc.*, 10 Paige, 339, and *Oakley v. The Mayor, etc.*, cited and referred to in that of *West*. The injunction asked in them was to restrain absolutely the prosecution of any suits at law for breaches of certain corporation ordinances. They are therefore clearly distinguishable from this. The relief herein was substantially to the same effect as that which would have been obtained if the actions had been all pending in the supreme court or any court of record by a consolidation of them.

It is said by Judge Story that "courts of equity disapprove, in

various forms, the promotion of unreasonable litigation, and on this ground, for the purpose of preventing a multiplicity of suits, they will not permit a party to bring a bill for a part of a matter only, where the whole is the proper subject of one suit. Thus, for example, they will not permit a party to bring a bill for a part of one entire account, but will compel him to unite the whole in one suit, for otherwise he might split it up into various suits and promote the most oppressive litigation. Upon a ground somewhat analogous, if an ancestor has made two mortgages, the heir will not be allowed to redeem one without the other." Story's Eq. Pl. sec. 287. The same principle is clearly applicable to the present case. See also, in support of the principle, Story's Eq. Jurisp., sec. 457, 853, 901; *Hanson v. Gardiner*, 7 Ves. Ch. 305; *Livingston v. Livingston*, 6 John. Ch. 499; *New Haven R. R. v. Schuyler*, 17 N. Y. 608. The prosecution of all of the suits referred to in the complaint at one and the same time would be unnecessarily oppressive, by having costs incurred which it is said in the complaint would be "onerous and oppressive;" and the case is one, under all the facts disclosed, where the interference of a court of equity was properly invoked and exercised. The result of the views above expressed is that the judgment appealed from should be affirmed, with costs.

See 10 L. R. A. (N. S.) 983. See "Injunction," Century Dig. § 31; Decennial and Am. Dig. Key No. Series § 26.

FEATHERSTONE v. CARR, 132 N. C. 800, 44 S. E. 592. 1903.
Injunction Against Multiplicity of Actions. Code Practice. Motion in the Cause.

[Plaintiff instituted summary proceedings in ejectment before a justice of the peace for the purpose of ejecting defendant from certain demised realty, and to recover rent claimed to be in arrears. Defendant resisted the proceeding and disputed the amount of rent claimed. The justice gave judgment against the defendant and he appealed to the superior court. After that appeal the plaintiff procured thirteen other judgments for rent, in the justice's court, from all of which judgments the defendant appealed. The plaintiff threatened to continue this method of suing for rents before the justice. All of these judgments and threatened actions concerned the same matter and could have been settled in one action. The other facts appear in the beginning of the opinion. Upon a motion in the original action, by the defendant, the judge granted an injunction against plaintiff's prosecuting any more actions, etc., and plaintiff appealed. Affirmed.]

MONTGOMERY, J. . . . The defendants, upon affidavits, made a motion in the case on appeal in summary ejectment for an injunction to restrain the plaintiffs from prosecuting any further suits against the defendants for and on account of the rents, and from issuing executions on the judgments, or either one of them, for rent; and his honor granted the injunction. It appears further in the proceedings that upon the taking of the appeal in the proceeding of summary ejectment, under section 1772 of the

Code, the defendant executed a bond in the sum of \$1,350 to secure the plaintiffs the rent and damages during the pendency of the appeal, and that afterwards, by an order made in the superior court, an additional bond for the same purpose in the sum of \$1,200 was executed and filed by the defendants. We can see no error in the course pursued by his honor. It was proper for the defendant to have made the motion for the injunction in the case then pending in the superior court, and a new action for that purpose could not have been maintained. *Faison v. McIlwaine*, 72 N. C. 312; *Lord v. Beard*, 79 N. C. 5.

It clearly appears from the record that in the controversy pending between the parties all matters in dispute between them can be settled, and the plan adopted by the plaintiffs of a multiplicity of suits for the monthly payment of rents must be regarded, therefore, as vexatious, and equity will intervene by injunctive process to prevent such litigation. The spirit of our present system of practice favors the adjustment and settlement of all matters in dispute between parties in one action, as far as possible; and it discourages multiplicity of suits, because of the vexatious delays and costs attendant upon them. *Sparger v. Moore*, 117 N. C. 450, 23 S. E. 359. And besides no harm could come to the plaintiffs through the issuing of the injunction, while the defendants would be subjected to inconvenience and probable loss if it were not granted, and in such cases it is proper for the injunction to be issued. *McCorkle v. Brem*, 76 N. C. 407; *Railroad v. Commissioners*, 108 N. C. 56, 12 S. E. 952. The plaintiffs cannot be hurt here. On the trial they can recover the rents due up to the trial, and any damages which they have sustained by the detention of the property; and there are bonds on file in the court in sufficient amount, and approved as to security by the proper officers. Also, if those bonds should become impaired, or if the litigation should become protracted to such an extent as to require additional security to protect the plaintiffs in their rents, then, under section 1772 of the Code of 1883, the superior courts can require additional security. Not only is it within the jurisdiction and power of the superior courts to have the bonds in such cases increased or strengthened, but under their general powers in equity, outside of that statute or any other statute, they would have the right to take such action. Or in case of inability on the part of a suitor to give, strengthen, or increase such security, the court would have the power to appoint a receiver to take possession of the property under the direction of the court. *Kron v. Dennis*, 90 N. C. 327; *Lumber Co. v. Wallace*, 93 N. C. 22. We, in deference, will add that as the court docket is always under the control of the presiding judge, and, as a general rule, to be regularly proceeded with, yet we have no doubt that, upon such a case as this being called to his honor's attention, a speedy trial would ensue if there was danger of loss to plaintiff by delay. No error.

See *Removal of Cloud upon Title*, ch. 3, sec. 6, ante. See "Injunction" Century Dig. §§ 31, 180; Decennial and Am. Dig. Key No. Series §§ 26, 106.

SEC. 7. BILLS OF INTERPLEADER.

SPRAGUE v. SOULE and Others, 35 Mich. 35. 1876.

Definition and Essentials.

MARSTON, J. A bill of interpleader is a bill filed for the protection of a person from whom several claim legally or equitably the same debt, thing, or duty; but who has incurred no independent liability to any of them, and does not himself claim any interest in the matter. Adams' Eq. 202. And it is essential among other things that the party seeking relief has incurred no independent liability to either claimant. Ib. 204. In this case the bill alleges that complainant incurred the liability under an express agreement with some of the parties against whom he now claims relief. Such being the case he is not entitled to the relief he now seeks. The decree dismissing the bill must be affirmed, with costs.

See 10 L. R. A. (N. S.) 748, and elaborate note. To warrant this remedy the claims "threatening the complainant must be such as antagonize and negative each other." School Dist. v. Weston, 31 Mich. 85; Wallace v. Sortor, 52 Mich. 159, 17 N. W. 794. But if several antagonistic claims be asserted to the same fund, the remedy lies. Ibid.; Moore v. Barnheisel, 45 Mich. 500, 8 N. W. 531. See next succeeding case as to privity between adverse claimants. See "Interpleader," Century Dig. § 12; Decennial and Am. Dig. Key No. Series § 10.

CRANE v. McDONALD, 118 N. Y. 648, 23 N. E. 991. 1890.

Essentials to the Action. Proceeding Under Code Practice. Form of Complaint. Privity Between Claimants.

[Action of Interpleader. A perpetual injunction was ordered, restraining defendant from further prosecution of an action commenced against the plaintiff. Defendant appealed. Affirmed.]

Plaintiff owed Jennie L. Graves \$808. The defendant claimed the money upon an alleged assignment from Jennie L. Graves, and brought an action against the plaintiff to recover the same. George E. Goodrich also claimed the money under an alleged attorney's lien for services to Jennie L. Graves, and under an attachment duly levied thereon. The plaintiff sued both the claimants and offered to pay the money into court or to which ever claimant would indemnify him. Plaintiff alleged the above facts and further stated that he was not in collusion with either defendant. Before this action was brought, plaintiff paid the money into court to abide the decision therein. The lower court ruled that this was a proper case for an interpleader and granted the injunction as above stated.]

VANN, J. The material allegations in a bill of interpleader, according to an early decision by the court of errors, are: (1) That two or more persons have preferred a claim against the complainant; (2) that they claim the same thing; (3) that the complainant has no beneficial interest in the thing claimed; and (4) that he cannot determine, without hazard to himself, to which of the defendants the thing belongs. Atkinson v. Manks, 1 Cow. 691, 703.

It was also held in that case that the complainant should annex to his bill an affidavit that there is no collusion between him and any of the parties, and that he should bring the money or thing claimed into court, so that he could not be benefited by the delay of payment which might result from the filing of his bill. This method of procedure still prevails. *Dorn v. Fox*, 61 N. Y. 268. The plaintiff insists that he has conformed to the practice thus laid down in every particular, while the appellant contends that the complaint is not sufficiently specific with reference to the claims of the defendants, and that no privity is shown between them in relation to their respective demands. The complaint describes the claim of the defendant McDonald more fully than that of the defendant Goodrich, because the former had sued him, and had thus furnished him with a definite description. While the claim of the latter was not clearly nor fully described, enough was set forth to show that it was not a mere pretext, but that it apparently rested upon a reasonable and substantial foundation. If the appellant desired that it should be made more definite and certain, his remedy was by motion, under section 546, Code Civil Proc. *Neftel v. Lightstone*, 77 N. Y. 96. Upon the trial, according to the old chancery practice, as it appeared by the answers of the defendants that each claimed the fund in dispute, no other evidence of that fact was required to entitle the plaintiff to a decree. *Balchen v. Crawford*, 1 Sandf. Ch. 380. In this case, however, the point was not left to be determined by the pleadings, but evidence was introduced upon the subject, and it appeared that at least a fair doubt existed as to the rights of the conflicting claimants. It was not necessary for the plaintiff to decide, at his peril, either close questions of fact or nice questions of law, but it was sufficient if there was a reasonable doubt as to which claimant the debt belonged. When a person, without collusion, is subjected to a double demand to pay an acknowledged debt, it is the object of a bill of interpleader to relieve him of the risk of deciding who is entitled to the money. If the doubt rests upon a question of fact that is at all serious, it is obvious that the debtor cannot safely decide it for himself, because it might be decided the other way upon an actual trial; while if it rests upon a question of law, as was said in *Dorn v. Fox*, 61 N. Y. 264, "so long as a principle is still under discussion . . . it would seem fair to hold that there was sufficient doubt and hazard to justify the protection which is afforded by the beneficent action of interpleader." Although the claim of Mr. Goodrich has since been held untenable by this court (*Goodrich v. McDonald*, 112 N. Y. 157, 10 N. E. Rep. 649), it does not follow that no doubt existed when this action was commenced, because the supreme court, both at special and general term, held that it was valid, and attempted to enforce it. This conflict in the decisions of the courts shows that the adverse claims of the defendants involved a difficult and doubtful question, and is a conclusive answer to the contention of the appellant that the plaintiff did not need the aid of an action

of this character. Was it possible for him to safely decide a point so intricate as to cause those learned in the law to differ so widely?

The law did not place so great a responsibility upon him, but provided him with a remedy to protect himself against the double liability, or, to speak more accurately, against a double vexation on account of one liability. *Dorn v. Fox*, *supra*; *Caulkins v. Bolton*, 31 Hun. 458, 98 N. Y. 511; *Johnston v. Stimmel*, 89 N. Y. 117; *Schuyler v. Pelissier*, 3 Edw. Ch. 191; *Bedell v. Hoffman*, 2 Paige, 199; *Railroad Co. v. Clute*, 4 Paige, 384; *Bell v. Hunt*, 3 Barb. Ch. 391; *Badeau v. Tylee*, 1 Sandf. Ch. 270; *German Exch. Bank v. Commissioners*, 6 Abb. N. C. 394; *Railroad Co. v. Arthur*, 10 Abb. N. C. 147; 3 Pom. Eq. Jur. §§ 1320-1327; 2 Story, Eq. Jur. §§ 800-824. It required, however, that he should act in good faith, and he insists that he furnished ample evidence upon that question. He offered to pay the money to Mrs. McDonald if she would indemnify him against the claim of Mr. Goodrich, but she refused to do so, and commenced an action to recover the amount involved. A like offer to Mr. Goodrich, upon the condition that he should furnish indemnity, was declined, and legal proceedings were threatened. Neither defendant would recede from the position thus taken, but both persisted in their respective demands. The plaintiff thereupon paid the money into court pursuant to its order, and then commenced this suit, annexing to his complaint, in addition to the usual verification, an affidavit stating that the action was brought in good faith, and without collusion with either defendant, or with any person "in their behalf." It did not appear that he had attempted to favor the position of either claimant. These facts, with others appearing in the record, furnished adequate support to the conclusion of the trial judge that the plaintiff acted in good faith.

The appellant contends that no such privity was shown to exist between the defendants as to authorize the plaintiff to bring an action to cause them to interplead. While the early authorities were exacting upon this subject, many of the later cases have been less rigid, and some have ignored it altogether. The doctrine seems to have been abrogated in England, partly by statute and partly by judicial decisions. Mr. Pomeroy, referring to the rule, says that "it is a manifest imperfection of the equity jurisdiction that it should be so limited. A person may be and is exposed to danger, vexation, and loss from conflicting independent claims to the same thing, as well as from claims which are dependent; and there is certainly nothing in the nature of the remedy which need prevent it from being extended to both classes of demands." 3 Pom. Eq. Jur. § 1324, note. Our statutory interpleader by order apparently does not recognize the doctrine. Code Civil Proc. § 820. A somewhat similar statute in England led the courts of that country to declare that they no longer felt bound, even in an equity action, by the narrow principle previously laid down. *Attenborough v. Dock Co.*, 3 C. P. Div. 450. It is not necessary, however, for us to decide whether the rule still exists.

or to what extent it exists, in this state; because, according to the most exacting authorities, where the adverse titles of the claimants are both derived from a common source, it is sufficient to authorize an interpleader. Such is the case under consideration. Mrs. Graves, as the owner of the contract in question and of the money that was invested therein, was the common source of title to both defendants. The title of Mrs. McDonald, as claimed,—for it is the claim only that is here material,—was by assignment of the legal title from Mrs. Graves, while the claim of Mr. Goodrich was by an equitable assignment from the same person. Each defendant, acknowledging the original title of Mrs. Graves, claimed the same debt under her, and the title of each was therefore “derivative,” as that word is used with reference to this subject. 3 Pom. Eq. Jur. § 1327. The plaintiff held the money to discharge the debt substantially as a stakeholder, having no beneficial interest therein, and being under no independent liability to either claimant. He does not deny the title of Mrs. Graves, but, affirming it, places himself upon the uncertainty as to which of the two persons claiming from her is entitled to receive the fund. Whether the claim of Mr. Goodrich was based on a lien by contract, or a lien by attachment, or both, it originated with Mrs. Graves, who at one time owned all that was claimed by either defendant. His lien had been sanctioned by a decree of the supreme court nearly a year before the trial of this action, and, although that judgment was subsequently reversed, it was still in force when the judgment now under review was rendered. The lien of the attachment, as it was claimed to exist, arose after the covenant to pay the sum in question was entered into by the plaintiff, and, although that lien also was subsequently held invalid, it was sufficient to support an action of interpleader, and is a complete answer to the contention of the appellant that this suit was not regularly brought, owing to the contractual relation between herself and the plaintiff. If the actual truth was a defense to a bill of interpleader, the argument of the appellant would be conclusive; but, necessarily, the plaintiff in such an action has the right to rely upon what is claimed to be true, as otherwise the remedy would be of no value. After carefully examining all of the exceptions involving questions of law, we think that none of them were well taken, and that the judgment appealed from should be affirmed, with costs.

See, for further information on the subject, 66 L. R. A. 89; Pell's Revisional, sec. 414 and notes. Mr. Pell's notes cover every essential under the Code practice in North Carolina. See "Interpleader," Century Dig. §§ 9, 10; Decennial and Am. Dig. Key No. Series §§ 8, 9.

SEC. 8. CERTIORARI.

DOUGAN v. ARNOLD, 15 N. C. 99. 1833.

Nature and Different Uses of the Remedy. Distinguished From Writs of Error and False Judgment. What the Petition Must Show.

[Arnold attached the property of Dougan, and obtained a judgment against him in a justice's court for the sale of his property. Dougan was a non-resident at the time and the service was by publication. Clark, as agent for Dougan, applied to the superior court for a certiorari and supersedeas to bring the judgment against Dougan before the court upon the ground that Dougan knew nothing of the proceedings against him until the order of sale was entered, and that he owed Arnold nothing. The judge ordered the certiorari and supersedeas and, upon the return thereof, set aside the order of sale and directed a new trial of the case before a jury in the superior court. To that end he ordered the case docketed. Arnold appealed. Affirmed.]

RUFFIN, C. J. The argument in favor of the motion to dismiss the certiorari as having been improvidently issued, is founded upon the use of that writ in the English law. It is there used to bring an indictment from an inferior court into the King's Bench for trial; or to have a judgment of an inferior magistrate, not proceeding according to the course of the common law, reviewed. In neither instance does a second trial of the facts take place. In the latter, the judgment, if irregular or unsupported by the facts found by the magistrate and stated in the conviction to be found, is quashed and the parties have to begin again. In this state the writ may also be, and has been used as a writ of *false judgment*, *merely to have the matter of law reviewed*. But it has also in our laws another important property—that of affording the means of *re-trying the facts, which is unknown in England*.

Here an appeal is matter of right, and on it there is a trial de novo. The *certiorari* is, in proper cases, *substituted for it*, and if the party has been improperly deprived of his appeal, upon affidavit of the facts, it is granted, if not of right, as of course. So also if he has lost his appeal by accident, and makes prima facie a case on the merits. If the merits in such case be not answered by the affidavits on the other side, the jurisdiction is exercised by setting aside the first judgment, and of ordering a new trial in the superior court on the former issues, if the first trial was on issues; or, if the first judgment was by default and without laches, the party is permitted to plead in such manner as the court may allow, so as to obtain a trial on the merits. Such has been the long established course in our courts; and it seems to be a necessary consequence of the provision, that one trial shall not conclude the parties, but that each by appeal may have a new trial. The right of appeal is favored and is not to be defeated by accident. This application of the writ is necessarily limited to the period during which the judgment remains unsatisfied. After execution and the levy of money by a sale, the interests of third persons forbid further interference, merely for the sake of an-

other trial. The remedy then must be by writ of error, or of false judgment for the error in law alone. But before satisfaction none but the parties can be affected, and there is no inconvenience to prevent a new trial by certiorari, upon a proper case, that is, one in which the applicant has merits, and accounts first for not pleading or not appealing, and secondly for the delay in applying for the writ, if delay there has been.

Here the merits are palpable. The demand of the original plaintiff has, upon his own affidavits, no foundation in conscience or law. The judgment is against a resident in Indiana, upon attachment before a justice of the peace out of court, advertised for thirty days in Randolph county, which conveyed no actual notice to the party, and of which he had, in fact, no knowledge until after the order for the sale of the land levied on had been made in the county court, and the land advertised for sale under execution. His application immediately followed the notice to him.

. . . No error.

See also *Gridley v. Halsey*, 9 N. C. 550. See "Certiorari," Century Dig. §§ 1-11, 20; Decennial and Am. Dig. Key No. Series §§ 1-6, 13.

STATE, ELDER, PROS. v. DISTRICT MEDICAL SOC., 35 N. J. L. 200.
1871.

All About the Remedy by Certiorari. Distinguished From Writ of Error. When and to What Tribunals it Issues. What Courts Can Issue.

[Proceedings were pending before the defendant Medical Society, which was a body authorized by statute. The object of the proceedings was to deal with Elder for alleged misconduct in his profession. While the proceedings were still pending and before any decision had been rendered by the Medical Society, Elder commenced this proceeding for a certiorari to remove the investigation into the supreme court. The writ was ordered, but upon the return thereof the defendant moved to dismiss the writ because it had been issued before the final action had been taken by the Medical Society. The writ was quashed.]

VAN SYCKEL, J. The prosecutor, who is a member of the Hudson County Medical Society, having been tried before the society for a violation of professional ethics, caused the proceedings against him to be removed to this court by certiorari, where motion is now made to dismiss the writ *because no judgment had been rendered by the inferior tribunal*, and that, therefore, the writ will not lie.

A writ of certiorari is in the nature of a writ of error, and is resorted to in those cases where a *writ of error does not lie*. When courts act in a summary way, or in a new course different from the common law, a certiorari, and not a writ of error, is the proper remedy. There is no doubt of the power of the supreme court, by virtue of the common law writ of certiorari, to review the final adjudications of special statutory tribunals, which act in a summary way, different from the course of the common law.

1 Archbold's Pr. 229; *Groenwelt v. Burwell*, 1 Salkeld, 263; *Phillips v. Phillips*, 3 Halst. 122. There is no power in this court to continue or complete the proceeding which has been instituted in the special tribunal created by positive law. The question to be tried cannot be withdrawn from that forum, nor can it be denied the right to terminate the proceedings which have been initiated before it.

The only legitimate use of a certiorari is, to subject to review in this court the *final* decision of the inferior jurisdiction. If parties are permitted to invoke its aid at any time during the progress of their cause, it would lead to consequences which are inadmissible. If the writ may issue before judgment, it may go at any and every stage of the case. At every single step in the cause it might be certified into this court, and when a final determination was reached in the tribunal below, after this court had adjudicated the various questions which might be started, and after delay almost interminable, the case would be subject again to review after final judgment.

The authorities are against the use of the common-law writ of certiorari before judgment, in cases which cannot be continued or terminated in the court above. In *Rex v. Nicolls*, 2 Strange, 1227, the certiorari was quashed, because it issued *before judgment*. In the case of *Groenwelt v. Burwell*, 2 Salkeld, 144, the proceedings of the censors of the College of Physicians were not removed until after they had condemned Dr. Groenwelt, and passed judgment upon him; and in an action of trespass between the same parties, growing out of the case last cited, reported in 1 Comyn, 80, Chief Justice Holt, in speaking of the way in which the action of the censors might have been reviewed, says that the doctor might have had a certiorari to remove the record of conviction, and then it might be examined and reviewed; but it was not even suggested that a review could have been had before judgment. In New York it is well settled that certiorari never lies to remove a civil proceeding before an inferior magistrate, who has jurisdiction, by statute, until after judgment final. *Lynde v. Noble*, 20 Johns. 83; *People v. Supervisors*, 43 Barb. 237.

The only authorities cited to justify the granting of the writ in this case are those cases in this state which have settled the practice that certiorari to remove proceedings before a justice of the peace, under the act of March 4th, 1847, may be allowed before the trial below. In *Mairs v. Sparks*, Southard, 369, which was an action of forcible entry and detainer, Justice Southard said he was not satisfied with this practice, but yielded to it, because it had theretofore received the sanction of the court. These cases are undoubtedly exceptional, and a departure from the general rule, but even then the writ is not used until the final determination below.

I find no authority for certifying into this court, for review, the proceedings now in question, *before judgment*, and therefore the writ should be quashed.

That a certiorari will issue to a board of county commissioners or other tribunal from whose decisions and proceedings no appeal is provided, see *Hillsboro v. Smith*, 110 N. C. 417, 14 S. E. 972, and other cases cited in Pell's Revisal, sec. 364. See "Certiorari," Century Dig. § 31; Decennial and Am. Dig. Key No. Series § 16.

HARTSFIELD v. JONES, 49 N. C. 309. 1857.

Certiorari and Recordari Distinguished. How Used Respectively.

[Hartsfield sued Jones before a justice of the peace and obtained a judgment, and Jones appealed to the county court, where judgment was again rendered against him. Having failed to appeal from this judgment, Jones applied to the superior court for a certiorari, alleging, as grounds therefor, various excuses for his failure to appeal, and setting out merits. The certiorari was issued and upon the return thereof Jones insisted that he was entitled to have the whole case tried de novo. The judge ruled against him and, upon investigation of the cause, dismissed the certiorari, and Jones appealed. The judgment was reversed because a final judgment instead of an interlocutory judgment had been entered in the county court, the order for the writ of certiorari was affirmed. Only that portion of the opinion which discusses the writs of certiorari and recordari is here inserted.]

BATTLE, J. The writs of recordari and certiorari are used in this state, most commonly, as substitutes for appeals, where the appellants had, without default, lost, or been improperly deprived of, their right of appeal; and in such cases they have been allowed a trial de novo upon the merits in the superior court. They may be used also, the recordari, as a writ of false judgment, and the certiorari, as a writ of error; in which case, all that can be discussed and decided in the superior court is the form and sufficiency of the proceedings in the inferior tribunals, *as they appear upon the face of them*. *Parker v. Gilbreath*, 28 N. C. 221; *Webb v. Durham*, 29 N. C. 130; *Brooks v. Morgan*, 27 N. C. 481; *Comrs. of Raleigh v. Kane*, 47 N. C. 288. *The writ of recordari lies to an inferior tribunal, whose proceedings are not recorded*, and it is necessarily used as a writ of false judgment, because no writ of error can be brought upon the order, sentence or judgment of such tribunals. 2 Sellon's Prac. 544.

The writ of certiorari lies to a court of record, and may be used for the same purpose as a writ of error in the regular form. It is true that, in the case of *Brooks v. Morgan*, above referred to, it is said by the court that this writ has been used by necessity for the correction of errors in law, in those cases where the right of appeal has not been given. We cannot perceive any sufficient reason why it may not be so applied in all cases, as it will be but another form of the writ of error. That writ, in England, issues out of the court of chancery, but here we have no office in our court of chancery out of which to issue a writ. It must, therefore, be issued from the superior to the inferior court of record, and whether it be in the well known form of the certiorari, or in any other form, can make no difference in the rights of the parties

litigant. The writ of certiorari, in the case now before us, was treated in the superior court solely as a writ of error, and his honor decided upon the errors assigned against the plaintiff in error. The appeal from that decision brings before us the whole record, and it is made our duty to render such judgment, as upon inspection of it, it shall appear to us ought, in law, to be rendered thereon. . . .

See *Collins v. Nall*, 14 N. C. 224; Pell's Revisal, sec. 584, and notes. The practice in applications for a Recordari is shown on pp. 306, 307 of Pell's Revisal; and the notes on pp. 303-306. Ib. give all essential points of practice in applications for a certiorari. See, also, Clark's Code, sec. 545, and notes. See "Certiorari," Century Dig. §§ 1, 145; Decennial and Am. Dig. Key No. Series §§ 1, 57.

BIGGS, EX PARTE, 64 N. C. 202. 1870.

Certiorari to Superior Court From Supreme Court in Cases in Which No Appeal is Provided for by Law.

[A petition under oath was filed in the supreme court by William Biggs, late an attorney of the courts of the state, alleging that at Fall Term, 1869, of Edgecombe court, an order had been made by his Honor Judge Jones, then and there presiding, by which, for an alleged contempt of court, he had been disbarred; setting forth a transcript of the record in the case, and praying for a mandamus, that the said judge allow him to practice law as heretofore.]

PEARSON, C. J. This is a petition for an *alternative* mandamus, commanding his honor, E. W. Jones, judge of the superior court for the second judicial district of the state, "to allow the petitioner to practice law in said court in like manner as theretofore he had been licensed and used to do, or show cause to the contrary." In presenting the petition, Mr. Graham, one of the counsel for the petitioner, informed the court that their purpose was to adopt the proceeding most fit and proper to accomplish the end; and that they had concluded to move that notice issue to his honor, Judge Jones, to show cause why an alternative mandamus should not issue.

The court desired to hear an argument on the questions: 1. Had the petitioner a right to appeal from the order of his honor, by which the petitioner was disabled from practicing as an attorney in said superior court? and 2. Is the appropriate mode of proceeding, by writ of mandamus, or by writ of certiorari? After hearing a full argument by Mr. Graham and Mr. Moore, attorneys in behalf of the petitioner, we are of opinion: 1. That the petitioner did not have the right of appeal; and 2. That the proper remedy is by writ of certiorari, in the nature of a writ of error, to bring up the record now remaining in the superior court for the county of Edgecombe, so that it may be reviewed, and such proceedings be had thereon as are agreeable to law.

The matter involves the power of a court, and also the right of an attorney of the court to be protected against error in the exercise of power on the part of the judge. It is ordained by the constitution, Art. 4, sec. 10: "The supreme court shall have power to issue any remedial writs necessary to give it a general supervision and control of the inferior courts." The question is: Does the case made by the petition call for the remedial writ of mandamus, or can the purpose be met by the remedial writ of certiorari in the nature of a writ of error?

The writ of mandamus is a high prerogative writ, and is never resorted to except in cases where there is no other mode of attaining the ends of justice. If there be any other remedial writ that will answer the purpose, this court is not allowed to grant the writ of mandamus: and we should be reluctant to resort to it in this instance, for surely it would not be seemly, unless there be positive necessity, to command a judge of the superior court to appear at the bar of this court, and confront in an adversary suit one who has been an attorney of his court, and now demands to be restored to that privilege. There is this further objection to the writ of mandamus: the court in granting it assumes that, *prima facie*, his honor is in the wrong. If upon the notice, he appears, and relies upon the order still remaining of record and in full force, then this court would be forced to review that order in a collateral way, and the order restoring the petitioner to his rights as an attorney could not have the legal effect of *reversing* the order in the superior court, but would simply be in *disregard* of it.

The writ of certiorari is used for two purposes: One, as a substitute for an appeal, where the opportunity for bringing up the matter by appeal, is lost without laches. It is to this that the remarks so forcibly made by Mr. Moore on the argument, as to the difficulty of making up the case, or the *postea* in the record, on bill of exceptions, or from the notes of the judge, or on affidavits, would fully apply. Such was the case of *Bradley v. Fisher*, 7 Wall. 376, and the case of *People v. Justices of Delaware*, 1 Johns. Cases, 181, cited on the argument. In these and like cases, the court is obliged to resort to the writ of mandamus, as the only remedy to meet the ends of justice. But this kind of certiorari is not now in question. The other is where the writ of certiorari is in the nature of a writ of error, and it is used where the writ of error proper does not lie. *Brooks v. Morgan*, 27 N. C. 481; *Comrs. of Raleigh v. Kane*, 47 N. C. 288. By this writ, only the record proper is brought up for review, and no *postea* or case is to be made up. Such is our case, for the whole matter rests on error alleged by the petitioner in the proceedings on the record, and nothing can be brought before this court except what appears on the face of the record. The action of this court will be either to affirm or to reverse the order in the court below.

Per Curiam.—Motion for notice to show cause why an alternative mandamus shall not issue, refused. Motion, having the alle

gations set out in the petition as its foundation, for a writ of certiorari in the nature of a writ of error, to bring up the record for review, allowed. The writ will be returnable forthwith.

See *Squier v. Gale*, 6 N. J. L. 157, inserted at ch. 10, sec. 3, and notes thereto. See "Attorney and Client," Century Dig. § 81; Decennial and Am. Dig. Key No. Series § 57.

BROWN v. OSBORN, 1 Blackford, 32. 1818.

Certiorari Upon Suggestion of a Diminution of the Record.

[Appeal from the Gibson Circuit Court.]

SCOTT, J. In this case the record does not show the names of the judges who rendered the judgment complained of; nor does it appear from the transcript before us that there were any judges, except what may be conjectured from the statement that a judgment has been rendered. This is evidently a neglect of the clerk, but it is a defect for which the court will not now reverse the proceedings.

Per Curiam.—A certiorari is awarded to the Gibson Circuit Court, directing them to send up a full and complete transcript of the record in this case.

That a certiorari always issues as a matter of course, "upon a suggestion of a diminution of the record," see Clark's Code, p. 725; Pell's Revisal, at bot. p. 304. The supreme court will order the writ ex mero motu where there is an apparent diminution of the record in a state case. *State v. Beal*, 119 N. C. at p. 811, 25 S. E. 815. See "Appeal and Error," Century Dig. §§ 2834-2843; Decennial and Am. Dig. Key No. Series § 659.

WARE v. NISBET, 92 N. C. 202. 1885.

Certiorari to a Judge to Correct or Certify a Case on Appeal.

[After the record was docketed in the supreme court the appellant, after notice served on the appellee, moved for a certiorari to correct an alleged error in the case on appeal. Motion denied. The facts appear in the opinion.]

MERRIMON, J. The appellant suggests upon affidavit, that the judge states in the case settled upon appeal by him, that certain special instructions to the jury were withdrawn, whereas in fact they were not withdrawn, and he desires that the judge shall state the facts from which he inferred such withdrawal, and to that end, he moves that the writ of certiorari be granted to bring up *a more perfect statement of the case*. The motion cannot be sustained. It does not appear from the affidavit offered to support it, or otherwise, that, "by inadvertence, mistake, or accidental misapprehension, the presiding judge misstated, or failed to state, something that ought to appear in the case settled upon appeal," nor does it appear that the judge "*would probably make the correction*" the appellant desires to have made. To entitle him to have his

motion allowed, such facts ought to appear. *Currie v. Clark*, 90 N. C. 17. Motion denied.

It is only when the judge writes a letter stating that he will correct the case on appeal as settled by him, and that letter, with an affidavit that there is error in the case on appeal, is filed in the supreme court, that a certiorari will issue to correct such case on appeal. *Barber v. Justice*, 138 N. C. 20, 50 S. E. 445. See also *Clark's Code*, (3rd ed.) p. 936; *Pell's Revisal*, p. 304. See "Appeal and Error," *Century Dig.* §§ 2834-2843; *Decennial and Am. Dig. Key No. Series* § 659.

SEC. 9. RECORDARI.

KING v. RAILROAD, 112 N. C. 318, 16 S. E. 929. 1893.

Recordari Explained. The Writ Before and After the Code Practice. When the Appropriate Remedy. Practice. Supersedeas.

[Petition for a writ of Recordari, Supersedeas and Restraining order. Judgment against the petitioner, the defendant, and it appealed. Reversed.]

King obtained a judgment against the defendant railroad company before a justice of the peace, and caused execution to issue. Thereupon the defendant filed a petition for a recordari, etc., *ut supra*. The petition alleged that the defendant had not been served with the summons in the action before the justice; that there was fraud and collusion between the plaintiff and the justice; and that the justice had no jurisdiction. King moved to dismiss the petition on the ground that relief should have been sought by a motion in the cause. Motion sustained.]

CLARK, J. The amended petition for recordari avers that there was no service of summons upon the defendant or its agent. If so, the judgment could be set aside at any time upon motion before the justice of the peace who tried the cause, or his successor in office. *Whitehurst v. Transportation Co.*, 109 N. C. 344, 13 S. E. Rep. 937. His honor, being of opinion that this was the only remedy, dismissed the petition. The defendant contends that, at its election, it was entitled to have the writ of recordari, in the nature of a writ of false judgment. This is the principal question in the case.

At common law, and up to the adoption of the Code of Civil Procedure, the writ of recordari served a double purpose, either as a substitute for an appeal lost without default of the petitioner, or as a writ of false judgment, where the justice did not have jurisdiction, or when judgment was taken without service of process. The original Code of Civil Procedure of 1868, by section 296 (now Code, § 544), abolished writs of error and substituted appeals, but did not provide for writs of certiorari and recordari, as was pointed out by the court in *Marsh v. Williams*, 63 N. C. 371. And thereupon the acts of 1874-75 (now Code, § 545) were enacted, as follows: "Writs of certiorari, recordari, and supersedeas are hereby authorized as heretofore in use. The writs of certiorari and recordari when used as substitutes for an appeal," etc. From this it would seem that the writ of recordari was author-

ized to the extent it had been "heretofore in use," and extended to cases other than "when used as substitutes for an appeal." But we are not without express decisions upon the point. In *Weaver v. Mining Co.*, 89 N. C. 198, SMITH, C. J., says: "The writ of recordari, under the former practice, and retained in the new, as has been often declared, is used for two purposes: the one, in order to have a new trial of the case upon its merits,—and this is a substitute for an appeal from a judgment rendered before a justice; the other, for a reversal of an erroneous judgment, performing in this respect the office of a writ of false judgment." In *McKee v. Angel*, 90 N. C. 60, where there was a motion made before the justice to set aside the judgment for want of proper service, and an appeal from such ruling, the court held that such course was correct, or the defendant could have had his remedy by a writ of recordari in the nature of a writ of false judgment. ASHE, J., says, in that case: "There is no doubt that, as soon as he discovered that such judgment had been rendered against him [i. e. without service of process] he might have availed himself of the remedy of a recordari in the nature of a writ of false judgment. But he has failed to resort to that remedy, and has had recourse to a motion before the justice who made the judgment to vacate it. Was it in the power of the justice to do that? If it was, it was clearly his duty to do so." The court then go on to cite *Hooks v. Moses*, 8 Ired. 88, as authority for the latter course. In the following cases since the Code of Civil Procedure, the use of the writ of recordari as a writ of false judgment has been recognized and approved. *Caldwell v. Beatty*, 67 N. C. 142, 69 N. C. 365; *Morton v. Rippy*, 84 N. C. 611; and there are others. Nor is there anything in *Whitehurst v. Transportation Co.*, *supra*, which militates against these authorities. In that case, the justice's judgment having been docketed in the superior court, the defendant brought an action in that court to have the judgment set aside on the ground that process had not been served in the case in which judgment had been rendered. This court held that the court below properly dismissed the action, since relief could have been had by a motion in the cause before the justice to set aside the judgment. But it was not held that the defendant might not also have had relief by another proceeding in the cause, i. e. by an application for a recordari.

As to the other allegation in this application, of fraud and collusion between the justice and others: Inasmuch as final judgment had been rendered, relief could only have been had on that ground by an independent action. *Guano Co. v. Bridgers*, 93 N. C. 439. The general rule is also repeated in *Carter v. Rountree*, 109 N. C. 29, 13 S. E. Rep. 716, citing many authorities. The defendant had its election. Had it proceeded by a motion in the cause before the justice, and appealed from the refusal, the finding of fact by the justice would not have been conclusive, as would be the findings upon a similar motion in the superior court. *Finlayson v. Accident Co.*, 109 N. C. 196, 13 S. E. Rep. 739. But probably

the defendant preferred the application for a recordari because if granted, a supersedeas might issue. See Super. Ct. Rule 14, 104 N. C. 939, 12 S. E. Rep. xiii., and *Weaver v. Mining Co.*, supra, which settle the procedure in applications for recordari. Whether there could be a supersedeas upon an appeal from a refusal by the justice to set aside a judgment may admit of some doubt.

The court below should have found the facts (*Collins v. Gilbert*, 65 N. C. 135; *Cardwell v. Cardwell*, 64 N. C. 621), and dismissed or have set aside the judgment (*McKee v. Angel*, 90 N. C. 60), in accordance with the law applicable to such state of facts. In dismissing the petition without inquiry into the facts upon the ground that the defendant had mistaken his remedy, and could only proceed by a motion in the cause before the justice to vacate the judgment, there was error.

See *Hartsfield v. Jones*, 49 N. C. 309, inserted at sec. 8, of this chapter; and *Leatherwood v. Moody*, 25 N. C. at p. 131 et seq.; Pell's Revisal, pp. 306-307; Clark's Code, pp. 730-732. For when the writ of recordari is used as a writ of false judgment, see *Parker v. Gilreath*, 28 N. C. 221; for when it is used as a writ of error, see *Webb v. Durham*, 29 N. C. 130; that the writ was left as at common law, in North Carolina, prior to the statutes referred to in the principal case, see *Marsh v. Williams*, 63 N. C. 371. See notes of the reporter in an anonymous case, 2 N. C. (469) 667, for some valuable information on the ancient practice with reference to recordari. See "Justices of the Peace," Century Dig. §§ 768-771; Decennial and Am. Dig. Ky. No. Series § 197.

SEC. 10. SCIRE FACIAS—SCI. FA.

ANDRESS v. THE STATE, 3 Blackford, 109. 1832.

Sci. Fa. Explained. Practice.

STEVENS, J. Proceedings had by scire facias upon a recognizance. The allegations contained in the scire facias are these: That on the 3rd day of January, 1831, a recognizance was filed in the office of the clerk of the Shelby circuit court, stating, that on the 19th day of October, 1830, Thomas A. Andress and John Andress personally appeared before one A. M. Smith, who signs himself a justice of the peace of said county of Shelby, and severally acknowledged themselves to owe to the state of Indiana the sum of \$250 each, to be levied, etc., conditioned that if Thomas A. Andress should personally appear at the next circuit court, to be holden for the said county on the first day of the term, then and there to answer a certain charge of larceny, etc., and abide the judgment of the court, etc., and that, afterwards, at a circuit court of the county, held in March, 1831, the said Thomas and John were severally called and defaulted for non attendance, and the recognizance forfeited and made absolute. These are all the substantial allegations the scire facias contains. The defendants filed two special pleas in bar, which were demurred to and the

demurrers sustained, and final judgment rendered in favor of the state, that she have execution, etc.

Three points are made for our consideration: 1. That the recognizance is not a judgment on which an execution can issue, and that when the recognizance was forfeited, a judgment should have been first rendered in favor of the state, etc., that she recover the amount named in the recognizance, etc., which was not done, and therefore the judgment and proceedings are erroneous. There is no error in this branch of the proceedings. A recognizance, when forfeited and made absolute, has all the force and effect of a judgment, and is defined by Blackstone to be an obligation of record, which a man enters into before some court of record or magistrate duly authorized, with condition to do some particular act. It is witnessed only by the record, and not by the party's seal. It is allowed a priority in point of payment, and binds the lands of the cognizor. 4 Blk. Com. 252. In 6 Bac. Abr. 104 and 108, it is said that a *scire facias* is a judicial writ founded on some matter of record, as a recognizance, etc.; and that *a recognizance is considered as a judgment*, being an obligation solemnly acknowledged and entered of record. In 2 Tidd's Prac. 982, 983, 984, a recognizance is classed among judgments. If these authorities are correct, no judgment is entered on a recognizance: it stands for a judgment itself, and when default is made, a *scire facias* at once goes requiring the cognizor to show cause why execution shall not issue.

2. The second point is, that there is no averment in the *scire facias*, showing who filed the recognizance in the circuit court, nor that it was taken by a person legally authorized to take recognizances. A recognizance not taken by a court of record, is not strictly a record until it is filed and entered in a court of record. 2 Tidd's Prac. 984, 985, 1035. Hence it is a matter of substance, and is material, that a *scire facias*, on a recognizance not taken in a court of record, should aver by whom it was taken and filed, and that the person who took it was legally authorized so to do, and that it thereby became a matter of record of said court, and still so remains, unsatisfied and in full force. This *scire facias*, in this particular, is wholly defective. It nowhere informs us who took, or who filed the recognizance, or that it was taken and filed by a person legally authorized so to do. 2 Marsh. 132, Lilly's Entries.

3. The third and last point is, that the court erred in sustaining the demurrers to the defendant's pleas in bar. These pleas are clearly defective, but the demurrers go back to the first error. They search the *scire facias*, and whole record, and locate themselves at the first substantial defect. A *scire facias*, although a judicial writ, must be considered as an original action, to which the defendant may plead, and therefore must contain a legal cause of action on its face. 6 Bac. Abr. 103; 2 Tidd's Prac. 982. This *scire facias*, certainly, does not contain any legal cause of action. Although every word on its face may be true, yet the state is not, by such a statement of facts as it contains, legally entitled to ex-

ecution. It lacks several material averments other than those above pointed out.

It is not necessary, further, to pursue the subject. The record is defective. It contains none of the form, and but little of the substance, of a record on scire facias. A considerable portion of it is a heterogeneous mass of papers and things transcribed, which is not legally any part of the record. Judgment reversed.

See 5 L. R. A. (N. S.) 402, and note. See *State v. Mills*, 19 N. C. 552, *McIntosh's Cases on Cont.* 67. See "Bail," *Century Dig.* §§ 386-393; *Decennial and Am. Dig. Key No. Series* § 89.

MCDOWELL v. ASBURY, 66 N. C. 444, 448. 1872.

Sci. Fa. Under the Code Practice.

[In the course of the opinion it is said:]

DICK, J. . . . The Code has abolished the writ of scire facias, C. C. P. sec. 362, but this section does not require a civil action to be brought to obtain a remedy in cases like the one we are now considering.

There were two forms and purposes of writs of scire facias at common law: (1) A writ which was used to remedy defects, or as a continuation of some former suit; (2) A writ in the nature of an original writ, used to commence some proceeding. The Code does not apply to the former, but only to the latter kind. This distinction is shown in many provisions of the Code.

Under the old system writs of sci. fa. of the first class were used to prevent abatements of suits, and remedy defects arising by a change of parties, etc. Under the Code, the objects are accomplished by a motion in the case. C. C. P. 54. After a lapse of three years from the entry of judgment an execution can be issued only on motion, with notice to the adverse party. C. C. P. 256. Formerly a sci. fa. was used to obtain an execution on a dormant judgment. In the case of the death of a judgment debtor, his personal representative must be summoned to show cause why the judgment shall not be enforced. C. C. P. 319. Other instances of a similar character might be given to show that it was not the purpose of the Code to require a civil action to be brought to obtain relief in cases where it was formerly furnished by a writ of sci. fa. of the first class above mentioned.

We will now refer to some of the writs of the second class. At common law a writ of scire facias to repeal letters patent is an original writ issuing out of chancery. Under the Code, a civil action must now be brought for that purpose, sec. 367. A writ of sci. fa. to subject bail was an original proceeding, and in such case the Code requires a civil action to be brought, sec. 160. A sci. fa. to enforce an amercement against a sheriff was in the nature of an original writ, and now a civil action is required. *Jones v. Gup-ton*, 65 N. C. 48.

Proceedings in the nature of writs of scire facias of the first class are almost indispensable in the administration of justice. The Code only intended to abolish the name and form, and simplify the process into a notice or summons to show cause why further proceedings should not be had, and to furnish further relief in matters where the parties had had a day in court. If these objects could only be obtained by civil actions, the cost of legal proceedings would become burdensome and the consequent delay would almost amount to a denial of justice.

There was error in the ruling of his honor. Let this be certified to the end that proper proceedings may be had in the cause.

See Mordecai's L. L. 940-943; Bouv. Law Dic. "Sci. Fa." See "Scire Facias," Century Dig. § 2; Decennial and Am. Dig. Key No. Series § 2.

CHAPTER XI.

ANCILLARY REMEDIES.

Introductory.

"Under our constitution, art. 4, sec. 1, there is but one form of action in civil cases. In that, many ancillary remedies may be asked, i. e., Arrest and Bail, Claim and Delivery, Injunction, Attachment, and Appointment of Receivers. These need not be asked, even if the party is entitled to them. *Wilson v. Hughes*, 94 N. C. 182, and if they are improperly asked they are simply denied or dismissed, but that does not affect the action itself, which goes on if the plaintiff is entitled to any other remedy." *Hargrove v. Harris*, 116 N. C. at p. 419, 21 S. E. at p. 916.

JUDD v. MINING CO., 120 N. C. 397, 27 S. E. 81. 1897.

Requisites of the Affidavit in all Ancillary Proceedings.

[The plaintiff had sued out an attachment. The defendant moved to vacate the attachment upon the ground, *inter alia*, that the affidavit upon which it was based was insufficient, in that it merely stated that defendants were "about to assign or dispose of their property with intent to defraud plaintiffs," and failed to state any reason or grounds for such assertion. The judge refused to vacate the attachment, and the defendant appealed. Reversed.]

CLARK, J. . . . The affidavit for attachment was insufficient, on the second ground assigned in the motion to vacate. When the affidavit is that the defendants are "about to assign or dispose of their property with intent to defraud the plaintiffs," that being not the assertion of a fact, but necessarily of a belief merely, the grounds upon which such belief is founded must be set out, that the court may adjudge if they are sufficient. *Hughes v. Person*, 63 N. C. 548; *Gashine v. Baer*, 64 N. C. 108; *Clark v. Clark*, *Id.* 150; *Penniman v. Daniel*, 90 N. C. 154. In an affidavit for arrest, where the requirements are very similar to those for an attachment, there is the same distinction between alleging things done and those about to be done. *Wood v. Harrell*, 74 N. C. 338; *Wilson v. Barnhill*, 64 N. C. 121; *Peebles v. Foote*, 83 N. C. 102. The same distinction obtains in applications for the appointment of receivers. *Hanna v. Hanna*, 89 N. C. 68. An appeal lies from the refusal to dismiss an attachment or arrest. *Sheldon v. Kivett*, 110 N. C. 408, 14 S. E. 970; *Fertilizer Co. v. Grubbs*, 114 N. C. 470, 19 S. E. 597. Error.

See "Attachment," *Century Dig.* §§ 245-257; *Decennial and Am. Dig. Key No. Series* §§ 96-100.

SEC. 1. ARREST AND BAIL.

LONG v. McLEAN, 88 N. C. 3. 1883.

In What Cases Arrest and Imprisonment Allowed in Civil Actions.

[Action for damages for the conversion of cotton. The plaintiff made affidavit to certain facts which showed a conversion of the cotton by the defendant, and thereupon an order of arrest was issued and executed. The defendant moved to vacate the order of arrest. Motion refused. Defendant appealed. Affirmed.]

RUFFIN, J. The summons in this case was served upon the defendant, Leach, alone. The action is for the wrongful conversion of personal property. Accompanying the summons was an order of arrest, under which the defendant was held to bail. At the return term, he moved to vacate the order upon the ground that the affidavit on which it was based, failed to allege fraud on the part of the defendant in taking the goods; and, upon his motion being overruled, he appealed to this court.

The fallacy of the defendant's argument is in supposing that the provision of the constitution, which prohibits "imprisonment for *debt*, except in cases of fraud," has any application to actions for *tort*. In *Moore v. Green*, 73 N. C. 394, the whole ground was gone over and thoroughly discussed, and it was solemnly resolved that the prohibition—and indeed the provisions of the entire section—was intended to apply only to causes of action arising *ex contractu*. To give it any other construction, it was said, would be to withdraw a wholesome check on violence and wrong, and would tend to license disorders and law-breaking incompatible with the peace and welfare of society. We can add nothing to what is there said, except to call attention to the fact, that similar provisions in the constitutions of other states have received a like construction. *Harris v. Bridgers*, 57 Ga. 407; *McCook v. State*, 23 Ind. 127; *Lathrop v. Singer*, 39 Barb. (N. Y.) 396; *People v. Cotten*, 14 Ill. 414. Affirmed.

See *Ex parte Hollman*, 79 S. C. 9, and note, inserted at ch. 6, sec. 3; and *Lewis v. Brackenridge*, 1 Blackf. 112, inserted at ch. 13, sec. 4. See 17 L. R. A. (N. S.) 1140, and note (arrest in proceedings for alimony); 20 *Ib.* 844, and note (arrest in actions for deceit and false warranty). See "Arrest," Cent. Dig. § 9; "Constitutional Law," Cent. Dig. § 151; Decennial and Am. Dig. Key No. Series § 83.

HARRISS v. SNEEDEN, 101 N. C. 273, 7 S. E. 801. 1888.

Sufficiency of the Affidavit. Duty of the Court as to Finding the Facts, etc. Assertions Upon Information and Belief. Motion to Vacate. Powers of Appellate Court.

[Action for slander of title to real estate. Defendant was arrested under an order issued in the cause, and discharged upon a motion to vacate the order of arrest. Plaintiff appealed. Affirmed.]

MERRIMON, J. In his application in the action for the provisional remedy of arrest and bail, the plaintiff should state in the affidavit such facts as clearly disclose a cause of action as to which the defendant may be arrested, as allowed by the statute Code, § 291. These facts should be set forth with such fullness and legal precision as that the court can certainly discern the particular cause of action intended to be alleged. It should find the facts from the evidence produced by the plaintiff, and be able to see and determine that the cause of action exists as alleged. It is not sufficient that it may exist. This must not be left to conjecture or bare probability. The court must be satisfied from the evidence before it that it does so exist; because the statute allows the order of arrest to be granted only "when it shall appear to the court, or judge thereof, by the affidavit of the plaintiff, or any other person, that a sufficient cause of action exists, and that the case is one of those provided for" by the statute. Moreover, a party shall not be arrested upon conjecture, or facts which leave the mind of the court in doubt and uncertainty. The affidavit should state the facts positively, when this can be done; but if it is founded upon information and belief of the affiant, the grounds of such belief must be set forth, so that the court can see and judge of their character and sufficiency. *Peebles v. Foote*, 83 N. C. 102, and cases there cited. The defendant may at any time before judgment move to vacate the order of arrest, upon the ground that it was irregularly granted, or that the evidence and the facts found were insufficient to justify it. In such case the plaintiff cannot be allowed to offer additional evidence to support his motion improperly granted. Code, § 317; *Bear v. Cohen*, 65 N. C. 511; *Devries v. Summit*, 86 N. C. 126. But the defendant may also support his motion by producing counter-affidavits and other appropriate evidence to prove that the plaintiff's motion for the order of arrest was not well or sufficiently founded. In this case, the plaintiff may produce additional affidavits and other pertinent evidence to cure defects and strengthen his case. *Clark v. Clark*, 64 N. C. 150; *Devries v. Summit*, supra. The court, having the order of arrest and the motion to vacate it before it, will determine whether or not, for any cause, the order was improvidently granted; and, if need be, finding the facts from the whole evidence, and considering and applying the same, it will direct that the order remain undisturbed, that it be modified in some particular, or vacated, accordingly as it may be of opinion one way or the other. A motion to vacate the order of arrest should be allowed, if, upon all the facts found, and the law arising thereupon, the court should be satisfied that the order ought to be vacated. But when the order was properly granted, as the facts at first appeared, a mere denial by the defendant of the plaintiff's allegations sufficiently made would not be sufficient to prompt the court to allow a motion to vacate the order. Nor, ordinarily, would the admission of the material facts upon which the order was granted, and facts made to appear in avoidance of the case made by the plaintiff, be sufficient, unless such facts in avoidance

should have such point and weight as to satisfy the court that the plaintiff's grounds for the order of arrest were not well founded. The order, regularly and properly granted—that is, granted upon sufficient proof to warrant it upon the application—should not be vacated but upon convincing proof that it should be. *Hale v. Richardson*, 89 N. C. 62; 1 Whitt. Pl. (4th ed.) 421, 422; 3 Estee, Pl. & Pr. § 4041 et seq.; 1 Gray, N. Y. Pr. 91 et seq.

Now, if it be granted that the cause of action (that of "slander of title"), which the plaintiff alleged very vaguely and unsatisfactorily in the complaint, which was used as an affidavit in support of the motion for the order of arrest, was embraced by the statute (Code, § 291), and as to which the defendants might be arrested (and this is questionable), the court had before it the complaint and answer used as affidavits upon the motion to vacate the order of arrest, and informally found the facts from the whole evidence, and that the facts as stated by the defendants were true, and "rebutted," or overthrew, the case made by the plaintiff for the purpose of the motion for the order of arrest. We are not at liberty to review the findings of facts by the court, this being a case at law (*Jones v. Boyd*, 80 N. C. 260; *Hale v. Richardson*, 89 N. C. 62; *Worthy v. Shields*, 90 N. C. 192); and, accepting the facts as found, we cannot hesitate to decide that the court properly vacated the order of arrest. The facts alleged by the plaintiff are indefinite, vaguely and loosely stated, and, therefore, to be taken with the more caution. The defendants, on the other hand, expressly and positively deny all the material allegations of the plaintiffs, and allege, affirmatively, facts found to be true, which go strongly to show that they claimed the title to the land referred to in good faith, and did not impertinently and officiously interfere with their claims but in order to assert their own claim and title. This, they had the right to do in good faith, in an action of this character, even though, upon scrutiny, it should turn out that their claim of title was not well founded. . . .

In equity, arrest and bail proceedings were not used, but a writ of *Ne Exeat* was issued as an ancillary remedy to keep the defendant within the reach of the process of the court. See Bouv. Law Dict. "*Ne Exeat*." For *ne exeat* in North Carolina, see *Howell v. Howell*, 38 N. C. 522; *Lehman v. Logan*, 42 N. C. 296. See also *Coble v. Alvord*, 27 Ohio St. 654, and note thereto, inserted at sec. 5, post. For the writ of *ne exeat* as used in the Federal courts, see Rev. Stat. U. S. sec. 717, U. S. Comp. St. 1901, p. 580, and Gould and Tucker's notes thereto; *Griswold v. Hazard*, 141 U. S. 260, 11 Sup. Ct. 972; *Shiras Eq. Pr.* 42, 212. The form in use in the Federal courts is given at p. 212 of *Shiras Eq. Pr.* See "*Arrest*," Century Dig. §§ 54, 55, 106; Decennial and Am. Dig. Key No. Series §§ 27, 44.

HUNTLEY v. HASTY, 132 N. C. 279, 43 S. E. 844. 1903.

Arrest Under Execution Against the Person. Arrest Where Proceedings in Arrest and Bail Have Not Been Instituted as an Ancillary Remedy.

[Action for assault and battery. No order of arrest was issued before judgment. After judgment the plaintiff applied to the clerk of the superior court for an execution against the person of the defendant, an execution against his property having been returned unsatisfied. From

the clerk's refusal to issue such execution, the plaintiff appealed to the judge. The judge reversed the ruling of the clerk, and defendant appealed. Affirmed. The facts appear in the beginning of the opinion.]

MONTGOMERY, J. This action was brought to recover damages against the defendant for an alleged assault and battery with a deadly weapon—a pistol or metallic knuckles. The details of the battery are set forth in the complaint. There was a verdict for the plaintiff, and a judgment thereon was duly entered. An execution in the ordinary form was issued against the property of the defendant, the homestead exemption laid off by the sheriff, and no excess found liable to execution. Upon the return of the execution unsatisfied, the plaintiff applied to the clerk for an execution against the person of the defendant, under section 447 of the Code. The clerk refused the motion upon the grounds, first, that judgment was taken and docketed before any demand for an order of arrest; second, that the complaint made no demand for an order of arrest; third, the plaintiff accepted the judgment without an order of arrest; and, fourth, that no affidavit accompanied the motion for the order of arrest. His honor reversed the action of the clerk, who had refused to grant the motion.

The case of *Peebles v. Foote*, 83 N. C. 102, is decisive of this case. The question is whether in such case execution can be issued against the person of a defendant without an order of arrest having been served before the judgment. The section of the Code under which the order of arrest was granted reads: "If the action be one in which the defendant might have been arrested, an execution against the person of the judgment debtor may be issued to any county within the state after the return of an execution against his property unsatisfied in whole or in part. But no execution shall issue against the person of a judgment debtor unless an order of arrest has been served as provided in title nine, sub-chapter 1, of this chapter, or unless the complaint contains a statement of facts showing one or more of the causes of arrest required by section 291." That section was amended by chapter 541, p. 595, of the Acts of 1891 by the adding to the end of it these words: "Whether such statement of facts be necessary to the cause of action or not." In *Peebles v. Foote*, supra, ASHE, J., for the court, said: "The section 260 [Code Civ. Proc.], under which the defendant was arrested, contemplates three classes: (1) Where the cause of arrest is not set forth in the complaint; (2) where the cause of arrest is set forth in the complaint, but is only collateral and extrinsic to the plaintiff's cause of action; (3) where the cause of arrest set forth in the complaint is essential to the plaintiff's action." Our case falls under the third class, and, as was said in *Peebles v. Foote*, supra, no affidavit for the order of arrest was needed; and no order of arrest is required before an execution may be issued against the person of the defendant, provided the complaint has been properly and sufficiently verified. The complaint was properly verified in the case before us. A cause of arrest was set forth in the complaint—Code, § 291.

subsec. 1; *Carroll v. Montgomery*, 128 N. C. 278, 38 S. E. 874; *Kinney v. Laughenour*, 97 N. C. 325, 2 S. E. 43.

The judge who made the order for the execution was the judge residing in the district, but was not the judge who was at that time holding the courts of the district, and for that reason the defendant contends that the order was void; the judge not having jurisdiction. The question for decision before the clerk was a mere matter of law, and the appeal was properly sent up to the judge residing in the district. Code, §§ 254, 255. No error.

See "Execution," Century Dig. §§ 1222; Decennial and Am. Dig Key No. Series § 424.

SEC. 2. CLAIM AND DELIVERY.

JARMAN v. WARD, 67 N. C. 32. 1872.

Whether or Not the Ancillary Remedy of Claim and Delivery May Be Dispensed With. Detinue.

[Action to recover possession of chattels. No affidavit or undertaking in Claim and Delivery proceedings was filed. Demurrer by defendant. Demurrer sustained, and plaintiff appealed. Reversed. The facts appear in the beginning of the opinion.]

PEARSON, C. J. This is an action to recover the possession of personal property, and damages for the detention.

The complaint alleges an executed contract for the sale of two steers, and a cow and calf, by force of which the ownership was vested in the plaintiff. The plaintiff does not make the affidavit nor give the undertaking as required by C. C. P. secs. 177, 179. To this the defendant demurs, and for ground of demurrer specifies: "The action is for claim and delivery of personal property, and the plaintiff has not complied with C. C. P. secs. 177, 178, 179 (ch. 11, p. 63)." This presents the question: Is the affidavit and undertaking required to be filed in all actions to recover the possession of personal property; or may the plaintiff, if he chooses, allow the property to remain in the possession of the defendant, pending the action, and thus avoid the necessity of making affidavit or of giving the undertaking, which latter requisite plaintiffs may not in all cases be able to comply with?

We think it clear, by the examination of C. C. P., that, in this action, if the plaintiff is content to let the property continue in the possession of the defendant pending the action, he is not required to make the affidavit or give the undertaking required by sections 177, 178, 179. *It is then, in effect, the old action of detinue*, and the judgment is as set out in sec. 251, C. C. P.: "In an action to recover the possession of personal property, judgment for the plaintiff may be for the possession, or for the value of the property (in case a delivery cannot be had) and damages for the detention," etc. It is only in cases when the plaintiff seeks to have the property delivered to him instanter and to have the possession pending the action, *as in the old action of replevin*,

that the affidavit and undertaking are required. This is obvious by looking at C. C. P., title IX, "Of provisional remedies in civil actions," ch. 1, Arrest and Bail, ch. 2, Claim and Delivery of Personal Property. This provisional remedy presupposes an original remedy, in which the provisional remedy may or may not be applied for. This general view of the subject does not seem to have suggested itself to his honor, or to the counsel, nor was C. C. P., sec. 251, adverted to.

The demurrer is overruled, and there should be judgment that the plaintiff recover the two steers and the cow and calf (which are described with great certainty in the complaint), together with damages for the detention and costs, and in case the property, or any part of it, cannot be had, then that he recover damages by way of valuation in addition to damages for the detention. The case is remanded, to the end that the amount of damages may be enquired of, and final judgment may be entered in the superior court—unless the defendant be allowed to amend his pleadings by withdrawing the demurrer and putting in an answer. *Love v. Comrs.*, 64 N. C. 706; *Mervin v. Ballard*, 66 N. C. 398. Defendant to pay the costs in this court, and judgment on the undertaking for the appeal. Judgment reversed.

For a further discussion of the ancillary remedy of Claim and Delivery, see ch. 7, sec. 1. See "Replevin," Century Dig. §§ 128, 139; Decennial and Am. Dig. Key No. Series §§ 27, 33.

SEC. 3. INJUNCTION.

FRINK v. STEWART, 94 N. C. 484. 1886.

Injunction When Granted as an Ancillary Remedy.

MERRIMON, J. . . . The court will not grant relief by injunction in a case of simple trespass, and when it appears that the plaintiff can have adequate remedy and compensation in damages for the injury sustained. To entitle him to such relief in the first instance, he must allege, and it must appear, that he will, or may, probably suffer irreparable injury in some way if it shall not be granted. And it is not sufficient to allege such injury in general terms—it must be done by such specific allegations of facts as will enable the court to see that such injury will, or may, happen. It is a mistaken notion that seems to prevail extensively, that relief by injunction may be had *in almost any case, and as a matter of convenience*, under the Code method of procedure. On the contrary, it is only to be granted when and where adequate relief cannot be had without it. It is extraordinary and provisional in its nature and purpose. *Thompson v. Williams*, 54 N. C. 176; *Gause v. Perkins*, 56 N. C. 177; *Bell v. Chadwick*, 71 N. C. 329; *German v. Clark*, *Id.* 417; *Dunkart v. Reinhardt*, 87 N. C. 224. . . .

Injunction as an ancillary remedy is further treated of under Injunction as an Extraordinary Remedy, ch. 19, sec. 5, ante. See "Injunction," Century Dig. §§ 3, 38. Decennial and Am. Dig. Key No. Series §§ 3, 46.

SEC. 4. ATTACHMENT.

SCHENCK v. GRIFFIN, 38 N. J. L. 462. 1875.

Origin and Nature of the Remedy by Attachment. Estoppel. Voluntary Appearance by Defendant.

[Schenck sued Griffin for an alleged indebtedness, and caused a writ of attachment to be levied on certain chattel property which Schenck claimed to belong to Griffin. Griffin was a non-resident and no process was personally served upon him, nor did he appear voluntarily and defend the action. Judgment was rendered against Griffin and certain money derived from the attached property was paid over to Schenck by the sheriff. Griffin then brought this action to recover from Schenck the money so received by him. Schenck contended that the judgment in the former action was an estoppel—was *res judicata*. The judge ruled that it was not, and, the jury having rendered a verdict against Schenck, judgment was given against him. Schenck carried the case to the supreme court by writ of error. Affirmed.]

DEPUE, J. The case was argued here on objections to the declaration and exceptions taken at the trial. The exception mainly relied on is, that judgment having been recovered in the attachment suit, the rights of the parties were conclusively settled, and the liability of the defendant for the debt was *res adjudicata*.

Foreign attachment is a peculiar proceeding to compel the appearance of a debtor by seizing his property, and, in default of appearance, appropriating it to the payment of the debt. *It is strictly a proceeding in rem.* With respect to the *property attached*, whether it be real or personal, or a debt due the defendant from the garnishee, the judgment and proceedings are conclusive. Neither in a subsequent action by the defendant in attachment against the garnishee for the recovery of the debt attached, nor in an action to recover the lands or chattels levied on, can the defendant in attachment defeat the recovery in the attachment suit by disproving the debt for which the attachment was issued. If the court had jurisdiction, the judgment is conclusive, and cannot be called in question for mere irregularities, when offered collaterally. Thus far, and for these purposes, a judgment in attachment has the quality of conclusiveness which pertains to an ordinary common law judgment. *Voorhees v. Bank of U. S.*, 10 Peters, 449; *Cooper v. Reynolds*, 10 Wall. 309; *McDaniel v. Hughes*, 3 East, 367; *Turbill's Case*, 1 Saund. 67, n. 1; *Welsh v. Blackwell*, 2 Green. 349; *Lomerson v. Hoffman*, 4 Zab. 674; *Drake on Attachments*, sec. 703. *But except with respect to the property attached, the proceeding has no effect.* No action can be brought on the judgment recovered, and in an action on the original demand a judgment in attachment is not competent as *prima facie* evidence of the indebtedness. *Miller v. Dungan*, 7 Vroom, 21; *Rubber Co. v. Goodyear*, 9 Wall. 807-810.

The proceeding in attachment had its origin in the custom of London, and has been adopted and modified by statutory provisions. By the custom of London, after judgment entered, but

before execution is awarded, the plaintiff is required to find sureties to undertake that if the defendant in the attachment shall, within a year and a day, come into court and disprove or avoid the debt demanded, the plaintiff shall restore the money condemned, or so much thereof as shall be disproved, or else his sureties will do it for him; and after the satisfaction of the judgment on the record, the defendant may, within a year and a day, sue out a writ of *scire facias ad disprobandum debitum*, which puts the plaintiff to the proof of the debt, and in case of his failure to prove his debt, judgment will pass against him for the restitution of the money, with execution thereon; and if he be unable or unwilling to restore the money, his sureties will be compelled to pay it for him. *Locke on Attachment*, 19-58; *Appendix to Drake on Attach.* 709-732; *Serg. on For. Attach.* 48-50; *Com Dig. Attachment*.

But it was contended in behalf of the plaintiff in error, that this provision [a section of the statute requiring the plaintiff in attachment to give bond to answer any suit against him by the defendant within a year] was entirely nugatory, inasmuch as the act did not expressly provide for the bringing of such action. It is not necessary that it should. The proceedings by foreign attachment, under the custom of London, were recognized by the common law, and adopted as part of the local law of the city of London, and administered as such in the common law courts. The common law courts had, furthermore, long before the Revolution, adopted the principle, that the judgment in such proceedings did not conclude the defendant as to the existence of the debt for which the attachment was issued, and that he had a remedy to recover back from his adversary the moneys realized thereunder if they were not due and owing. And the section referred to plainly recognizes the existence of a remedy by a suit, in which, by the judgment or decree of a court, it shall be adjudged, that moneys received under the attachment were not due and owing to the attaching creditors. That remedy can only be obtained by an action such as the plaintiff in this case is prosecuting.

Exception was also taken to the refusal of the judge to nonsuit, on the ground that Griffin having knowledge of the attachment suit before judgment entered, and having neglected to enter an appearance and litigate therein the demand of Schenck, was estopped from bringing this action. One of the peculiarities of the proceeding by attachment is, that the defendant may appear during the pendency of the suit and contest the plaintiff's demand, or, within the time limited after judgment, may dispute the debt for which the attachment issued. Both these remedies are given in the alternative. The defendant has his election to pursue either. If he appears to the suit, he makes the judgment, if any be recovered, a judgment in personam. He is under no obligation to give the plaintiff that advantage. He may leave the plaintiff to prosecute his proceedings in rem, and avail himself of the right which the law gives him of recovering back the proceeds realized

if the debt be not due. Any other exposition of the law would be manifestly unjust. The demand in controversy may be large, and the property attached of comparatively little value. The defendant was under no compulsion to submit himself to the hazard of a judgment against him personally, in a forum which had no jurisdiction over his person, or else be estopped from pursuing a remedy which he is legally entitled to in case the proceeding be unlawfully prosecuted. . . . Judgment affirmed.

See "Attachment," Century Dig. § 1327; Decennial and Am. Dig. Key No. Series § 364; "Judgment," Century Dig. §§ 1164, 1238; Decennial and Am. Dig. Key No. Series, §§ 652, 713.

PENOYAR v. KELSEY, 150 N. Y. 77, 44 N. E. 788. 1896.

Explanation of Attachment as a Common Law and as a Code Remedy.

VANN, J. The question certified to us for determination depends upon the construction of section 636 of the Code of Civil Procedure, which prescribes "what must be shown to procure" a warrant of attachment against property. The learned counsel for the respective parties differ as to the rule of construction that should be applied; the one contending that it should be strict, because the provision is in derogation of the common law, while the other insists that it should be liberal, because the statute does not derogate from the common law, but merely amplifies a well-known common-law remedy. The process of attachment, as it existed under the common law, differed in its nature and object from the provisional remedy now known by that name. Its original purpose was to acquire jurisdiction of the defendant by compelling him to appear in court through the seizure of his property, which he forfeited if he did not appear or furnish sureties for his appearance. 3 Bl. Comm. 280; 1 Rolle, Abr. "Customs of London," K. 13; Kneel, Attachm. 6; Drake, Attachm. § 5; Ashley, Attachm. 11; Locke, Attachm. 12. It was part of the service of process in a civil action through a species of distress, in which the goods attached were the ancient *vadii* or pledges. Bond v. Ward, 7 Mass. 123, 128; Gilb. Dist. 24. As said in the case last cited: "The practice of attaching the effects of a defendant and holding them to satisfy a judgment, which the plaintiff may recover, when, perhaps, judgment may be for the defendant, is unknown to the common law, and is founded on our statute law." Its present purpose is not to compel appearance by the debtor, but to secure the debt or claim of the creditor. It is a proceeding in rem, and the process may issue, in certain cases, whether the defendant has been served with a summons or not, although inability to serve through the fault of the defendant, is a ground upon which the warrant may be granted. It exists, as a provisional remedy, only when authorized by statute, and, as such, is comparatively recent in its origin. While attachments were permitted in justices'

courts by the Revised Statutes, and were extended somewhat by the non-imprisonment act, they were proceedings in the nature of original process, by which the action was commenced. 2 Rev. St. p. 274; Laws 1831, c. 300; Bradner, *Attachm.* 2. See, also, 1 Webst. & S. *Attachm.* 236; 2 Rev. Laws 1813, p. 157. Attachment, as a provisional remedy, with the object of securing a debt by preliminary levy upon property to conserve it for eventual execution, was created by the Code of Procedure, and has been continued and extended by the Code of Civil Procedure. Code Proc. § 227; Code Civ. Proc. § 635. Unlike the attachment against absent or absconding debtors under the Revised Statutes or the Stillwell act, which sequestered the property of the debtor for the benefit of all the creditors alike, this proceeding is for the benefit of the attaching creditor alone. It is not only created by statute, but has substantially none of the features peculiar to the common-law remedy. As said by a recent writer: "It amounts to the involuntary dispossession of the owner prior to any adjudication to determine the rights of the parties. It violates every principle of proprietary right held sacred by the common law. It is, to some extent, equivalent to execution in advance of trial and judgment. Property is taken, under legal process, at the instance of one without even a claim of title, from the possession of another whose title is unquestioned; and, though the mere taking does not work any change in the ownership of the property, it seriously affects some of the most important incidents of that ownership, and may even be the means of thwarting the owner in his endeavors to meet the just demands against him." Wade, *Attachm.* § 2.

Owing to the statutory origin and harsh nature of this remedy, the section in question should be construed, in accordance with the general rule applicable to statutes in derogation of the common law, strictly in favor of those against whom it may be employed. *Id.*; *Sharpe v. Speir*, 4 Hill, 76, 86; *Waples*, *Attachm.* § 23.

See 3 L. R. A. (N. S.) 608, 20 Ib. 264, and notes; attachment (of a debt payable outside of the jurisdiction); 11 Ib. 706, and note (of funds in hands of a guardian); 5 Ib. 1072, and note (of funds in the hands of an executor or administrator); 13 Ib. 757, and note (of funds in custody of court officers); 14 Ib. 1221, and note (of funds in hands of assignee in bankruptcy); 16 Ib. 1026, and note (foreign railroad car); 18 Ib. 1158, and note (stockholder's interest in a corporation); 20 Ib. 912, and note (unearned salary); 6 Ib. 491, 10 Ib. 983, and notes (injunction against vexatious attachment); 6 Ib. 598, and note (liability of plaintiff for wrongful levy); *Moore v. Bank*, 140 N. C. 293, 52 S. E. 944 (liability of plaintiff for malicious attachment); 1 L. R. A. (N. S.) 778, and note (when does a resident who intends to move become a non-resident?). See "Attachment," *Century Dig.* §§ 5-7, *Decennial and Am. Dig. Key* No. Series § 2.

MARSH v. WILLIAMS, 63 N. C. 371, 373. 1869.

"Original Attachment" Under Ancient Practice, and Attachment Under the Code Practice.

Dick, J. . . . The defendant Marsh sued out an original attachment before a justice of the peace, against the property of the plaintiff in this case. This kind of process has been abolished by the Code, and now the original process in every civil case is the summons. The warrant of attachment can be used as an auxiliary remedy to secure the satisfaction of a judgment which may be obtained by the summons and complaint, but it can only be issued upon affidavit for causes specified in sections 197 and 201. . . .

"Attachment, other than the common law writ which issued out of the common pleas upon the non-appearance of the defendant at the return of the original writ, had its origin in the civil law, and afterwards was adopted in England in the form of a custom of the London merchants, and out of this, as modified and extended by statute, has grown the modern law in respect to this remedy. 4 Cyc. 396, 397; 1 Shinn on Attachment, secs. 1 and 2. It was resorted to in order to compel the attendance of the debtor as well as to afford a security to the creditor. Under our former statutes, when the defendant was a non-resident, it issued either in the form of an original or a judicial attachment and without any notice until there had been a levy or caption of the goods of the debtor, when advertisement was required if the defendant resided without the jurisdiction. Rev. Code, ch. 7, secs. 12 and 13. By sec. 12 it was provided that 'No judicial process shall be issued against the estate of any person residing without the limits of the state, unless the same be grounded on an original attachment, or unless the leading process of the suit has been executed on the person of the defendant within the state.' This was the method of proceeding against non-residents until the adoption of the Code system. *The remedy then became ancillary* to the principal suit for the recovery of the debt. But there was no essential change in the procedure by which the defendant was brought before the court and compelled to appear and submit his person to its jurisdiction, or lose his property as the penalty for his default, or so much thereof as was necessary to satisfy the plaintiff's demand. The very nature of the case, as shown by the fact of non-residence, made it clearly futile to attempt to serve him personally. As he was presumed to have a constant regard for his property and always to keep a watchful eye upon it, the law-makers at once concluded that the most effective and the speediest way of compelling his appearance was by seizing it; and at the same time this method had the further advantage of protecting his creditor. But in order that the cardinal principle of our judicial system should not be even seemingly violated, it was required that in the original action, instead of the idle and useless ceremony of issuing a summons for a man who it was well known could not be found, publication, in such manner as would be likely to give notice of the action, should be made; and such is the meaning and clear intent of the statute as plainly manifested by its words. It is true that civil actions are commenced by issuing a summons, but this refers to cases where the defendant, being within the jurisdiction of the court, can be served personally, and the method of making such service is specially provided for in Rev. §§ 429-442." *Grocery Co. v. Bag. Co.*, 142 N. C. at p. 177, 55 S. E. at p. 91. This case holds that attachment proceedings against persons out of reach of the process of the court, need not be commenced by the issue of a summons, but may be commenced by filing the affidavit and proceeding to publish the requisite notice. See "Attachment," *Century Dig.* §§ 398, 664; *Decennial and Am. Dig. Key No. Series* §§ 143, 206.

TOMS v. WARSON, 66 N. C. 417. 1879.

Nature of Attachment Under Code Practice. Ancillary Remedy. Motion in the Cause. Motion to Vacate. Who May Be Let in as Parties.

RODMAN, J. In January, 1869, the plaintiff commenced an action in Buncombe superior court against the defendant upon two notes. Afterwards, while the action was pending and undetermined, the plaintiff applied to the clerk of that court upon affidavit for an attachment, which was issued, and returned levied on certain lands in Henderson county, and also on certain lands in Buncombe county. On the return of the attachment, the defendant put in an answer, denying that he was the owner of the property attached, etc., and the clerk thereupon returned all the papers connected with the attachment to the superior court in term time for the trial of the issues thus irregularly joined between the plaintiff and the defendant. Crawford and Murray appeared before the judge, the former claiming the lands in Henderson, and the latter those in Buncombe, and they moved the judge to allow them to become parties to the original action on the note. This he refused, but allowed them to become parties to the collateral issues respecting the title to the property levied on. From this refusal they appealed.

1. The summons and complaint by the plaintiff as a ground for his motion for the attachment were unnecessary. The motion for an attachment is a motion in the original action. It must be founded on a proper affidavit, and should be in writing. The defendant may oppose the granting of the attachment in the first instance, if he has notice of the application, or he may come in afterwards and move to vacate it, either for defects in the plaintiff's case, or on counter affidavits, as the nature of the case may require. But he cannot plead to the attachment in a technical sense. To do so was irregular. Crawford and Murray might have appeared before the clerk and moved there to be allowed to be made parties, when they could have set up their title to the property. When issues of fact were thus joined, the clerk should have sent them up to the judge of the superior court to be tried there.

2. As this was not done, and the clerk had sent up the issues between the plaintiff and the defendant, arising out of the attachment, and they were then pending before the judge, Crawford and Murray might well apply to him to become parties to that collateral issue for the purpose of asserting their respective claims to the property. This the judge offered to allow them to do.

3. They had no right to become parties to the original action on the note. In the matters at issue in that action, they had no interest to be affected by any judgment which might be given. There was no reason for their intervening. They were strangers to that controversy, and could neither be benefited nor prejudiced by its result. The judge properly refused to allow them to become parties. If they had so moved, the judge might have made an order suspending the sale of the property attached until after

the determination of the collateral issues respecting the title, and no doubt he would have done so, but whether he did or not all purchasers of the land in Buncombe would have been affected by notice of the claim to that, and Crawford, by filing a notice of lis pendens in Henderson county, as provided by sec. 90, C. C. P., could have affected with notice all the purchasers of the property in that county. There is no error.

See 23 L. R. A. (N. S.) 536, 1081, and notes (rights and remedies of an intervenor). See "Attachment," Century Dig. §§ 214, 216, 808, 816, 999; Decennial and Am. Dig. Key No. Series §§ 119, 121, 225, 237, 287.

BRANCH v. FRANK, 81 N. C. 180. 1879.
Sufficiency of Affidavit.

ASHE, J. This was a motion to vacate an attachment. The motion was based upon two grounds: First, that the affidavit for the attachment did not state "that the court has jurisdiction of the subject matter of the action;" Second, "that it did not state positively that the defendants had property in the state, but stated that the defendants had property therein, as plaintiffs are informed and believe, consisting of a debt due, or shortly to be due, them by L. A. Farinholt, of Weldon."

It seems that the court below fell into the error of confounding the requisites of the affidavit for *service of summons by publication* with those for obtaining a *warrant of attachment*, the first is prescribed in section 83 of the Code of Civil Procedure, and the latter in section 201, *and they are quite different*. By section 201 it is provided that the warrant of attachment may be issued whenever it shall appear by affidavit that a cause of action exists against the defendant, specifying the amount of the claim and the grounds thereof, and that the defendant is a foreign corporation, or not a resident of this state. The affidavit in this case, so far as relates to obtaining the warrant of attachment, comes fully up to the requirements of the law—the second, third and fourth paragraphs set forth the fact that a cause of action exists against the defendants, and state with sufficient precision the amount and grounds thereof; and the sixth states that the defendants are non-residents of the state. *This is all that is needful to obtain the warrant*. There is no provision in this section that requires the statement "that the court has jurisdiction of the subject-matter of the action, nor that the defendant has property in this state." . . . The affidavit to obtain the warrant was sufficient. It was error to vacate the attachment before judgment, however defective the affidavit may be for the purpose of having service of the summons by publication, for it is possible that may be amended. There is error. Reversed.

See introduction to this chapter for requirements of the affidavit. See "Attachment," Century Dig. §§ 242-244; Decennial and Am. Dig. Key No. Series § 116.

MANUFACTURING CO. v. NATIONAL BANK, 130 N. C. 609, 41 S. E. 870. 1902.

Attachment Against a National Bank.

FURCHES, C. J. The plaintiff commenced an action against Geo. H. Tierney & Co. in which plaintiff alleges that said Tierney & Co. is liable to plaintiff in the sum of \$285.92 on account of a breach of contract. Upon this allegation, said Tierney & Co. being nonresidents of this state, but owning a lot of cotton in this state (as plaintiff alleged), plaintiff sued out an attachment, and caused it to be levied on said fifty bales of cotton. In that action the defendant bank intervened, and claimed the cotton. The plaintiff then commenced this action against the defendant bank, and attached the same cotton as the property of the defendant bank. In this way both cases stood upon the docket of Durham superior court at the same time, and the defendant bank moved to dismiss the action against it and to discharge the attachment as against it, while, on the other hand, the plaintiff moved to consolidate this action with the action of plaintiff against Tierney & Co. The court refused the motion of defendant to dismiss the action and discharge the attachment against it, but allowed the motion of plaintiff, and consolidated the two actions, and defendant appealed.

We do not see at present how it is the plaintiff has a cause of action against the defendant bank for a breach of contract with the defendant Tierney & Co., as alleged by it. But this would be more properly a question to be considered on a trial of the case, and not on a motion to dismiss. But the motion to dismiss the action and discharge the attachment is not made upon that ground, but for the reason that it is commenced by attachment, and a levy upon fifty bales of cotton alleged to be the property of the defendant bank. It is alleged by the plaintiff and admitted that the defendant is a "national bank," and in our opinion the defendant's motion should have been allowed. Act Cong. 1873, incorporated into section 5242, Rev. St. U. S. (U. S. Comp. St. 1901, p. 3517), provides that no attachment shall be brought against a national bank in any state court, and this has been held to be the law, not only as to state courts, but also as to United States courts. *Bank v. Mixer*, 124 U. S. 721, 8 Sup. Ct. 718, 31 L. Ed. 567. And the same is held to be the law in the state of Vermont. *Safford v. Bank*, 61 Vt. 373, 17 Atl. 748.

Therefore the defendant's motion to dismiss and to discharge the attachment should have been allowed. Error.

See "Banks and Banking," Century Dig. §§ 1067-1069; Decennial and Am. Dig. Key No. Series § 278.

PENNIMAN v. DANIEL, 91 N. C. 431. 1884.

The Doctrine of Pennoyer v. Neff.

SMITH, C. J. . . . In *Pennoyer v. Neff*, 95 U. S. 714, decided in 1877, with but a single dissenting voice, the conclusion reached and announced is, that a judgment recovered in a suit by attachment levied upon the defendant's land when no personal service has been made, is exhausted by a sale of the property attached and the appropriation of the proceeds to the creditor's debt, and possesses no other legal force. The sale of other land of the debtor under such judgment was held to pass no title to the plaintiff. If this be accepted as the law in this state, it shows that the preservation of the lien of the attachment was the fundamental condition of success, and might well excuse the waiting until the validity of the warrant was determined. We do not undertake to say that such is the law in this state, and certainly this decision is at variance with the adjudications under the former law. It has been held that a proceeding commenced by original attachment and prosecuted on due notice by publication of the seizure of the debtor's property to final judgment, was *not a proceeding in rem, but the judgment is personal*. *Skinner v. Moore*, 19 N. C. 138. The attachment was, in its nature and operated as, a distress to compel appearance; and if it did not, the judgment was as absolute and conclusive as if rendered after personal service.

The attachment under the Code is of quite a different nature, and subsidiary only towards obtaining the relief which is the object of the action, and seems under the statute to be intended to be more comprehensive and more fully remedial within the state than is admitted in the opinion in Pennoyer v. Neff. As to the extra-territorial effect of such a judgment, it can be only recognized as effectual so far as it appropriates the debtor's property to the creditor's demand, and wholly inoperative beyond that limit, and so it is held in Peebles v. Patapseo, 77 N. C. 233.

Pennoyer v. Neff seems to be fully sustained in *Vick v. Flournoy*, 147 N. C. 209, 60 S. E. 978; *May v. Getty*, 140 N. C. 310, 53 S. E. 75; *Lemly v. Ellis*, 143 N. C. 200, 55 S. E. 629; *Bernhardt v. Brown*, 118 N. C. 701, 24 S. E. 527; *Long v. Ins. Co.*, 114 N. C. 465, 19 S. E. 347; *Winfree v. Bagley*, 102 N. C. 515, 9 S. E. 198. The doctrine of *Pennoyer v. Neff* has been extended to actions for divorce. *Haddock v. Haddock*, 201 U. S. 562, 26 Sup. Ct. 525, inserted at ch. 12, post. See *Long v. Ins. Co.*, 114 N. C. 465, inserted at ch. 13, § 6, post. Due process of law requires service of process. There are three ways in which such service may be made so as to satisfy such requirement: (1) Actual *personal* service by an officer, acceptance of service, or voluntary appearance. The legislative department may prescribe whether the service shall be by reading the process to the person to be served, or by leaving a copy with him personally or at his abode; (2) Publication of the process when the proceeding is in rem as distinguished from a proceeding in personam; (3) Publication where the proceedings are quasi in rem—such as attach-

ment. *Bernhardt v. Brown*, 118 N. C. at p. 705, 24 S. E. 527, approved in *Vick v. Flournoy*, 147 N. C. at p. 212, 60 S. E. 978. See "Attachment," Century Dig. § 749; Decennial and Am. Dig. Key No. Series § 217.

SEC. 5. RECEIVERS AND SEQUESTRATION. NE EXEAT.

BOOTH v. CLARK, 17 Howard (U. S.) 322, 331-333. 1854.

Nature and History of the Remedy of Appointing Receivers. Uses of the Remedy. Powers of the Receiver. Limits of Power, etc.

[Booth was appointed receiver of the estate of Clark. The appointment was by an order entered in a creditors' bill pending in a state court in the state of New York. Booth, as receiver, brought this suit in equity in the circuit court of the District of Columbia, against Clark, and seeks to have placed in his, Booth's, hands, as receiver, a certain claim which Clark had against Mexico. The foundation upon which this suit was supposed to stand was, that the receivership under the decree of the New York court created a lien upon Clark's assets and, consequently, Booth, as receiver, could maintain this suit in the District of Columbia to reach such assets. It was contended by Clark that Booth, as receiver, could maintain no action except in the courts of the state of New York. Decree against Booth dismissing his suit. Affirmed. Only a portion of the opinion is here inserted.]

WAYNE, J. . . . Whatever may be the operation of the decree in respect to the receiver's powers over the property of the debtor within the state of New York, and his right to sue for them there, we do not find anything in the cases in the New York reports showing the receiver's right to represent the creditor or creditors of the debtor in a *foreign jurisdiction*. It is true that the receiver in this case is appointed under a statute of the state of New York, but that only makes him an officer of the court for that state. He is a representative of the court, and may, by its direction take into his possession every kind of property which may be taken in execution, and also that which is equitable, if of a nature to be reduced to possession. But it is not considered in every case that the right to the possession is transferred by his appointment: for, where the property is real, and there are tenants, the court is virtually the landlord, though the tenants may be compelled to attorn to the receiver. *Jeremy's Eq. Juris*, 249. When appointed, very little discretion is allowed to him, for he must apply to the court for liberty to bring or defend actions, to let the estate, and in most cases to lay out money on repairs, and he may without leave distrain only for rent in arrear short of a year. 6 Vesey 802; 15 *Ibid.* 26; 3 Bro. C. C. 88; 9 Ves. 335; 1 Jac. & W. 178; *Morris and Elme*, 1 Ves. Jr. 139; 1 *Ibid.* 165; *Blunt and Clithero*, 6 Ves. 799; *Hughes and Hughes*, 3 Bro. C. C. 87; 5 *Madd.* 473.

A receiver is an indifferent person between parties, appointed by the court to receive rents, issues, or profits of land, or other thing in question in the court, pending the suit, where it does not seem reasonable to the court that either party should do it

Wyatt's Prac. Reg. 355. He is an officer of the court; his appointment is provisional. He is appointed in behalf of all parties, and not of the complainant or the defendant only. He is appointed for the benefit of all parties who may establish rights in the cause. The money in his hands is in custodia legis for whoever can make out a title to it. *Delany v. Mansfield*, 1 Hogan, 234. It is the court itself which has the care of the property in dispute. The receiver is but the creature of the court; he has no powers except such as are conferred upon him by the order of his appointment and the course and practice of the court. *Verplanck v. Mercantile Ins. Co.*, 2 Paige Ch. 452; unless where he is appointed under the statute of New York, directing proceedings against corporations (2 R. S. 438), and then he is a standing assignee, vested with nearly all the powers and authority of the assignee of an insolvent debtor. *Attorney Gen. v. Life and Fire Ins. Co.*, 4 Paige Ch. 224. In the case just cited, Chancellor Walworth says, that the receiver has "no powers except such as are conferred upon him by the order of his appointment and the course and practice of the court." In the statement which has been made of the restraints upon a receiver, we are aware that they have been measurably qualified by rules, and by the practice of the courts in the state of New York, as may be seen in *Hoffman's Practice*; but none of them alter his official relation to the court, and, so far as we have investigated the subject, we have not found another instance of an order in the courts of the state of New York, or in the courts of any other state, empowering a receiver to sue in his own name officially in another jurisdiction for the property or choses in action of a judgment debtor. Indeed, whatever may be the receiver's rights under a creditor's bill, to the possession of the property of the debtor in the state of New York, or the permission which may be given to him to sue for such property, we understand the decisions of that state as confining his action to the state of New York.

Such an inference may be made from several decisions. It may be inferred from what was said by Chancellor Walworth, in *Mitchell v. Bunch*, 2 Paige, Ch. 615. Speaking of the property which might be put into the possession of a receiver, and of the power of a court of chancery to reach property out of the state, he declares the manner in which it may be done, thus: "The original and primary jurisdiction of that court was in personam merely. The writ of assistance to deliver possession, and even the sequestration of property to compel performance of a decree, are comparatively of recent origin. The jurisdiction of the court was exercised for several centuries by the simple proceeding of an attachment against the bodies of the parties to compel obedience to its orders and decrees. Although the property of a defendant is beyond the reach of the court, so that it can neither be sequestered nor taken in execution, the court does not lose its jurisdiction in relation to that property, provided the person of the defendant is within the jurisdiction. By the ordinary course of proceeding,

the defendant may be compelled either to bring the property in dispute, or to which the defendant claims an equitable title, within the jurisdiction of the court, or to execute such a conveyance or transfer thereof as will be sufficient to vests the legal title, as well as the possession of the property, according to the *lex loci rei sitæ*. It is very obvious, from the foregoing extract, that up to the time when *Mitchell v. Bunch* was decided, in the year 1831, it had not been thought that a court of chancery in the state of New York could act upon the property of a judgment debtor in a creditor's bill which was not within the state of New York, but by the coercion of his person when he was within the jurisdiction of the state, and that it had not been contemplated then to add to the means used by chancery to enforce its sentences, in respect to property out of the state of New York, the power to a receiver to sue in a foreign jurisdiction for the same. It is true that the jurisdiction of a court of chancery in England and the United States, to enforce equitable rights, is not confined to cases where the property is claimed in either country, but the primary movement in the chancery courts of both countries to enforce an injunction, is the attachment of the person of the debtor, where he is amenable to the jurisdiction of the court. . . .

Foreign receivers may sue in the state courts of North Carolina by comity. *Person v. Leary*, 127 N. C. 114, 37 S. E. 149, but the general rule is as stated in the principle case, 23 Am. & Eng. Enc. L. 1107 et seq. See "Receivers," Century Dig. § 417; Decennial and Am. Dig. Key No. Series § 210.

BATTLE v. DAVIS, 66 N. C. 252. 1872.

Actions Which a Receiver May Maintain. General Rules Governing Receiverships. Chancery Practice. Code Practice.

[Action by the plaintiff as the receiver of a corporation, to recover a debt owing to the corporation by the defendant. The plaintiff was appointed receiver by the United States circuit court for the district of North Carolina. The defendant insisted that in the absence of express authority by the court which appointed him, the receiver could not bring this action. As there was no express authority conferred, the action was dismissed, and plaintiff appealed. Affirmed.]

DICK, J. A court of equity has the power of appointing a receiver for the purpose of protecting and securing property which is the subject of litigation. A receiver is an officer of the court, and his possession of property is the possession of the court. The court has control over the parties to a suit and can order them to deliver property in controversy to its officer, and if they fail or refuse to obey such order, they may be proceeded against by process of contempt. If the property in controversy is in the possession of a third person who claims the right of possession, the plaintiff may make him a party to the suit and thus render him subject to an order of the court in regard to delivering such property to the receiver. *Parker v. Browning*, 8 Paige, 388. The

order appointing a receiver and giving him possession does not in any manner affect the title of the property, but he holds it as a mere custodian until the rightful claimant is ascertained by the court, and then he holds for such claimant. 4 Md. 80; 3 Md. Ch. 280.

A receiver cannot commence an action for the recovery of outstanding property without an order of the court, and when such order is made the action must be brought in the name of the legal owner and he will be compelled to allow the use of his name upon being properly indemnified out of the estate and effects, under the control of the court. 3 Dan. Ch. Pr. 1977, 1991. The practice of the court of chancery in England on this subject is well settled by many authorities, has long been the course and practice of our courts, and has not been materially changed by the Code. Our attention has been called to the practice in New York, in matters of this kind, and we find upon investigation that the common law powers of receivers have been greatly enlarged by statute, and they may bring an action in their own name for the recovery of property which they have been directed by an order of the court to reduce into possession. Dan. Ch. Pr. 1988, note 2; 2 Paige, 452; 4 Paige, 224; 1 Tif. & Smi. Pr. 160; Vorhies' Code, 432. The case of Hoyt v. Thompson, 1 Selden, 320, commented upon by plaintiff's counsel, does not sustain their position. The plaintiff in that case was the assignee of a receiver appointed by a court of chancery in New Jersey, under a statute of that state authorizing such court in certain cases to appoint receivers, "with full power and authority to demand, sue for, collect and recover, etc., and sell, convey and assign all the said real and personal estate, etc."

The power of a receiver in this state to bring an action is regulated by the rules in a court of chancery, and if the order under which the plaintiff has acted, had been made by one of our courts, he could not maintain this action; and certainly an order made by the U. S. circuit court cannot confer greater powers and privileges upon a suitor in our courts. It is therefore unnecessary for us to consider the question of comity between the state and federal courts which was urged on the argument. We take pleasure, however, in saying that upon all proper occasions such comity will be extended, as in accordance with judicial usage and the laws of the land. We concur in the opinion of his honor, and the judgment must be affirmed.

See further, in affirmation of the principal case, 5 Pom. Eq. Jur. § 180.

The granting or refusing the appointment of a receiver, is appealable. Upon such appeal the supreme court, under the North Carolina practice, will review both law and facts, following the practice in equity. Coates v. Wilkes, 92 N. C. 376; Pearce v. Elwell, 116 N. C. 595, 21 S. E. 305. Generally such orders are considered merely interlocutory and not appealable in the absence of express statutory provision. 2 Cyc. 611. See "Receivers," Century Dig. §§ 327, 346; Decennial and Am. Dig. Key No. Series §§ 173, 178.

MILLER v. WASHBURN, 38 N. C. 161, 166. 1844.

Sequestration in Equity Explained.

[Bill in equity by an administrator and some of the next of kin and legatees against other next of kin and legatees for a settlement of an estate. The bill alleged that a portion of the assets—consisting of certain slaves—was in the possession of the defendants, and plaintiffs feared the defendants would take the slaves beyond the jurisdiction of the court; that the defendants were persons of slender means; and prayed for a writ of sequestration. Upon filing the bill, the court ordered a writ of sequestration, which was issued to the sheriff and duly executed. The defendants answered, setting up title to the slaves, denying the material allegations of the bill, and denying any intention to remove the slaves beyond the jurisdiction of the court. Thereupon the court removed the sequestration from the slaves of one of the defendants, but refused to remove it as to those of another defendant, Josiah Washburn. The plaintiff and Josiah appealed. Affirmed as to Josiah's appeal, and reversed as to plaintiff's appeal. Only that portion of the opinion that explains the writ of sequestration as a remedy, is here inserted.]

NASH, J. When money is alone the demand, the common law security is the person of the debtor, nor will equity go farther; but when property is in contest, chancery will in special cases exercise its preservative power and look further than to the personal liability of the defendant. It will, in cases where the circumstances authorize its interference, and where its aid is invoked, secure the property itself during the existence of the controversy. Thus, in cases of waste, the common law gave the writ of waste, and to aid and secure to the plaintiff the full benefit of the process, the writ of estrepement to stay the further injuring of the property, during the contest, was awarded. The writ of waste, both in England and in this country, from its peculiar features, has become obsolete, and has been succeeded by the more convenient and less cumbrous action on the case in the nature of waste. With the old writ fell that of the estrepement, and the power of the court of equity was called in to supply its place, in aid of the more modern action on the case, and in analogy to the writ of estrepement. Equity, when it interferes, will secure the property in contest during the litigation. With us, we have a species of property peculiarly requiring the exercise of this power in a court of chancery. Without it, the fruits of a judgment at law would often prove illusory. Thus Judge Henderson, in the case of *Edwards v. Massey*, 8 N. C. 364, says, "the same principle which induced the chancery in England to interfere in the case of waste applies in all its force in cases of property in slaves; for the nature of the property is such, that possession may be lost by the most vigilant owner, without there being an actual taking, or the commission of a trespass." In cases, then, of this species of property, in which it is proper for a court of equity to interfere, having taken possession of the property, the court, in analogy to the principle and object of estrepement, retains that possession until the cause is finally disposed of.

It is the opinion of the court, that the interlocutory decree in
Remedies—15

this case, removing the sequestration from the negroes of Abraham Washburn, was erroneous, and that the sequestration ought to have been retained until the final hearing. The court is further of opinion, that there was no error in the interlocutory decree, retaining the sequestration on the negroes of Josiah Washburn. There must be judgment against the defendants for both appeals.

See "Sequestration," Century Dig. §§ 2-6; Decennial and Am. Dig. Key No. Series § 3-7.

PARKER v. GRAMMER, 62 N. C. 28. 1866.

Sequestration and Injunction. Principles Which Guide the Court in Granting and Removing Such Process.

[Bill in equity for an account of a co-partnership. The bill charged that the defendant, a member of the firm, had refused to turn over to the plaintiff certain cotton belonging to the firm, although such refusal was in violation of express stipulations in the articles of co-partnership, that the defendant should turn over to the plaintiff all property bought for the firm; that the defendant had sold part of such property and used the money, and threatened to sell the residue and turn over the proceeds to his wife; prayer for an account and for writs of sequestration and injunction. The answer denied that plaintiff was entitled to the possession of the property and asserted the right of defendant to sell it, admitted some of the allegations of the bill and denied others. Upon the filing of the answer, the defendant moved to dissolve an injunction which had been issued as prayed for by the plaintiff. Motion overruled, and defendant appealed. Affirmed.]

PEARSON, C. J. Where there is reason to apprehend that the subject of a controversy in equity will be destroyed, removed, or otherwise disposed of by the defendant, pending the suit, so that the complainant may lose the fruit of his recovery, or be hindered and delayed in obtaining it, the court, in aid of the primary equity, will secure the fund by the writ of sequestration, or the writs of sequestration and injunction, until the main equity is adjudicated at the hearing of the cause. These writs are extraordinary process, and to sustain them, on a motion to dissolve the injunction and remove the sequestration, the court must be satisfied: 1. That the complainant does not sue in a mere spirit of litigation, and seek to set up an unfounded claim, but has "probable cause," and may at the hearing be able to establish his primary equity; 2. that its extraordinary process is not asked for simply to vex and embarrass the defendant, but because there is reasonable ground for apprehension in regard to the security of the fund pending the litigation.

At this stage of the proceeding there is nothing before the court but the bill, answer and exhibits; and treating the bill as an affidavit in support of the complainant's allegations, the court, upon that, in connection with the answer and exhibits, is taking the whole matter together to decide the question of probable cause in regard to the primary equity, and the question of a reasonable apprehension as to the security of the fund. *McDaniel v.*

Stokes, 40 N. C. 274. These principles are settled, and so fully sustain the order appealed from that we can account for the appeal only by supposing that the distinction between cases of *special injunction* and sequestration, like the one before us, and cases of the *common injunction* to prevent a party who has obtained a judgment at law from suing out execution (where the rule is, the injunction will be dissolved on the coming in of the answer, unless the equity be confessed or the answer be insufficient or evasive, see *Capehart v. Mhoon*, 45 N. C. 30), was not adverted to.

How the facts may be declared to be at the hearing of the cause will depend on the proofs. It is sufficient to say that, as they now appear to be upon the bill and answer, we are satisfied that the complainant has probable cause in support of his equity, and that there is reasonable ground to apprehend that the defendant, unless restrained, inasmuch as he sets up an exclusive claim to the cotton, would remove and dispose of it in violation of the agreement alleged by the complainant, whereby the latter would be hindered and delayed in having the decree enforced should the case be decided in his favor. We refrain from entering into any discussion of the facts, in order to leave the matter open until the cause is brought on for hearing. In the meantime the parties may enter into such an arrangement as their common interests suggest, in order to have the cotton sold at the present high prices, and the proceeds of sale held subject to the final decree. Affirmed.

See 2 Dan. Ch. Prac. 1050 et seq., and Bacon's Abr. 628. For regulations governing the writ of sequestration in the federal courts and the form of the writ used in those courts, see *Shiras' Eq. Prac.* 140, 212; *Foster's Fed. Prac.* (3rd ed.) 348, 772, 960. For other uses of the writ of sequestration, see *Bouv. L. D.* 982. See further, for the practice in equity in granting and enforcing the writ, 1 L. R. A. 788, and note. Under the Code practice an order for an injunction and receiver is substituted for the writ of sequestration, *Ellett v. Newman*, 92 N. C. at p. 523; and in proper cases an order will issue for the payment of money into court. Rev. §§ 850-852. See "Sequestration," *Century Dig.* §§ 3-6; *Decennial and Am. Dig. Key No. Series* §§ 3-7.

SKINNER v. MAXWELL, 68 N. C. 400, 404. 1873.
*Property in the Hands of a Receiver to What Extent In Custodia Legis,
 and the Effect of Such Custody on Third Persons*

RODMAN, J. . . . To the liability of these [goods] to sale under a fieri facias, several objections may be made. That being in the hands of a receiver, they were in custodia legis, and hence not subject to execution sale. This last position we think is correct. The authorities on the general doctrine will be found referred to in *Drake on Attachment*, secs. 492-509. As to the case of a receiver in particular, the following authorities support the proposition: 2 Story Eq. Juris. see 833; *Field v. Jones*, 11 Ga. 413; *Martin v. Davis*, 21 Iowa, 535; *Glen v. Gill*, 2 Md.

1, 155; *Russell v. East Anglian R. W. Co.*, Naughten & Gordon, 104, and cases cited in note. The reason of it is this: When a court of equity has undertaken to adjudicate upon and distribute a fund among the parties entitled to it, it would be inconvenient if a court of law (or any other court) could by its process interrupt the adjudication and create new rights in the property itself. This rule is not understood as absolutely preventing the acquisition of new rights to the fund in controversy after the commencement of the proceedings. Any person claiming to have acquired such an interest pendente lite, while he cannot interfere under the process of another court, may apply to the court which has jurisdiction of the fund, *pro interesse suo*, and his claim will be heard." Story Eq. Juris. sec. 891. The limits of this principle are somewhat uncertain, but it is sufficient for the present case to say, that while property is in the hands of a receiver no right to it can be acquired by sale under execution. And it makes no difference that the receiver appointed declined to act; the property was nevertheless in the custody of the law. . . .

Taxes on property in custodia legis, how collected. 17 L. R. A. (N. S.) 465. See "Receivers," Century Dig. §§ 145-147; Decennial and Am. Dig. Key No. Series § 78.

WHITEHEAD v. HALE, 118 N. C. 601, 24 S. E. 360. 1896.

Principles Governing Courts in Applications for Appointment of a Receiver.

[Action to recover a personal judgment on a note and to foreclose a mortgage securing the same. Plaintiff moved for the appointment of a receiver. The motion was based upon the complaint, answer and reply, supplemented by affidavits. Motion refused, and plaintiff appealed.]

The mortgage covered a newspaper, its presses, etc. The defendant admitted the execution of the mortgage but claimed that there was nothing due on the debt secured thereby. He also stated in his affidavit, that to appoint a receiver would absolutely destroy the value of the newspaper and render it worthless. This was denied by the plaintiff. The judge did not find the facts nor did either party request him to do so.]

CLARK, J. This action is brought for the foreclosure of a mortgage upon a newspaper, together with its press, type, subscription list, etc., including its good will. The defendant, while admitting that the mortgage had been executed, denies that there is any balance due on the same, and alleges, on the contrary, that the plaintiff is indebted to him, and asks for an account and a cancellation of the mortgage. Under these circumstances, the court not only would not decree a foreclosure till the balance due, if any, was ascertained, but would enjoin any attempt to sell under a power of sale in the mortgage until the account had been stated. *Purnell v. Vaughan*, 77 N. C. 268; *Pritchard v. Sanderson*, 84 N. C. 299; *Pender v. Pittman*, Id. 372. But the plaintiff goes further, and asks that the property be taken out of the control of the defendant, pending the litigation, by placing it in the hands of a receiver. Inasmuch as the answer of the defendant, if true, nega-

tives any lien or interest of the plaintiff as to the property, this would be a strong measure to grant the plaintiff, as he offers no indemnity (as he would have done had he proceeded by claim and delivery) for the damage which might be done the defendant if the plaintiff's claim should prove unfounded. To grant such motion without due caution might put it in the power of an irresponsible or reckless mortgagee to ruin a mortgagor's business, though no balance is due on the mortgage. Whether a receiver shall be appointed in any case is left, therefore, largely to the sound judgment of the presiding judge, who will take into consideration all the circumstances, including the nature of the property, and its likelihood to be destroyed or spirited away during the litigation, and the probability, on the other hand, of its value being seriously impaired by its being placed in the hands of a receiver, as would be particularly the case with a newspaper, whose value so largely depends upon its good will and the personal characteristics of the editor and the policy he pursues, as is well pointed out by Avery, J., in *Cowan v. Fairbrother*, 118 N. C. 406, 24 S. E. 212.

In the present case there was no request by the appellant that the judge should find the facts, and we must take them to be as set out in the affidavits filed by the appellee. On turning to the affidavits, we find it testified by the defendant, and not denied by the plaintiff, that to appoint a receiver "would be positively to destroy absolutely its value, and render the property in controversy in this action worthless as a newspaper." Owing to the peculiar nature of this species of property, and the important part its good will and the capacity and policy of the editor, especially if a man of talent and popularity and of strong individuality, have in giving it value, it can be readily seen that appointing a receiver to take charge of the paper, with power to change the editor or control its policy, might, and in many cases would, destroy all its value beyond the slight value attached to the possibly well-worn type and press. To appoint a receiver even of realty, or of a rail road, or the like, is to be done with caution (*Lumber Co. v. Wallace*, 93 N. C. 22), though in such cases the value does not, as is the case with a newspaper, depend upon the popularity of the owner or manager and the good will, which is so largely personal to him.

It is true that the plaintiff alleged that the defendant was insolvent, and this the defendant admitted; but there is no allegation that the defendant intends to run off with or conceal or destroy the property, and the only possible bearing which the allegation of insolvency could have is in connection with the other allegation (which is found against the plaintiff) that the property is depreciating, and thus the security is being impaired. The allegation of the defendant's insolvency and poverty, taken alone, is not sufficient ground to take the property out of his hands, which he avers is his own, free from any legal claim of the plaintiff, especially when the effect of the judge's ruling is, as we have

seen, that the security is not being impaired, but in truth has doubled in value, and is steadily increasing in worth, and that, in fact, to appoint the receiver would be really to destroy the chief value of the property. Upon a proper state of facts, a receiver can be appointed of a newspaper as well as of other property; but, upon the peculiar state of facts found in this case, to appoint a receiver would be a great injury to the defendant, and no benefit to the plaintiff; and the judge below properly left the property in the hands of the defendant until a jury could pass upon the controverted issue of fact whether the plaintiff has any sum due him for which he can ask a decree of foreclosure. No error.

See 5 Pom. Eq. Juris. §§ 62-262; 23 Am. & Eng. Enc. L. 1000-1132; Jones on Chat. Mort. §§ 439, 451, 787; 2 Jones on Mort. §§ 1516-1534. See "Mortgages," Century Dig. §§ 1374, 1375; Decennial and Am. Dig. Key No. Series § 468.

CABLE v. ALVORD, 27 Ohio State, 654, 664-669. 1875.

The Writ of Ne Exeat—Its History, Uses, Practice in Issuing, etc. How Its Place is Supplied Under the Code Practice.

[Action upon a bond given to secure the release of the obligors from arrest under a writ of Ne Exeat. Alvord was a surety to such bond. The defendants insisted that no recovery could be had because the court had no power to issue the writ of ne exeat under the Code and, that being so, the bond was void. What was done in the court below is not stated in the report, but it would seem that the bond was held to be valid and judgment was rendered against the obligors and their sureties, and that they took the case to the supreme court by writ of error. What was the judgment of the supreme court is also left to conjecture, but it seems that the judgment below was reversed. For what is to be learned of the disposition of the case reliance must be had upon the briefs of counsel at page 657. After quoting a section of the statutes of Ohio, the opinion proceeds:]

JOHNSON, J. . . . A majority of the court are of the opinion that this section is not broad enough to embrace a ne exeat which, by the same amendatory act, was omitted, in view of the provisions of the code, and the express repeal of the chancery practice act by the code.

This view is made clear by an examination of the nature and office of the ne exeat as a process in chancery prior to the code. In *Rhodes v. Cousins*, 6 Ran. (Va.) 191, it is said: "The ne exeat, as now understood and practiced upon, is a proceeding in equity to obtain bail in a case where there is a debt due in equity, though not at law, except in cases of account and perhaps a few other cases of concurrent jurisdiction. The general rule is, that where you can get bail at law, equity will not grant the writ. In the exercise of this power, courts of equity will be very cautious, as it is a strong step, tending to abridge the liberty of the citizen. To induce that court to issue a ne exeat, it must appear: (1) That there is a precise amount of debt positively due; (2) That it is an *equitable demand*, upon which the plaintiff cannot sue at law, ex-

cept as before, on account and some other cases of concurrent jurisdiction: (3) That the defendant is about quitting the country to avoid payment."

Lord Eldon says: "The affidavit to authorize the writ must be as positive as to the *equitable debt* as an affidavit of a legal debt to hold to bail." *Jackson v. Petrie*, 10 Vesey, 163. *Blaydes v. Calvert*, 2 Jacobs & Walk, 211, was a bill to enforce an agreement to give a bill of exchange to secure the debt of a third person, and prayed for a *ne exeat regno*. Lord Eldon says: "After looking into the books, my present opinion is that the party cannot be held to equitable bail; in other words, I do not find authority to warrant granting the writ in such a case as this." The reason was it was not a money demand. *Cowdin v. Cram*, 3 Edw. Ch. 232, was a demand for a *ne exeat*. It is there said that whenever, in a bill for specific performance, the writ is allowed, it has been against the vendee, where there is a money demand which is sought to be enforced. In such cases, if the vendor can give a good title, he may have the writ, provided the defendant is about to leave the jurisdiction: "because there is an equitable money demand or indebtedness, the amount of which governs the court in making the writ for bail."

This was a process unknown to the ancient common law, which, in the freedom of its spirit, allowed every man to depart the realm at his pleasure. From an early period it was used as an auxiliary jurisdiction of courts of equity, and at one time it issued at the instance of the king as a prerogative writ. As a writ of right in cases of private rights, Judge Story says: "In general, it will not be granted unless in cases of equitable debts; for, in regard to civil rights, it is treated as in the nature of equitable bail." 2 Story Eq. Juris. sec. 1470. Only two exceptions are recognized; one is the case of alimony decreed to the wife, which will be enforced against the husband by *ne exeat*, and [the other] in cases of account, on which a balance is admitted by the defendant, but a larger claim is insisted on by the creditor. 2 Story Eq. sec. 1470. In *Adams on Equity*, 360, the same limitations are used in describing this writ. It is said: "It is granted wherever a present equitable debt is owing, which, if due at law, would warrant an arrest, and also to enforce arrears of alimony in aid of the spiritual court in respect of the inability of that court to require bail."

In *Brown v. Haff*, 5 Page, 239, the chancellor says, "that to entitle the complainant to a writ of *ne exeat*, he must show a demand actually due at the time the writ issued." So the writ was refused in *Cook v. Ravie*, 6 Vesey, 283, "upon an undertaking for an indemnity; to obtain it there must be an equitable demand in the nature of a debt actually due." Lord Eldon asks: "Has it not always been a money demand?" In *Gilbert v. Colt*, 1 Hopkins Ch. 500, it is said by the court: "According to the adjudged cases, a positive affidavit of an existing debt is required as a foundation for the writ of *ne exeat*; and this rule has been observed with great strictness." *De Carrier v. De Callone*, 4 Vesey, 577, and notes.

Dawson v. Dawson, 7 Vesey, 173. It is never used to enforce specific performance of an agreement, except where there is a money demand to be enforced in equity. *Raynes v. Wyse*, 2 Merivale, 473; *Blaydes v. Calvert*, 2 Jac. & Walk. 218; nor to compel the defendant to abide the event of an action. *Gardner's Case*, 15 Vesey, 445. It is a writ to obtain equitable bail, *Mitchel v. Bunch*, 2 Page, 617; *Smedbarger v. Mark's Ex'r*, 6 John. Ch. 138; *Dick v. Swinton*, 1 Vesey & Bearnese, 372; *Stewart v. Graham*, 19 Ves. 312; *Goodman v. Sayers*, 5 Madd. Ch. 471; *Grant v. Grant*, 3 Russell Ch. 598; *Cox v. Scott*, 5 Harris & John. 398; *Shearman v. Shearman*, 3 Brown Ch. 370. It is said by Story, that there are two, and only two, exceptions to the rule that there must be an equitable money demand, and the affidavit must be as certain as for a *capias*; they are cases of alimony, and the action in equity for an account, when that court has concurrent jurisdiction. Both of these exceptions are money demands, however. *Denton v. Denton*, 1 John. Ch. 364, is an instance in alimony, and *Forrest v. Forrest*, 10 Barb. 46, is another. *Russell v. Ashby*, 5 Vesey, 96, is an instance of an equitable action for an account.

In the light of these authorities, as to the office of the writ of *ne exeat* under the former chancery practice, showing that it was to a court of equity what a *capias* for the body was in legal actions—a process to hold the custody of the body, until he should give bail to abide the decree of the court—we are prepared to appreciate the force of section 145 of the code. It provides, that “A defendant in a civil action can be arrested before and after judgment, in the manner prescribed by this code, and not otherwise; but this provision does not apply to proceedings for contempt; nor does it apply to actions or judgments prosecuted in the name of the state of Ohio, to recover fines or penalties for crimes, misdemeanors, or offenses.” The writ of arrest under this section may issue in any civil action, legal or equitable, when there is an affidavit “stating the nature of the plaintiff's claim; that it is just, and the amount thereof, as nearly as may be, and establishing one or more of the” grounds for arrest specified in section 146. This language is broad enough to embrace equitable money demands.

Under the analogous section, authorizing attachment in a civil action, it has been held “that the code has extended the remedy, not only by embracing legal cases, in which the remedy had not before been allowed, but also equitable actions brought to recover money, and actions for the recovery of money only.” *Per Gholson, J.*, *Goble v. Howard*, 12 Ohio St. 167.

It thus appears that a remedy under the safeguards provided by the code, the affidavit, and the plaintiff's undertaking to pay the defendant all damages which he may sustain by reason of the arrest, if the order be wrongfully obtained, has been provided by the code, applicable to all equitable money demands. Hence the 603 section of the code has no application. By that section, “if a case ever arise, in which an action for the enforcement and protection of a right . . . cannot be had under the code, the

former practice heretofore in use may be adopted, so far as may be necessary to prevent a failure of justice." It was not the intention of the code to create new causes of action, but to provide a mode of procedure to "all rights of civil action, given or secured by existing laws" (except as excepted in section 604). The writ of *ne exeat* was a remedial process in chancery, and not an "action for the enforcement and protection of a right." Neither is it saved by section 6 of the act of 1853. That only saves "process and remedies" not inconsistent with the constitution of 1851, nor laws passed since its adoption, nor with the provisions of the code of civil procedure. We conclude, therefore, that the code provides as full and ample remedy for all cases in equity wherein formerly this writ was allowable (in some respects broader than the old remedy), under the safeguards with which the liberty of the citizen should always be surrounded.

We have examined a number of decisions of the supreme court and superior courts of New York, cited by counsel. In some of these it is held that under a similar provision in the New York Code (section 468), the *ne exeat* is not abolished. See *Forrest v. Forrest*, 5 How. 125; *Bushnell v. Bushnell*, 7 How. 393; while other cases hold that it was abolished. *Johnson v. Johnson*, 16 Abb. 43. These New York cases cited are cases of alimony. As our code, section 604, excepts from its operation proceedings relating to alimony, the cases are not analogous. Whether this writ was ever applied in Ohio to cases of alimony, and if so, whether the power to issue it in such cases still exists, we are not called on to determine.

The action in this case was for both legal and equitable relief. As to the legal demand, it is not claimed but that the plaintiff had ample remedy under the code to prevent the departure of the defendants from the state until they had given bail. As to the equitable demand, which was to compel a vendor to convey the title to lands, we have shown, that under the former practice the plaintiff had no right to such a writ, and hence it is not saved by section 603 of the code, nor by the 6th section of the act of 1853, before cited. We hold, therefore, that as to all civil actions covered by the provisions of the code of civil procedure, the writ *ne exeat* is abolished in Ohio. This conclusion comports with the spirit of our constitution and laws relating to imprisonment for debt, and the ancient maxims of the law, that process which abridges the liberty of the citizen should be resorted to with great caution.

See *Harriss v. Sneed*, 101 N. C. 272, 7 S. E. 801, and note thereto inserted at sec. 1, ante, of this chapter. The writ of *ne exeat* is in the nature of equitable bail—it is used to keep the *person* of the defendant within the jurisdiction of the court. *Bony, Law Dict.* p. 473. *Hunter v. Nelson*, 5 Blackf. 263. Sequestration, of the kind discussed in the cases *supra*, was for the purpose of keeping the defendant's *property* within the control of the court in order to coerce obedience to the decree. *Anonymous*, 2 N. C. 147. See 29 Cyc. 382. For what constituted a breach of a *ne exeat* bond, see 20 L. R. A. (N. S.) 76. See *"Ne Exeat"*, Century Dig. § 1-6, Decennial and Am. Dig. Key No. Series 33, 1-4.

CHAPTER XII.

JURISDICTION.

BRYAN v. BLYTHE, 4 Blackford, 249, 251. 1836.

Jurisdiction of the Subject-Matter. Want of Such Jurisdiction, How Taken Advantage of. Effect of the Want of Such Jurisdiction on the Judgment of the Court.

[Bill in equity against the heirs of John Blythe praying for a decree that they pay certain judgments at law rendered against their ancestor. The cause was transferred to the supreme court for trial. Bill dismissed. After disposing of some minor points, the opinion proceeds:]

BLACKFORD, J. . . . Another objection to this part of the bill is, that it shows plainly on its face, that the complainant's remedy on the bond is exclusively at law. A court of chancery has no jurisdiction in the case of a contract for the mere payment of money. *Brough v. Oddy*, 1 Tamlyn, 215. The assignee of a bond has the same right, by our law, to sue on it in a court of law that the obligee has; and his remedy is confined to that court. The complainant may suppose, that, as this objection was not made by demurrer, it is too late to make it now. We think, however, *that if a court, whether of law or of chancery, have no jurisdiction of the subject-matter in controversy, it can render no valid judgment or decree upon the merits of the cause.* The following language on the subject is used in a modern work on pleading: "It is a fatal objection to the jurisdiction of any court, that it has not cognizance of the subject-matter of the suit; that is, that the nature of the action is such as the court is, under no circumstances, competent to try: as if a real action were brought in the King's Bench, or a cause, exclusively of admiralty jurisdiction, in any court of common law. In any such case, neither a plea to the jurisdiction, nor any other plea, would be necessary to oust the jurisdiction of the court. The cause might be dismissed on motion; and even without motion, it would be the duty of the court to dismiss it *ex officio*: for the whole proceeding would be *coram non iudice* and utterly void." Gould on Plead, 236. And, in a suit in chancery, Lord Hardwicke says—"that a court of equity, which can exercise a more liberal discretion than common law courts, if a plain defect of jurisdiction appears at the hearing, will no more make a decree than where a plain want of equity appears." *Penn v. Lord Baltimore*, 1 Ves. Sen. 444. From this view of that part of the cause which respects the claim on the bond, it is evident that, as a court

of chancery, we could not render a decree for the complainant, though the defense relied on were not proved. . . . Bill dismissed.

See "Judgment," Century Dig. § 24; Decennial and Am. Dig. Key No. Series § 16.

RHODE ISLAND v. MASSACHUSETTS, 12 Peters, 657, 718-720. 1828

Jurisdiction Defined. Jurisdiction of the English Courts. General and Special Jurisdiction. Jurisdiction of the Subject-Matter. Objection to the Jurisdiction, How and When Taken. Waiving Want of Jurisdiction. Jurisdiction of the Federal Courts.

[Bill in equity filed by the state of Rhode Island against the state of Massachusetts, in the Supreme Court of the United States, to settle the boundaries between the two states. The state of Massachusetts filed a plea to the effect that matters set up in the bill had been theretofore settled between the two states. Thereafter the state of Massachusetts moved to dismiss the bill for want of jurisdiction of the court. Motion overruled. Only a portion of the opinion is here inserted.]

BALDWIN, J. . . . However late this objection has been made, or may be made in any cause, in an inferior or appellate court of the United States, it must be considered as decided before any court can move one further step in the cause; as any movement is necessarily the exercise of jurisdiction. Jurisdiction is the power to hear and determine the subject-matter in controversy between parties to a suit, to adjudicate or exercise any judicial power over them; the question is, whether on the case before a court, their action is judicial or extrajudicial; with or without the authority of law to render a judgment or decree upon the rights of the litigant parties. If the law confers the power to render a judgment or decree, then the court has jurisdiction; what shall be adjudged or decreed between the parties, and with which is the right of the case, is judicial action, by hearing and determining it. 6 Pet. 709; 4 Russ. 415; 3 Pet. 203.

A motion to dismiss a cause pending in the courts of the United States, is not analogous to a plea to the jurisdiction of a court of common law or equity in England; there the superior courts have a general jurisdiction over all persons within the realm, and all causes of action between them. It depends on the subject-matter, whether the jurisdiction shall be exercised by a court of law or equity; but that court, to which it appropriately belongs, can act judicially upon the party and the subject of the suit; unless it shall be made apparent to the court that the judicial determination of the case has been withdrawn from the court of general jurisdiction, to an inferior and limited one. It is a necessary presumption that the court of general jurisdiction can act upon the given case, where nothing appears to the contrary; hence has arisen the rule that the party claiming exemption from its process, must set out the reasons by a special plea in abatement, and show that some inferior court of law or equity has the exclusive cognizance

of the case; otherwise the superior court must proceed, in virtue of its general jurisdiction. This rule prevails both at law and in equity. 1 Ves. Sen. 204; 2 Ves. Sen. 307; Mit. 183. A motion to dismiss, therefore, cannot be entertained, as it does not and cannot disclose a case of exception; and if a plea in abatement is put in, it must not only make out the exception, but point to the particular court to which the case belongs. A plaintiff in law or equity is not to be driven from court to court by such pleas; if a defendant seeks to quash a writ, or dismiss a bill for such cause, he must give the plaintiff a better one, and shall never put in a second plea to the jurisdiction of that court to which he has driven the plaintiff by his plea. 1 Ves. Sen. 203. There are other classes of cases where the objection to the jurisdiction is of a different nature, as on a bill in chancery; that the subject-matter is cognizable only by the king in council, and not by any judicial power, 1 Ves. Sen. 445; or that the parties defendant cannot be brought before any municipal court, on account of their sovereign character, and the nature of the controversy, as in 1 Ves. Jr. 371, 387; 2 Ves. Jr. 56, 60; or in the very common cases which present the question, whether the cause properly belongs to a court of law or equity. To such cases, a plea in abatement would not be applicable, because the plaintiff could not sue in an inferior court; the objection goes to a denial of any jurisdiction of a municipal court in one class of cases; and to the jurisdiction of any court of equity or of law in the other; on which last, the court decides according to their legal discretion. An objection to jurisdiction, on the ground of exemption from the process of the court in which the suit is brought, or the manner in which the defendant is brought into it, is waived by appearance and pleading to the issue. 10 Pet. 473; *Toland v. Sprague*, 12 Pet. 300; but when the objection goes to the power of the court over the parties, or the subject-matter, the defendant need not, for he cannot, give the plaintiff a better writ or bill. Where no inferior court can have jurisdiction of a case in law or equity, the ground of objection is not taken by plea in abatement, as an exception of the given case, from the otherwise general jurisdiction of the court; appearance does not cure the defect of judicial power, and it may be relied on by plea, answer, demurrer, or at the trial or hearing, unless it goes to the manner of bringing the defendant into court, which is waived by submission to the process.

As a denial of jurisdiction over the subject-matter of a suit between parties within the realm, over which and whom the court has power to act, cannot be successful in an English court of general jurisdiction, a motion like the present could not be sustained consistently with the principles of its constitution. But as this court is one of limited and special original jurisdiction, its action must be confined to the particular cases, controversies, and parties over which the constitution and laws have authorized it to act; any proceeding without the limits prescribed, is *coram non iudice*, and its action a nullity. 10 Pet. 474; 4 Russ. 415. And whether the want or excess of power is objected by a party, or is apparent to

the court, it must surcease its action, or proceed extrajudicially. Before we can proceed in this cause, we must, therefore, inquire, whether we can hear and determine the matters in controversy between the parties who are two states of this Union, sovereign within their respective boundaries, save that portion of power which they have granted to the federal government, and foreign to each other for all but federal purposes. So they have been considered by this court through a long series of years and cases to the present term, during which, in the case of the Bank of the United States v. Daniels, 12 Pet. 32, this court has declared this to be a fundamental principle of the constitution; and so we shall consider it in deciding on the present motion. 2 Pet. 596. . . . [The case decides that, under the constitution and judiciary act, the court has jurisdiction of the cause.]

See "Courts," Century Dig. §§ 140-143; Decennial and Am. Dig. Key No. Series §§ 34-36; "Appearance," Century Dig. § 62; Decennial and Am. Dig. Key No. Series § 12.

SCOTT v. McNEAL, 154 U. S. 34, 14 Sup. Ct. 1108. 1893.

Want of Jurisdiction of the Subject-Matter. Grant of Letters Upon the Estate of a Living Person. Want of Jurisdiction of the Person. Fourteenth Amendment.

[Action of Ejectment by Scott against McNeal, in a state court. Judgment against the plaintiff, and he appealed to the supreme court of the state, where the judgment was affirmed. The plaintiff then carried the case to the supreme court of the United States by writ of error. Reversed.]

Scott owned the locus in quo. In 1881 Scott disappeared and was not heard of until 1891, when he re-appeared. In the interim his former associates supposed he was dead. In 1888 administration was granted on Scott's estate, he not having been heard from for seven years, although duly inquired after. Notice of the application for letters of administration was duly published, as required by the statutes of the state, before letters were issued. The probate court adjudged that Scott was dead and granted administration. In July, 1888, in a petition for the sale of land for assets—to which those who would have been Scott's heirs if he had been dead, were made parties—Scott's land was ordered to be sold. Under such order the land was sold and purchased by Ward, who afterwards conveyed to McNeal. The state courts ruled that Scott was bound by the above orders of the probate court and that he was divested of his title.]

MR. JUSTICE GRAY. . . . The fundamental question in the case is whether letters of administration upon the estate of a person who is in fact alive have any validity or effect as against him.

By the law of England and America, before the Declaration of Independence, and for almost a century afterwards, the absolute nullity of such letters was treated as beyond dispute.

In *Allen v. Dumas*, 3 Term R. 125, in 1789, in which the court of king's bench held that payment of a debt due to a deceased person to an executor who had obtained probate of a forged will discharged the debtor, notwithstanding the probate was afterwards

declared null and void, and administration granted to the next of kin, the decision went upon the ground that the probate, being a judicial act of the ecclesiastical court within its jurisdiction, could not, so long as it remained unrepealed, be impeached in the temporal courts. It was argued for the plaintiff that the case stood as if the creditor had not been dead, and had himself brought the action, in which case it was assumed, on all hands, that payment to an executor would be no defense. But the court clearly stated the essential distinction between the two cases. Mr. Justice Ashurst said: "The case of a probate of a supposed will during the life of the party may be distinguished from the present, because during his life the ecclesiastical court has no jurisdiction, nor can they inquire who is his representative; but, when the party is dead, it is within their jurisdiction." And Mr. Justice Buller said: "Then this case was compared to a probate of a supposed will of a living person; but in such a case the ecclesiastical court have no jurisdiction, and the probate can have no effect: their jurisdiction is only to grant probates of the wills of dead persons. The distinction in this respect is this: if they have jurisdiction, their sentence, as long as it stands unrepealed, shall avail in all other places; but where they have no jurisdiction, their whole proceedings are a nullity." *Id.* 130. And such is the law of England to this day. Williams, *Ex'rs* (9th ed.), 478, 1795; Taylor, *Ev.* (8th ed.), §§ 1677, 1714.

In *Griffith v. Frazier*, 8 Cranch, 9, 23, in 1814, this court, speaking by Chief Justice Marshall, said: "To give the ordinary jurisdiction, a case in which, by law, letters of administration may issue, must be brought before him. In the common case of intestacy, it is clear that letters of administration must be granted to some person by the ordinary; and though they should be granted to one not entitled by law, still the act is binding until annulled by the competent authority, because he had power to grant letters of administration in the case. But suppose administration to be granted on the estate of a person not really dead. The act, all will admit, is totally void. Yet the ordinary must always inquire and decide whether the person, whose estate is to be committed to the care of others, be dead or in life. It is a branch of every cause in which letters of administration issue. Yet the decision of the ordinary that the person on whose estate he acts is dead, if the fact be otherwise, does not invest the person he may appoint with the character or powers of an administrator. The case, in truth, was not one within his jurisdiction. It was not one in which he had a right to deliberate. It was not committed to him by the law. And although one of the points occurs in all cases proper for his tribunal, yet that point cannot bring the subject within his jurisdiction." See also *Insurance Co. v. Tisdale*, 91 U. S. 238, 243; *Hegler v. Faulkner*, 153 U. S. 109, 118, 14 Sup. Ct. 779. . . .

The fourteenth article of amendment of the constitution of the United States, after other provisions which do not touch this case, ordains: "Nor shall any state deprive any person of life, liberty or

property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." These prohibitions extend to all acts of the state, whether through its legislative, its executive, or its judicial authorities. *Virginia v. Rives*, 100 U. S. 313, 318, 319; *Ex parte Virginia*, *Id.* 339, 346; *Neal v. Delaware*, 103 U. S. 370, 397. And the first one, as said by Chief Justice Waite in *U. S. v. Cruikshank*, 92 U. S. 542, 554, repeating the words of Mr. Justice Johnson in *Bank v. Okely*, 4 Wheat. 235, 244, was intended "to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice."

Upon a writ of error to review the judgment of the highest court of a state upon the ground that the judgment was against a right claimed under the constitution of the United States, this court is no more bound by that court's construction of a statute of the territory or of the state, when the question is whether the statute provided for the notice required to constitute due process of law, than when the question is whether the statute created a contract which has been impaired by a subsequent law of the state, or whether the original liability created by the statute was such that a judgment upon it has not been given due faith and credit in the courts of another state. In every such case, this court must decide for itself the true construction of the statute. *Huntington v. Attrill*, 146 U. S. 657, 683, 684, 13 Sup. Ct. 224; *Mobile & O. R. Co. v. Tennessee*, 153 U. S. 486, 492-495, 14 Sup. Ct. 968.

No judgment of a court is due process of law, if rendered without jurisdiction in the court, or without notice to the party.

The words "due process of law," when applied to judicial proceedings, as was said by Mr. Justice Field, speaking for this court, "mean a course of legal proceedings according to those rules and principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights. To give such proceedings any validity, there must be a tribunal competent by its constitution—that is, by the law of its creation—to pass upon the subject-matter of the suit; and, if that involves merely a determination of the personal liability of the defendant, he must be brought within its jurisdiction by service of process within the state, or his voluntary appearance." *Pennoyer v. Neff*, 95 U. S. 714, 733.

Even a judgment in proceedings strictly in rem binds only those who could have made themselves parties to the proceedings and who had notice, either actually or by the thing condemned being first seized into the custody of the court. *The Mary*, 9 Granch. 126, 144; *Hollingsworth v. Barbour*, 4 Pet. 466, 475; *Pennoyer v. Neff*, 95 U. S. 714, 727. And such a judgment is wholly void if a fact essential to the jurisdiction of the court did not exist. The jurisdiction of a foreign court of admiralty, for instance, in some cases, as observed by Chief Justice Marshall, "unquestionably depends as well on the state of the thing as on the constitution of the

court. If by any means whatever a prize court should be induced to condemn, as prize of war, a vessel which was never captured, it could not be contended that this condemnation operated a change of property." *Rose v. Himely*, 4 Cranch, 241, 269. Upon the same principle, a decree condemning a vessel for unlawfully taking clams, in violation of a statute which authorized proceedings for her forfeiture in the county in which the seizure was made, was held by this court to be void, and not to protect the officer making the seizure from a suit by the owner of the vessel, in which it was proved that the seizure was not made in the same county, although the decree of condemnation recited that it was. *Thompson v. Whitman*, 18 Wall. 457.

The estate of a person supposed to be dead is not seized or taken into the custody of the court of probate upon the filing of a petition for administration, but only after and under the order granting that petition; and the adjudication of that court is not upon the question whether he is living or dead, but only upon the question whether and to whom letters of administration shall issue. *Insurance Co. v. Tisdale*, 91 U. S. 238, 243.

A court of probate must, indeed, inquire into and be satisfied of the fact of the death of the person whose will is sought to be proved or whose estate is sought to be administered, because, without that fact, the court has no jurisdiction over his estate; and not because its decision upon the question, whether he is living or dead, can in any wise bind or estop him, or deprive him, while alive, of the title or control of his property.

As the jurisdiction to issue letters of administration upon his estate rest upon the fact of his death, so the notice given before issuing such letters assumes that fact, and is addressed, not to him, but to those who after his death may be interested in his estate, as next of kin, legatees, creditors, or otherwise. Notice to them cannot be notice to him, because all their interests are adverse to his. The whole thing, so far as he is concerned, is *res inter alios acta*.

Next of kin or legatees have no rights in the estate of a living person. His creditors indeed, may, upon proper proceedings, and due notice to him, in a court of law or of equity, have specific portions of his property applied in satisfaction of their debts. But neither creditors nor purchasers can acquire any rights in his property through the action of a court of probate, or of an administrator appointed by that court, dealing, without any notice to him, with his whole estate as if he were dead.

The appointment by the probate court of an administrator of the estate of a living person, without notice to him, being without jurisdiction, and wholly void as against him, all acts of the administrator, whether approved by that court or not, are equally void. The receipt of money by the administrator is no discharge of a debt, and a conveyance of property by the administrator passes no title.

The fact that a person has been absent and not heard from for seven years may create such a presumption of his death as, if not

overcome by other proof, is such *prima facie* evidence of his death that the probate court may assume him to be dead, and appoint an administrator of his estate, and that such administrator may sue upon a debt due to him. But proof, under proper pleadings, even in a collateral suit, that he was alive at the time of the appointment of the administrator, controls and overthrows the *prima facie* evidence of his death, and establishes that the court had no jurisdiction and the administrator no authority; and he is not bound, either by the order appointing the administrator or by a judgment in any suit brought by the administrator against a third person, because he was not a party to and had no notice of either.

In a case decided in the circuit court of the United States for the southern district of New York in 1880, substantially like *Roderigas v. Institution*, as reported in 63 N. Y. 460, above cited, Judge Choate, in a learned and able opinion, held that letters of administration upon the estate of a living man, issued by the surrogate after judicially determining that he was dead, were null and void as against him; that payment of a debt to an administrator so appointed was no defense to an action by him against the debtor; and that to hold such administration to be valid against him would deprive him of his property without due process of law, within the meaning of the fourteenth amendment of the constitution of the United States. This court concurs in the proposition there announced "that it is not competent for a state, by a law declaring a judicial determination that a man is dead, made in his absence, and without any notice to or process issued against him, conclusive for the purpose of divesting him of his property and of vesting it in an administrator, for the benefit of his creditors and next of kin, either absolutely or in favor of those only who innocently deal with such administrator. The immediate and necessary effect of such a law is to deprive him of his property without any process of law whatever, as against him, although it is done by process of law against other people, his next of kin, to whom notice is given. Such a statutory declaration of estoppel by a judgment to which he is neither party nor privy, which has the immediate effect of divesting him of his property, is a direct violation of this constitutional guaranty." *Lavin v. Bank*, 18 Blatchf. 1, 24, 1 Fed. 641.

The defendants did not rely upon any statute of limitations, nor upon any statute allowing them for improvements made in good faith; but their sole reliance was upon a deed from an administrator, acting under the orders of a court which had no jurisdiction to appoint him or to confer any authority upon him as against the plaintiff.

Judgment reversed, and case remanded to the supreme court of the state of Washington for further proceedings not inconsistent with this opinion.

See also *Woerner's Am. Law of Adm.* pp. 447 et seq.; *Mordant's* l. 4, 1131; *Springer v. Shavender*, 116 N. C. 12, 21 S. E. 397; S. C., 118 N. C.

33, 23 S. E. 976. See "Descent and Distribution," Century Dig. § 10; Decennial and Am. Dig. Key No. Series § 18; "Executors and Administrators," Century Dig. § 15; Decennial and Am. Dig. Key No. Series § 4.

SANTOM v. BALLARD, 133 Mass. 464. 1882.

When Can Consent Confer Jurisdiction? General Appearance. Waiver of Want of Jurisdiction. Jurisdiction of Subject-Matter. Jurisdiction of the Person.

[Action of contract, brought upon an account, in the Central District Court of Worcester. Judgment against the plaintiff for costs. Plaintiff appealed to the superior court but did not give the appeal bond required by a statute. The defendant entered a general appearance in the superior court and moved to dismiss the action on the ground that the superior court had no jurisdiction because the appeal bond had not been given. Motion sustained and judgment against the plaintiff dismissing his action. Plaintiff then appealed to the supreme court. Affirmed. Under the statute, the superior court could acquire no jurisdiction in such cases unless the appellant gave the bond.]

MORTON, C. J. . . . The case before us was brought in the Central District Court of Worcester, which rendered judgment against the plaintiff. He claimed an appeal, but did not file the bond as required by law. The superior court, therefore, had no jurisdiction of the case, and might dismiss it on its own motion, or on the motion of the appellee, at any time before judgment.

In many cases, where there has been an objection to the jurisdiction, because of some irregularity or defect in the service, or some merely technical defect in the process, it has been held that a general appearance by the defendant is a waiver of such objection. *But this rule applies only in cases where the court has jurisdiction of the subject-matter.* Consent of parties may in a certain sense give jurisdiction of the *person*, but it cannot create a jurisdiction over the *cause and subject-matter*, which is not vested in the court by law. *Brown v. Webber*, 6 Cush. 560; *Ashuelot Bank v. Pearson*, 14 Gray, 521; *McQuade v. O'Neil*, 15 Gray, 52; *Riley v. Lowell*, 117 Mass. 76.

The provisions of law requiring a bond are not wholly for the benefit of the appellee, but partly, upon considerations of public policy, to discourage frivolous and vexatious litigation. Parties cannot by their consent dispense with the bond, and thus, without complying with the law, divest the inferior court of its jurisdiction and transfer the case to the higher court. It follows that the superior court rightly dismissed the action. Judgment affirmed.

See also *Crabtree v. Scheelky*, 119 N. C. 56, 25 S. E. 707; *Leach v. Railroad*, 65 N. C. 486; *Branch v. Houston*, 44 N. C. 85. "It is elementary that a judgment in personam against a person who is sui juris, when no process has been served or service accepted and no voluntary [general] appearance is made, and these facts appear on the record, is void, and may be attacked collaterally." And so it is if the court issuing the summons had no authority so to do, even though the service of the process be, in other respects, regular. *Rutherford v. Ray*, 147 N. C. at p. 258, 61 S. E. 57. A want of jurisdiction of the subject-matter cannot be waived,

and such want of jurisdiction can be taken advantage of for the first time after the cause has reached the appellate court. *Realty Co. v. Corpening*, 147 N. C. 613, 61 S. E. 528. See "Appeal and Error," Century Dig. §§ 88-97, 2185; *Ibid.* "Courts," §§ 75-81; Decennial and Am. Dig. Key No. Series, "Appeal and Error," § 21; "Courts," §§ 22-25.

McMINN v. HAMILTON, 77 N. C. 300. 1877.

When the Court Ex Mero Motu Will Dismiss for Want of Jurisdiction. Subject-Matter. Venue. Waiver.

[Plaintiff sued the defendant in the wrong county before a justice of the peace. The justice had jurisdiction of the cause of action—the subject matter—but the defendant could not have been sued in the county in which the justice resided if the defendant had seen fit to object. The defendant made no point about the venue, but appeared before the justice and pleaded payment and the statute of limitations. The justice rendered judgment against the defendant who thereupon appealed to the superior court. In the superior court the defendant insisted that the justice had no jurisdiction and moved to dismiss the action. Motion allowed and judgment against the plaintiff dismissing the action. Plaintiff appealed to the supreme court. Reversed.]

FAIRCLOTH, J. Where a court has no jurisdiction of the subject-matter, the objection can be taken at any time, and indeed as soon as this fact is discovered, the court *ex mero motu* will take notice of it and dismiss the action. But if it has jurisdiction of the subject matter and the venue is wrong, the objection must be taken in apt time; and if the defendant pleads to the merits of the action, he will be taken to have waived the objection. He cannot have two chances. Applying this principle to the case before us, we think the defendant waived the objection by pleading [to the merits] before the justice and that it was then too late to raise it. Judgment reversed.

See "Appearance," Century Dig. § 111; Decennial and Am. Dig. Key No. Series § 23; "Venue," Century Dig. § 49; Decennial and Am. Dig. Key No. Series § 32.

CHILDS v. MARTIN, 69 N. C. 126. 1873.

Concurrent Jurisdiction and Exclusive Jurisdiction.

[Action brought in the superior court of Mecklenburg county to set aside a judgment rendered by the superior court of New Hanover against the plaintiff and in favor of the defendant. The complaint alleged that the judgment in question was obtained by fraud, and the plaintiff prayed for an injunction against the defendant's enforcing such judgment. Judgment against defendant granting the injunction prayed for by plaintiff. Defendant appealed. Reversed, and action dismissed.]

PEARSON, C. J. "The rule is, where there are courts of equal and concurrent jurisdiction, the court possesses the case in which jurisdiction first attaches." *Merrill v. Lake*, 16 Ohio 373. This rule is so consonant with reason, and the necessity for such a rule

in order to prevent confusion and conflict of jurisdiction is so obvious, that further comment is unnecessary, and we will simply refer, as a matter within the knowledge of every member of the profession, to the deplorable condition of things in the state of New York, resulting from a violation of this rule exhibited in the newspapers under the title of the "Erie Row."

The judge of the superior court of the county of New Hanover was possessed of the case. Suppose the judgment before him was obtained by fraudulent combination and contrivance between the bondholders and the president and directors of the Wilmington, Charlotte and Rutherford Railroad Company, the plaintiffs in this action were at liberty to make themselves parties to the action in New Hanover, and to ask as "a motion in the cause" to have the judgment reheard, and in the meantime for a supersedeas of the order of sale. Instead of pursuing this regular and orderly mode of proceeding, the plaintiffs in this action adopt the erratic and unprecedented course (except that exhibited in the "Erie Row") of bringing another action before the judge of the superior court of the county of Mecklenburg, and actually obtain an injunction not only against the parties to the action in the superior court of New Hanover but against the commissioners appointed by that court and ordered to make sale, and the result is this, if the commissioners obey the order of the superior court of New Hanover they are in contempt of the superior court of Mecklenburg, and if they obey the order of the latter court, there is a contempt in regard to the former. "Reductio ad absurdum." The order appealed from is reversed, as improvidently granted, and the action is dismissed for want of jurisdiction.

For attack upon a judgment obtained by perjury, see 10 L. R. A. (N. S.) 216, 23 Ib. 134, 564, and notes, 144 N. C. 81.

See also *Smith v. McIver*, 9 Wheat. 529, at p. 535; *Riggs v. Johnson Co.*, 6 Wall. 166; *N. W. Iron Co. v. L. & R. Imp. Co.*, 92 Wis. 487, 66 N. W. 515. As to the ruling in the principal case that a judgment must be attacked for fraud by a motion in the cause, see and compare *Mock v. Coggin*, 101 N. C. 366, 7 S. E. 899; *Moore v. Gulley*, 144 N. C. 81; *Houser v. Bonsal*, 149 N. C. at p. 56, 62 S. E. 776. See "Courts," *Century Dig.* §§ 1229-1239; *Decennial and Am. Dig. Key No. Series* § 475; "Injunction," *Cent. Dig.* § 69.

HADDOCK v. HADDOCK, 201 U. S. 563, 26 Sup. Ct. 525. 1905.

Extra-territorial Effect of Judgments. Jurisdiction of the Subject-matter and of the Person. The Doctrine of Pennoyer v. Neff How Far Applicable to Divorce. "Full Faith and Credit" Clause.

[Action by the wife against the husband seeking a separation from bed and board and for alimony. Judgment against the husband as prayed for. The husband carried the case to the supreme court of the United States by writ of error. Affirmed.]

In 1868 the parties were lawfully married in the state of *New York*, where both parties resided at the time. Immediately after the marriage, the husband abandoned the wife and ever after refused to support her. The husband went to *Connecticut* and in 1881 obtained an absolute di-

voiced from his wife in the courts of that state. *The wife remained a resident of New York.* There was no personal service of the process on the wife in the Connecticut divorce suit, nor did she voluntarily appear in such action, but *there was service by publication pursuant to the laws of Connecticut.* By the laws of Connecticut the divorce was valid; but the courts of New York refused to acknowledge its validity. This action was brought by the wife in 1899 in the supreme court of the state of New York, which court rejected the Connecticut judgment as a defense, and gave judgment against the husband, who thereupon appealed to the New York Court of Appeals. That court affirmed the rulings of the supreme court, and the supreme court of the United States does likewise. The husband was personally served, in the state of New York, with the summons in this action.]

MR. JUSTICE WHITE. . . . With the object of confining our attention to the real question arising from this condition of the Connecticut record, we state at the outset certain legal propositions irrevocably concluded by previous decisions of this court, and which are required to be borne in mind in analyzing the ultimate issue to be decided.

First. The requirement of the constitution is not that some, but that full, faith and credit shall be given by states to the judicial decrees of other states. That is to say, where a decree rendered in one state is embraced by the full faith and credit clause, that constitutional provision commands that the other states shall give to the decree the force and effect to which it was entitled in the state where rendered. *Harding v. Harding*, 198 U. S. 317, 49 L. ed. 1066, 25 Sup. Ct. Rep. 679.

Second. Where a personal judgment has been rendered in the courts of a state against a non-resident merely upon constructive service, and, therefore, without acquiring jurisdiction over the person of the defendant, such judgment may not be enforced in another state in virtue of the full faith and credit clause. Indeed, a personal judgment so rendered is, by operation of the due process clause of the 14th Amendment, void as against the non-resident, even in the state where rendered; and, therefore, such non-resident, in virtue of rights granted by the Constitution of the United States, may successfully resist, even in the state where rendered, the enforcement of such a judgment. *Pennoyer v. Neff*, 35 U. S. 714, 24 L. ed. 565. The facts in that case were these: Neff, who was a resident of a state other than Oregon, owned a tract of land in Oregon. Mitchell, resident of Oregon, brought a suit in a court of that state upon a money demand against Neff. The Oregon statutes required, in the case of personal action against a non-resident, a publication of notice, calling upon the defendant to appear and defend, and also required the mailing to such defendant at his last known place of residence of a copy of the summons and complaint. Upon affidavit of the absence of Neff, and that he resided in the state of California, the exact place being unknown, the publication required by the statute was ordered and made, and judgment by default was entered against Neff. Upon this judgment execution was issued and real estate of Neff was sold and was ultimately acquired by Pennoyer. Neff died in the event

court of the United States for the district of Oregon to recover the property, and the question presented was the validity in Oregon of the judgment there rendered against Neff. After the most elaborate consideration it was expressly decided that the judgment rendered in Oregon, under the circumstances stated was void for want of jurisdiction and was repugnant to the due process clause of the Constitution of the United States. The ruling was based on the proposition that a court of one state could not acquire jurisdiction to render personal judgment against a non-resident who did not appear by the mere publication of a summons, and that the want of power to acquire such jurisdiction by publication could not be aided by the fact that under the statutes of the state in which the suit against the non-resident was brought, the sending of a copy of the summons and complaint to the postoffice address in another state of the defendant was required and complied with. The court said (p. 727, L. ed. p. 570):

"Process from the tribunals of one state cannot run into another state, and summon parties there domiciled to leave its territory and respond to proceedings against them. Publication of process or notice within the state where the tribunal sits cannot create any greater obligation upon the non-resident to appear. Process sent to him out of the state and process published within it are equally unavailing in proceedings to establish his personal liability."

And the doctrine thus stated but expressed a general principle expounded in previous decisions. *Bischoff v. Wethered*, 9 Wall. 812, 19 L. ed. 829. In that case, speaking of a money judgment recovered in the common pleas of Westminster hall, England, upon personal notice served in the city of Baltimore, Mr. Justice Bradley, J., speaking for the court, said (p. 814, L. ed. p. 830):

"It is enough to say [of this proceeding] that it was wholly without jurisdiction of the person, and whatever validity it may have in England, by virtue of statute law, against property of the defendant there situate, it can have no validity here, even of a *prima facie* character. It is simply null."

Third. The principles, however, stated in the previous proposition, are controlling only as to judgments in personam, and do not relate to proceedings in rem. That is to say, in consequence of the authority which government possesses over things within its borders, there is jurisdiction in a court of a state by a proceeding in rem, after the giving of reasonable opportunity to the owner to defend, to affect things within the jurisdiction of the court, even although jurisdiction is not directly acquired over the person of the owner of the thing. *Pennoyer v. Neff*, *supra*.

Fourth. The general rule stated in the second proposition is, moreover, limited by the inherent power which all governments must possess over the marriage relation, its formation and dissolution, as regards their own citizens. From this exception it results that where a court of one state, conformably to the laws of such state, or the state, through its legislative department, has acted

concerning the dissolution of the marriage tie, as to a citizen of that state, such action is binding in that state as to such citizen, and the validity of the judgment may not therein be questioned on the ground that the action of the state in dealing with its own citizen concerning the marriage relation was repugnant to the due process clause of the constitution. *Maynard v. Hill*, 125 U. S. 190, 31 L. ed. 654, 8 Sup. Ct. Rep. 723. In that case the facts were these: Maynard was married in Vermont, and the husband and wife removed to Ohio, from whence Maynard left his wife and family and went to California. Subsequently he acquired a domicile in the territory of Washington. Being there so domiciled, an act of the legislature of the territory was passed granting a divorce to the husband. Maynard continued to reside in Washington, and there remarried and died. The children of the former wife, claiming in right of their mother, sued in a court of the territory of Washington to recover real estate situated in the territory, and one of the issues for decision was the validity of the legislative divorce granted to the father. The statute was assailed as invalid, on the ground that Mrs. Maynard had no notice, and that she was not a resident of the territory when the act was passed. From a decree of the supreme court of the territory adverse to their claim the children brought the case to this court. The power of the territorial legislature, in the absence of restrictions in the organic act, to grant a divorce to a citizen of the territory, was, however, upheld, in view of the nature and extent of the authority which government possessed over the marriage relation. It was therefore decided that the courts of the territory committed no error in giving effect within the territory to the divorce in question. And as a corollary of the recognized power of a government thus to deal with its own citizen by a decree which would be operative within its own borders, irrespective of any extraterritorial efficacy, it follows that the right of another sovereignty exists, under principles of comity, to give to a decree so rendered such efficacy as to that government may seem to be justified by its conceptions of duty and public policy.

Fifth. It is no longer open to question that where husband and wife are domiciled in a state there exists jurisdiction in such state, for good cause, to enter a decree of divorce which will be entitled to enforcement in another state by virtue of the full faith and credit clause. It has, moreover, been decided that where a bona fide domicile has been acquired in a state by either of the parties to a marriage, and a suit is brought by the domiciled party in such state for divorce, the courts of that state, if they acquire personal jurisdiction also of the other party, have authority to enter a decree of divorce, entitled to be enforced in every state by the full faith and credit clause. *Cheever v. Wilson*, 9 Wall. 108, 19 L. ed. 604.

Sixth. Where the domicile of matrimony was in a particular state, and the husband abandons his wife and goes into another state in order to avoid his marital obligations, such other state to

which the husband has wrongfully fled does not, in the nature of things, become a new domicile of matrimony, and, therefore, is not to be treated as the actual or constructive domicile of the wife; hence, the place where the wife was domiciled when so abandoned constitutes her legal domicile until a new actual domicile be by her elsewhere acquired. This was clearly expressed in *Barber v. Barber*, 21 How. 582, 16 L. ed. 226, where it was said (p. 595, L. ed. p. 230):

"The general rule is, that a voluntary separation will not give to the wife a different domiciliation in law from that of her husband. But if the husband, as is the fact in this case, abandons their domicile and his wife, to get rid of all those conjugal obligations which the marriage relation imposes upon him, neither giving to her the necessaries nor the comforts suitable to their condition and his fortune, and relinquishes altogether his marital control and protection, he yields up that power and authority over her which alone makes his domicile hers."

And the same doctrine was expressly upheld in *Cheever v. Wilson*, *supra*, where the court said (9 Wall. 123, 19 L. ed. 608):

"It is insisted that Cheever never resided in Indiana; that the domicile of the husband is the wife's, and that she cannot have a different one from his. The converse of the latter proposition is so well settled that it would be idle to discuss it. The rule is that she may acquire a separate domicile whenever it is necessary or proper that she should do so. The right springs from the necessity for its exercise, and endures as long as the necessity continues."

Seventh. So also it is settled that where the domicile of a husband is in a particular state, and that state is also the domicile of matrimony, the courts of such state having jurisdiction over the husband may, in virtue of the duty of the wife to be at the matrimonial domicile, disregard an unjustifiable absence therefrom, and treat the wife as having her domicile in the state of the matrimonial domicile for the purpose of the dissolution of the marriage, and as a result have power to render a judgment dissolving the marriage which will be binding upon both parties, and will be entitled to recognition in all other states by virtue of the full faith and credit clause. *Atherton v. Atherton*, 181 U. S. 155, 45 L. ed. 794, 21 Sup. Ct. Rep. 544.

Coming to apply these settled propositions to the case before us, three things are beyond dispute: a. In view of the authority which government possesses over the marriage relation, no question can arise on this record concerning the right of the state of Connecticut within its borders to give effect to the decree of divorce rendered in favor of the husband by the courts of Connecticut, he being at the time when the decree was rendered domiciled in that state. b. As New York was the domicile of the wife and the domicile of matrimony, from which the husband fled in disregard of his duty, it clearly results from the sixth proposition that the domicile of the wife continued in New York. c. As then there can

be no question that the wife was not constructively present in Connecticut by virtue of a matrimonial domicile in that state, and was not there individually domiciled, and did not appear in the divorce cause, and was only constructively served with notice of the pendency of that action, it is apparent that the Connecticut court did not acquire jurisdiction over the wife within the fifth and seventh propositions; that is, did not acquire such jurisdiction by virtue of the domicile of the wife within the state or as the result of personal service upon her within its borders.

These subjects being thus eliminated, the case reduces itself to this: Whether the Connecticut court, in virtue alone of the domicile of the husband in that state, had jurisdiction to render a decree against the wife under the circumstances stated, which was entitled to be enforced in other states in and by virtue of the full faith and credit clause of the constitution. In other words, the final question is whether, to enforce in another jurisdiction the Connecticut decree, would not be to enforce in one state a personal judgment rendered in another state against a defendant over whom the court of the state rendering the judgment had not acquired jurisdiction? Otherwise stated, the question is this: Is a proceeding for divorce of such an exceptional character as not to come within the rule limiting the authority of a state to persons within its jurisdiction, but, on the contrary, because of the power which government may exercise over the marriage relation, constitutes an exception to that rule, and is therefore embraced either within the letter or spirit of the doctrine stated in the third or fourth propositions?

Before reviewing the authorities relied on to establish that a divorce proceeding is of the exceptional nature indicated, we propose first to consider the reasons advanced to sustain the contention. In doing so, however, it must always be borne in mind that it is elementary that where the full faith and credit clause of the constitution is invoked to compel the enforcement in one state of a decree rendered in another, the question of the jurisdiction of the court by which the decree was rendered is open to inquiry. And if there was no jurisdiction, either of the subject-matter or of the person of the defendant, the courts of another state are not required, by virtue of the full faith and credit clause of the constitution, to enforce such decree. *National Exch. Bank v. Wiley*, 195 U. S. 259, 269, 49 L. ed. 184, 190, 25 Sup. Ct. Rep. 70, and cases cited. . . .

Without questioning the power of the state of Connecticut to enforce within its own borders the decree of divorce which is here in issue, and without intimating a doubt as to the power of the state of New York to give to a decree of that character rendered in Connecticut, within the borders of the state of New York and as to its own citizens, such efficacy as it may be entitled to in view of the public policy of that state, we hold that the decree of the court of Connecticut rendered under the circumstances stated was not entitled to obligatory enforcement in the state of New

York by virtue of the full faith and credit clause. It therefore follows that the court below did not violate the full faith and credit clause of the constitution in refusing to admit the Connecticut decree in evidence; and its judgment is, therefore, affirmed. Brown, Harlan, Brewer and Holmes, JJ., dissented.

See *Penniman v. Daniel*, 91 N. C. at p. 434, inserted at ch. 11, sec. 4, ante, and the note to that case. See also *Long v. Ins. Co.*, 114 N. C. 465, 19 S. E. 347, inserted at ch. 13, § 6, post; also *Beard v. Beard*, 21 Indiana, at p. 323; *Hart v. Sanson*, 110 U. S. at p. 154, 3 Sup. Ct. 596; *Carpenter v. Strange*, 141 U. S. 87, 11 Sup. Ct. 960; *Andrews v. Andrews*, 188 U. S. 14, 23 Sup. Ct. 237; note in 28 L. R. A. 59; note in 19 *Ibid.* 775; *Barnes v. Gibbs*, 31 N. J. L. 317. The principal case reviews all the rulings of the different state courts on the point in question. The following extract from "Case and Comment," vol. 16, No. 1 (June, 1909), which is inserted by permission of Mr. Burdett A. Rich, the editor, is a valuable explanation of some rather intricate questions of extra-territorial jurisdiction, and conflicting and concurrent jurisdiction: "A peculiar question as to the right of one state to punish an act in violation of its laws, committed on a boundary river over which the adjoining states have concurrent jurisdiction under an act of Congress, when the act was actually committed within the limits of the other state and under its authority and license, was decided in the case of *Nielsen v. Oregon*, 212 U. S. 315, 53 L. ed. 528, 29 Sup. Ct. 383. What constitutes concurrent jurisdiction in such cases has been in previous cases held to mean the jurisdiction of two powers over one and the same place, and not to be limited to legislative jurisdiction, but to include the right to administer the law below low-water mark on the river, and, as a part of that right, the right to serve process there with effect, both in civil and criminal cases. In the present case the court says that one purpose of the law undoubtedly, and perhaps the primary purpose, was to avoid any nice question as to whether a criminal act was committed on one side or the other of the exact boundary, which sometimes changed by reason of the shifting of the channel. In the case of an act *malum in se*, prohibited and punished by the laws of both states, the one first acquiring jurisdiction of the person may prosecute the offense, and its judgment will be a finality in both states, so that one cannot be prosecuted thereafter in the other state. In the *Nielsen Case* the offense was against the fishing laws of Oregon, consisting of operating a purse net on the Columbia river. But, while this was contrary to the laws of Oregon, it was expressly authorized by the laws of Washington. Under these circumstances, it was held by the Supreme Court of the United States that the state of Oregon could not, by virtue of precedence in taking jurisdiction, enforce the fishing laws of that state against a person who was fishing within the limits of the state of Washington under a license from that state, though the act was on the river over which both states had concurrent jurisdiction. The court says there is little authority upon this precise question, but, among the authorities on the general subject, refers to *Roberts v. Fullerton*, 117 Wis. 222, 93 N. W. 1111, 65 L. R. A. 953. And the decision of the Wisconsin court held that the enforcement by the state of Minnesota of its fish and game laws on the Wisconsin side of the main channel of the Mississippi river was not justifiable on the theory of common ownership of the river or things in, or on, or under the same, on the Wisconsin side of the main channel; and that no authority to do this is conferred by the grant of concurrent jurisdiction over the river by the act of Congress. The whole subject of jurisdiction over boundary rivers is treated at length in a note to that case in 65 L. R. A. 953 et seq. This deals not only with the grant of concurrent jurisdiction, but with such questions as to what rights are exclusive in the river, and the effect of change of channel, or the effect of treaties and compacts respecting rivers, and all the other questions that have come up on this general

topic. There is a surprising number of questions and decisions on this general topic." For when a decree of divorce may be attacked because plaintiff not domiciled in the state in which the decree was rendered, see 23 L. R. A. (N. S.) 1254 and note.

See "Divorce," Century Dig. §§ 827-844; Decennial and Am. Dig. Key No. Series §§ 325-330.

LEVIN v. GLADSTEIN, 142 N. C. 482, 55 S. E. 371. 1906.

"Full Faith and Credit" Clause. Attacking a Judgment for Fraud. Matters Not Within the Jurisdiction of a Court Sometimes Allowed as Defenses.

[Levin sued Gladstein in the superior court of the city of Baltimore and obtained a judgment against him. Levin then sued on that judgment in a justice's court in North Carolina. The defendant admitted the rendition of the judgment in Baltimore and set up no defense thereto except he alleged that such judgment was obtained against him by means of fraudulent practices of Levin, the plaintiff. The justice rendered judgment against the defendant, and that judgment was affirmed in the superior court. The defendant then appealed to the supreme court. Reversed. In the superior court the plaintiff moved for judgment upon defendant's admissions—insisting that the judgment could not be attacked, in this action, for fraud. The judge overruled the motion and submitted the issue as to fraud to the jury, who found a verdict that the judgment was obtained by the fraud of the plaintiff.]

CONNOR, J. Two questions are presented upon the plaintiffs' appeal: First. Can the defendant, in the manner proposed herein, resist a recovery upon the judgment rendered against him by the Maryland court? Second. If so, has the justice of the peace jurisdiction to hear and determine such defense? The plaintiffs, relying upon the provision of the Constitution of the United States, art. 4, § 1, that "full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state," earnestly contends that the defense is not open to the courts of this state; that the remedy for the fraud in procuring the judgment, if any, must be sought in the courts of Maryland. The well-considered brief of plaintiffs' counsel thus states the question involved in the appeal: "The case presents the question of the right of a defendant to avail himself of the plea of fraud as a defense to an action in one state based upon a judgment obtained in a sister state." When a judgment rendered by the court of one state becomes the cause of action in the court of another state and the transcript, as made in such state, duly certified, as prescribed by the act of Congress, is produced, it imports verity and can be attacked for only one purpose. The defendant may deny that the court had jurisdiction of his person or of the subject-matter, and for this purpose may attack the recitals in the record. Bailey on Jurisdiction, §§ 198, 199. Jurisdiction will be presumed until the contrary is shown. If not denied, or when established after denial, defendant cannot interpose the plea of null debet. This was held in *Mills v. Duryee*, 7 Cranch, 480, 3 L. Ed. 411, and has been uniformly followed by both state and federal courts. 2 Am. Lead. Cases, 538. It is thus apparent

that the judgment obtained by the fraud of plaintiffs, as found by the jury, would be open to attack in the courts of Maryland upon the universally accepted principles of equity jurisprudence invoked in the courts of this state, and in giving the defendant relief we are giving the judgment the same "faith and credit" which it has in that state. Mr. Bailey, in his work on Jurisdiction, 202, 203, notes the language of Judge Gray in *Christmas v. Russell*, *supra*, and Fuller, C. J., in *Cole v. Cunningham*, *supra*, saying: "However it should be conceded that whatever may have been the rule in the court prior to the decision in *Cole v. Cunningham*, that the rule there stated must be taken as the present doctrine of that court." He notes the diversity in the several states, saying that in Maryland the court has not followed the rule in *Cunningham's Case*, citing *Hambleton v. Glenn*, 72 Md. 351, 20 Atl. 121. In that case the question was whether in that state the judgment rendered in Virginia could be collaterally attacked for fraud. That is not the question here, but whether in Maryland the judgment of its own courts could be enjoined in equity for fraud, and, as we have seen, it may be. We are not seeking to know what the courts of Maryland would permit to be done if a North Carolina judgment was sued upon there, but what they will permit to be done when one of their own judgments is sued upon or attacked for fraud. The plaintiff says, however this may be, the defendant can have this relief only in Maryland; that he must go into that state, and attack the judgment or enjoin the plaintiff. Mr. Freeman says: "If the judgment was procured under circumstances requiring its enforcement to be enjoined in equity, the question will arise whether these circumstances may be interposed as a defense to an action on the judgment in another state. Notwithstanding expressions to the contrary, we apprehend that, in bringing an action in another state, the judgment creditor must submit to the law of the forum, and must meet the charge of fraud in its procurement, when presented in any form in which fraud might be urged in an action on a domestic judgment. If, in the state in which the action is pending, fraud can be pleaded to an action on a domestic judgment, it is equally available and equally efficient in actions on judgments of other states. . . . It is true that two of the decisions of the Supreme Court of the United States contain the general statement that the plea of fraud is not available as an answer to an action on a judgment—citing *Christmas v. Russell* and *Maxwell v. Stewart*, *supra*. We apprehend, however, that these decisions are inapplicable in those states in which the distinctions between law and equity are attempted to be abolished, and equitable as well as legal defenses are, when properly pleaded, admissible in actions at law." *Freeman on Judgments*, § 576. If those states, in which equitable remedies were administered only by courts of equity, enjoined proceeding at law upon a judgment obtained by fraud, why should not, in those courts administering legal and equitable rights and remedies in one court and one form of action,

the defendant be permitted to set up his equitable defense to the action on the judgment? The question is answered by the case of *Gray v. Bicycle Co.*, 167 N. Y. 348, 60 N. E. 605, 82 Am. St. Rep. 720. The action was brought on a note which the court held was merged into a judgment rendered in Indiana. It was alleged that the judgment was procured by fraud. Vann, J., said that it was admitted that "even a foreign judgment may be successfully assailed for fraud in its procurement. . . . It was not necessary to go into the state of Indiana to obtain relief from the judgment through its court, for, as we have held, a court from one state may, when it has jurisdiction of the parties, determine the question whether a judgment between them, rendered in another state, was obtained by fraud, and, if so, may enjoin the enforcement of it, although its subject-matter is situated in such other state. The assertion of the foreign judgment as a bar in this action was an attempt to enforce it indirectly and it was the duty of the trial court to send the case to the jury with the instruction that, if they found the judgment was procured by fraud, it could not be asserted as a bar in this state." *Davis v. Cornue*, 151 N. Y. 172, 179, 45 N. E. 449. The same rule is laid down by Black.

In some of the states, when the formal distinction between law and equity is abrogated, the law allows equitable defenses to be set up in an action at law. Hence, in those states, when the suit is brought upon a domestic judgment, the defendant is allowed to plead any circumstances of fraud which would have justified a court of equity in interfering in his behalf. Now, when the same judgment is made the basis of an action of another state, he ought to be allowed the same latitude of defense; for if it were otherwise, the foreign court would be required to give greater faith and credit to the judgment than it is entitled to at home, which the constitution does not require. *Black on Judgments*, § 948. That the defense made by defendant may, under our Code, be set up by way of answer, is well settled. The cases in point are collected in *Clark's Code* (3d ed.) p. 238. The remaining question is whether the defense is available to defendant in a justice's court. It is said that the remedy of defendant being an injunction against proceeding with the action, resort must be had to the superior court having equitable jurisdiction. The question is not free from difficulty. It would seem, however, that in view of the frequent decisions of this court that while a justice's court has no jurisdiction to administer or enforce an equitable cause of action a defendant may interpose an equitable defense in that court. His honor correctly submitted the issue raised by the defense. In *Lutz v. Thompson*, 87 N. C. 334, the defendants sought to prevent a recovery upon a bond by showing that it had been executed in accordance with certain agreements, and that by reason of which it would be inequitable to enforce one part of it and leave the other part unfulfilled. The objection was made that this defense, being equitable in its character, could not be interposed in a justice's court. Ruffin, J., said: "Whenever such a

court has jurisdiction of the principal matter of an action, as on a bond, for instance, it must necessarily have jurisdiction of every incidental question necessary to its proper determination; and though it cannot affirmatively administer an equity, it may so far recognize it as to admit it to be set up as a defense." In *McAdoo v. Callum*, 86 N. C. 419, originating in a justice's court for the purpose of ousting defendants, tenants of the plaintiff, the defendants set up by way of defense a contract for a renewal of the lease, etc. To the objection that the justice had no jurisdiction to hear such defense, Smith, C. J., said: "While this provision is not itself a renewal so as to vest an estate in the defendants for the successive term, it gave them an equity, which, while it cannot be specifically enforced in the court of a justice, will be recognized as a defense to a proceeding for the ejection of the defendants." *Hurst v. Everett*, 91 N. C. 399. We can see no good reason why the defendant may not set up, by way of defense, the facts which show that the judgment, plaintiff's cause of action, was obtained by fraud practiced upon him. *Bell v. Howerton*, 111 N. C. 73, 15 S. E. 891; *Holden v. Warren*, 118 N. C. 326, 24 S. E. 770; *Vance v. Vance*, 118 N. C. 865, 24 S. E. 768. These and other cases in our reports illustrate the rule of practice, that equitable defenses may be set up in the court of a justice of the peace. In *Earp v. Minton*, 138 N. C. 202, 50 S. E. 624, the suit was not upon a judgment, but the judgment, in an action between the plaintiff and another party, one Cranor, was offered in evidence to sustain plaintiff's title. The judgment, when so offered, could not be attacked collaterally, as shown both upon reason and the authorities cited. In our case, the defendant, if in the superior court, would have pleaded the fraud in bar of plaintiff's recovery, just as if the suit had been upon a bond under seal obtained by fraud. We can see no good reason why he may not, for the same purpose, set it up in the justice's court. It would be incompatible with our conception of remedial justice under the code system to require the defendant to submit to a judgment, and be compelled to resort to another court to enjoin its enforcement. This is one of the inconveniences of the old system which was abolished by the constitution and the adoption of the code practice. We but follow the line marked by *Ruffin, J.*, when he announced the general principle in *Lutz v. Thompson*, *supra*.

We find no error in the ruling of his honor in regard to the burden of proof or probative force of the testimony required to establish the defense. We have examined the authorities cited by plaintiffs' counsel, and while there is, to say the least, some apparent conflict, we are of the opinion that the conclusion reached by us is in accordance with the weight of authority and those best sustained by reason.

There is no error.

See "Judgment," Century Dig. §§ 1486, 1487, 1760; Decennial and Am. Dig. Key No. Series §§ 820, 930.

JONES v. BUNTIN, 1 Blackford, 321, 322. 1824

Several Claims, Each too Small for Superior Court Jurisdiction, But the Aggregate Within Such Jurisdiction.

SCOTT, J. Declaration in debt on the statute against Buntin, for charging and receiving unlawful fees for services as clerk of the Knox Circuit Court. General demurrer to the declaration sustained, and judgment for the defendant. The objection to the declaration is, that there are different fees charged to have been unlawfully demanded and received by the appellee, all united in one suit, when, if each item had been made the foundation of a separate suit, they would all have been cognizable by a justice of the peace. We can see neither reason nor precedent in support of this objection. The judgment must be reversed.

For similar rulings in North Carolina, see Pell's Revisal, at pp. 732, 790, citing *Boyd v. Railroad*, 132 N. C. 184, 43 S. E. 631, and other cases. See "Courts," Century Dig. § 417; Decennial and Am. Dig. Key No. Series § 121.

WASHBURN v. PAYNE, 2 Blackford, 216. 1829.

Jurisdiction of Actions on Penal Bonds.

[Payne sued Washburn, in a justice's court, on a bond for \$175 conditioned to be void upon the delivery of certain property. Payne claimed only \$81.25, as the amount he was entitled to recover as damages for the breach of the bond. Judgment for the plaintiff in the justice's court, which was affirmed, on appeal, by the circuit court. Washburn then carried the case to the supreme court by writ of error. Affirmed.]

SCOTT, J. . . . The statute of 1827 gives jurisdiction to a justice of the peace, where the sum due or demanded shall not exceed one hundred dollars. From the phraseology of the statute we are of the opinion that the intention of the general assembly was to regulate the jurisdiction of a justice of the peace, not by the amount named in the bond on which suit might be brought, but by the amount actually claimed or demanded by the plaintiff. The amount claimed in this case, and alleged to be due to the plaintiff, is \$81.25. This sum is clearly within a justice's jurisdiction under the statute. For this sum judgment was rendered by the justice, and that judgment was correctly affirmed by the circuit court. Judgment affirmed.

The contrary is held in North Carolina, see *Cummins v. Barnett*, 34 N. C. 317 and other cases cited at p. 732 of Pell's Revisal, near top of page. See also note to *Cummins v. Moore*, 33 N. C. 34 (inserted at chap. 8, § 2, citing *State ex rel. Hall v. Porter*, 49 N. C. 140. See "Justices of the Peace," Century Dig. § 161; Decennial and Am. Dig. Key No. Series § 44.

HUNTON v. LUCE, 60 Ark. 146, 29 S. W. 151, 28 L. R. A. 221. 1895.
How a Claim too Large to Come Within the Jurisdiction of an Inferior Court May Be Brought Within Its Jurisdiction. Remission.

[Sallie P. Falconer was indebted to Hunton upon a promissory note for the sum of \$306.50. By the laws of Arkansas a justice's court has no jurisdiction of an action on contract where the sum demanded exceeds \$300 and interest. Hunton credited the note in question by endorsing thereon "credit by amount remitted \$7.50," and sued Sallie P. Falconer for \$299, as the amount due on her note, in a justice's court. There was a judgment for the plaintiff and the judgment being docketed became a lien on the lands of Sallie P. Falconer. Luce bought the land and brings this action against Hunton to have such judgment declared a nullity, on the ground that the justice had no jurisdiction. Judgment against Hunton, and he appealed. Reversed.]

RIDDICK, J. . . . The decisions of the different states upon the question whether a plaintiff may, by remitting a portion of the amount due him on a note or contract, bring his case within the jurisdiction of an inferior court, are very conflicting. This court, so far as we know, has never passed directly upon this question; but, in several cases touching the question of jurisdiction, its reasoning is along the lines adopted by those courts that sustain the right of the plaintiff to bring his action within the jurisdiction of an inferior court by remitting a portion of his claim. Our constitution provides that justices of the peace shall have jurisdiction "*exclusive of the circuit court in all matters of contract when the amount in controversy does not exceed the sum of one hundred dollars, excluding interest; and concurrent jurisdiction in matters of contract, when the amount in controversy does not exceed the sum of three hundred dollars, exclusive of interest.*" It will be seen that the jurisdiction of a justice of the peace in matters of contract depends upon the amount in controversy, exclusive of interest. In *Lafferty v. Day*, 7 Ark. 260, it was held that "the amount *claimed* by the plaintiff is the sum in controversy, and determines the jurisdiction," and that, if the amount sued for be within the jurisdiction of a justice of the peace, the defendant cannot defeat the jurisdiction by showing that he owes the plaintiff more than he has sued for. In *State v. Seoggin*, 10 Ark. 328, Judge Scott, discussing a question concerning the jurisdiction of a justice of the peace, refers to the point raised here as follows: "So, upon a like foundation, it has been repeatedly held by the supreme court of Alabama that, although an open account for an amount beyond the jurisdiction of a justice of the peace cannot be broken up so as to ground several actions before him, yet the plaintiff may elect to proceed for an amount within his jurisdiction, by discarding so much of his account as may be beyond the justice's jurisdiction, and proceed only for such items as may amount to the sum of that jurisdiction; and also of a note or bond, after being reduced by voluntary credits,—the recovery in all such cases going to the whole contract, and extinguishing all claim to that which was discarded."

He concludes, on this point, that a contract originally beyond the jurisdiction of a justice may be properly brought within it by credit, if the balance only be claimed. A large number of cases by the courts of the different states on this question may be found collated in an opinion by Chief Justice Blackley in a case lately decided by the supreme court of Georgia. After saying that "whether a creditor whose demand is created by express contract, such as a promissory note, can voluntarily abandon a part of his claim, or enter a credit upon it for the express purpose of reducing it within the jurisdiction of a given court, is a question upon which the authorities differ," he adds that "it is probable the weight of decision is with the affirmative." *Stewart v. Thompson*, 85 Ga. 830. The authorities on this question may also be found collated on pages 61 and 62 of "Courts and Their Jurisdiction," a book by Judge Works, where the author states the rule as follows: "A plaintiff may bring his action for less than is due him, remitting the balance, and thus bring his case within the jurisdiction of an inferior court." See also note to *Grayson v. Williams*, 12 Am. Dec. 569, where the editor cites a number of cases holding, in substance, that it is not the amount of the plaintiff's claim, but the sum that he actually demands, which determines the jurisdiction.

We have been favored by briefs from the counsel representing the different parties in this cause, in which the cases upon this question by the courts of the different states have been discussed and commented upon in an able and admirable way, but it would serve no useful purpose to discuss such cases further. We will only announce our conclusion that the appellants had the right to bring their case within the jurisdiction of the justice of the peace by remitting a portion of the principal of their note. We do not see that it is any violation of the rights of a debtor to allow his creditor to remit by voluntary credits a portion of his debt, and thus bring his claim within the jurisdiction of an inferior court. After the judgment of the inferior court is rendered upon the reduced claim, the part remitted is completely extinguished, and can never afterwards be asserted against the debtor. If the creditor desires to avail himself of the speedy justice furnished by these inferior courts, at the expense of a portion of his claim, he should be allowed to do so. We therefore conclude that the judgment of the justice of the peace against Sallie Falconer for \$299 and interest was valid. The decree of the circuit declaring the said judgment void, and enjoining the collection of the same, is therefore reversed.

For a very full note on the question embraced in the principal case, see 28 L. R. A. 221-230. This matter is regulated by statute in North Carolina, see *Pell's Revision*, § 1421 and notes; see also *Riddle v. Mulling Co.*, 150 N. C. at p. 690, 64 S. E. 732. See "Jurisdiction of the Peace," *Century Dig.* § 179; *Decennial and Am. Dig. Key-Not. Digest* § 49.

MOORE v. THOMPSON, 44 N. C. 221. 1853.

Fraud Upon the Jurisdiction of the Court.

[Action of debt brought in a justice's court, for \$100 alleged to be due by note. The justice gave judgment against the defendant who appealed to the superior court. In the superior court the defendant pleaded in abatement that the note sued on was given for \$110.02, and that without the consent of the defendant the plaintiff had credited the note with \$10.02 in order to bring it within the jurisdiction of a justice's court "thereby committing a fraud upon the law . . . and the legal rights of the defendant." Plaintiff demurred to this plea and the demurrer was sustained, overruling the plea. Defendant appealed. Reversed.]

PEARSON, J. . . . The creditor, without the knowledge or consent of the debtor, enters a credit on the note for the purpose of giving jurisdiction; the debtor has never assented to, or ratified this credit, but has always objected to it. This does not amount to a payment, and the magistrate had consequently no jurisdiction. It is a familiar maxim of law, "No one can make another his debtor without his consent." The converse is equally true. No one can give another a specific article or sum of money, unless he chooses to accept it; and although in this latter case the acceptance is usually presumed (as it is supposed to be for his benefit), yet there may be reasons why he may not choose to accept (as in our case), and then the presumption is rebutted. Suppose a creditor, whose debt is about being barred by the statute of limitations or the presumption of payment, enters a credit; no effect whatever is given to it, unless the debtor assents to it. It is said this is like the case of a plaintiff who remits a part of his damages to prevent a variance. There is no analogy; for then the court allows the remittitur as an amendment of the record. *State v. Mangum*, 28 N. C. 369; *Fortescue v. Spencer*, 24 N. C. 63 both assume that the case now under consideration would be a fraud upon the jurisdiction. Judgment reversed, and judgment that the writ be abated.

See note to next preceding case. See "Courts," *Century Dig.* § 428; *Decennial and Am. Dig. Key No. Series* § 169; "Justices of the Peace," *Century Dig.* §§ 170, 171; *Decennial and Am. Dig. Key No. Series* § 44.

WISEMAN v. WITHEROW, 90 N. C. 140. 1884.

Fraud Upon the Jurisdiction of the Court.

[Action commenced in the superior court to recover \$312. It appeared that, from the plaintiff's own showing, only \$58.75 was really due and that plaintiff knew this when his action was commenced. The judge thereupon dismissed the action on defendant's motion, and the plaintiff appealed. Affirmed.]

MERRIMON, J. It is the sum of money demanded in the action upon the contract, express or implied, that determines the question of jurisdiction, in a case like the present one, but the law contemplates that the plaintiff will make his demand in good

faith and with reasonable certainty, and with no purpose to evade or give the jurisdiction improperly. If it manifestly appears to the court that the sum demanded is greater than was really due, then, when in truth and law it could not attach, then, in the language of the late Chief Justice Pearson, in *Froelich v. Express Co.*, and was so alleged for the purpose of giving the court jurisdiction, 67 N. C. 1, "it is the duty of the court, *ex mero motu*, to interfere and prevent an evasion of the constitution."

In this case, the court below does not specify the particular ground upon which the judgment dismissing the action for want of jurisdiction was founded, but we must presume, in view of the facts appearing in the record, that it rested upon the ground that there was obviously a purpose to give the court jurisdiction, when the facts and law arising upon them would not allow the same. It seems to us that there were facts that warranted the action of the court. The plaintiff sued for \$312, for feeding and lodging the defendant's servant, at regular intervals, for a period embracing several years. Pending that time, the defendant from time to time paid on account of such running indebtedness sundry sums of money, thus discharging the same *pro tanto*, until, at the time the action was brought, he owed her only the sum of \$58.75. This appears from the plaintiff's own showing. Her daughter, under her direction, kept the account, and she knew or could have known what sum was due her. It was not fair or proper to allege that so large a sum was due, when in fact, within her knowledge, so small a one was due. We think the court was warranted in giving the judgment appealed from. There is no error and the judgment must be affirmed.

"Manifestly, 'the sum demanded' is used in the sense of 'the amount in dispute,' and on the assumption that plaintiffs will act fairly and only demand such an amount as they may reasonably expect to recover, when the contrary appears, it is the duty of the courts '*ex mero motu*' to interfere and prevent an evasion of the constitution. In olden times, when it was found that, by reason of the vast increase in commercial dealings, the court of Common Pleas in England, to which was assigned by statute all actions founded on contracts, was oppressed with business, the fiction of *quo minus* in the court of Exchequer and the contrivance of the *ac etiam* clause in the King's Bench were winked at and favored by the courts, in order to divide the jurisdiction in regard to contracts, and to relieve the court of Common Pleas of a part of a burden which was too heavy for it. But the condition of things here is entirely different, and the courts are not at liberty to wink at, or favor, an attempt to evade the constitution." *Froelich v. Express Co.*, 67 N. C. at p. 3. See also *Realty Co. v. Corpening*, 147 N. C. 613, 61 S. E. 528. See "Courts," *Century Dig.* § 423; *Decennial and Am. Dig. Key No. Series* § 121.

BOING V. RAILROAD, 87 N. C. 966, 163, 1882.

Jurisdiction of an Appellate Court in Cases in Which It Has No Original Jurisdiction and in Cases in Which Its Jurisdiction is Concurrent With That of the Inferior Court.

[Action commenced in a justice's court to recover \$50 damages for injury to a cow. The justice gave judgment against the defendant who appealed to the superior court, where judgment was rendered against the plaintiff and he appealed. Reversed. The point that the justice had no

jurisdiction was not made until the case was reached in the supreme court. Only that portion of the opinion which discusses the question of jurisdiction, is here inserted.]

ASHE, J. . . . In this court, the counsel for the defendant moved to dismiss the action for want of jurisdiction in the superior court, basing his motion upon the fact that the action was commenced before the justice of the peace under section 10, chapter 16, of Battle's Revisal, which had been declared to be unconstitutional. *Nance v. R. R.*, 76 N. C. 9. The answer to that is that the act of 1876 7, ch. 251, gave to justices of the peace concurrent jurisdiction of civil actions not founded on contract, when the value of the property in controversy does not exceed fifty dollars; and although the justice in this case summoned freeholders to assess the damages, it was yet his judgment, though irregular and perhaps erroneous.

The counsel seems to have overlooked the distinction between the cases, where the jurisdiction of the superior courts and the courts of justices of the peace is concurrent, and where it is exclusive in the one or the other. We take the distinction to be, that where it is concurrent, and a case is carried by appeal to the superior court, and the appellant, as in this case, files an answer under leave of the court and goes to trial without objection, the court will have cognizance of the matter by virtue of its original jurisdiction of the subject matter of the action, and by the consent of the parties thus manifested, however irregular the proceedings may have been in the justice's court. *West v. Kittrell*, 8 N. C. 493. But when a justice of the peace takes cognizance of an action of which he has no jurisdiction, and the case is carried by appeal to the superior court, that court acquires no jurisdiction because its jurisdiction is altogether derivative, and depends upon that of the justice from whose court the appeal is taken. *Allen v. Jackson*, 86 N. C. 321; *Boyett v. Vaughn*, 85 N. C. 363. Error.

For a full discussion of the concurrent jurisdiction of the superior court and justices' courts, see *Houser v. Bonsal*, 149 N. C. 51, 62 S. E. 776. See "Courts," Century Dig. § 489; "Appeal and Error," Century Dig. §§ 81-87; Decennial and Am. Dig. Key No. Series § 20.

ROBERSON v. ROCHESTER BOX CO., 171 N. Y. 538, 546, 64 N. E. 442. 1902.

Jurisdiction of Courts of Equity, Origin of.

PARKER, C. J. . . . It is undoubtedly true that in the early days of chancery jurisdiction in England the chancellors were accustomed to deliver their judgments without regard to principles or precedents and in that way the process of building up a system of equity went on, the chancellor disregarding absolutely many established principles of the common law. "In no other

way," says Pomeroy, "could the system of equity jurisprudence have been commenced and continued so as to arrive at its present proportions." In their work the chancellors were guided not only by what they regarded as the eternal principles of absolute right, but also by their individual consciences, but after a time when "the period of infancy was past and an orderly system of equitable principles, doctrines and rules began to be developed out of the increasing mass of precedents, this theory of personal conscience was abandoned; and 'the conscience,' which is an element of the equitable jurisdiction, came to be regarded, and has so continued to the present day, as a metaphorical term, designating the common standard of civil right and expediency combined, based upon general principles and limited by established doctrines to which the court appeals, and by which it tests the conduct and rights of suitors—a juridicial and not a personal conscience." (Pom. Eq. Jur. §§ 48, 57.)

THORN v. WILLIAMS, 4 N. C. 30. 1814.

Jurisdiction of Courts of Equity, General Principles of.

SEAWELL, J. . . . Whenever the principles of the law by which the ordinary courts are guided, tolerate a right, but afford no remedy; or where the law is silent, and interference is necessary to prevent a wrong; or where the ordinary courts are incompetent to a complete remedy, a court of equity will afford relief. So also in cases where it is essential to a fair trial in the courts of law, a court of equity will lend assistant aid, by compelling discovery of matters necessary for that end, and in this respect she acts as a handmaid of the law. But in no instance is it believed, a court of equity will interpose where the party applying has a fair and complete remedy at law. . . .

HIPP v. RABIN, 19 Howard, 271, 278. 1856.

Jurisdiction of Courts of Equity, Limitations of.

CAMPBELL, J. . . . Whenever a court of law is competent to take cognizance of a right, and has power to proceed to a judgment which affords a plain, adequate, and complete remedy, without the aid of a court of equity, the plaintiff must proceed at law, because the defendant has a constitutional right to a trial by jury. . . .

HENDERSON v. BATES, 2 Blackford 467. 1834.

Jurisdiction of Courts of Equity, Instances of.

McKINNEY, J. The principal question to be settled in this case is, does the bill of Henderson show that he is without relief at law and that a court of equity should interpose? The complainant contends that the case presented by the bill is peculiarly ap-

propriate to a court of equity, and in support of his position assumes several grounds, each of which in the course of this examination will be noticed. The object of the bill is to protect from sale certain personal property, levied on by executions against Town, and against Town & Pulliam. A part of this property is claimed by Henderson, by a transfer made to him by the sureties of Town, and the residue is claimed on original ownership, and a denial of the divestment of his right by the possession of Town, and of Town & Pulliam.

The rule is well settled that *relief will not be granted in chancery when, at law, a complete remedy is afforded*. 3 Atk. 740; 3 Bro. Parl. Cas. 525; Mitf. Pl. 111; *Cunningham v. Caldwell*, Hard. 123; *Waggoner's Trustees v. McKinney et al.*, 1 Marsh. 479. It is also well settled that chancery will not entertain a bill when *personal property is the subject-matter*, unless in some peculiar cases; nor will it interpose and enjoin a sale of personal property, taken in execution, either on the ground that it is not the property of the defendant in the execution, but belongs to a third person, or that it belongs to the complainant, unless it be shown that if the property were sold *the complainant would be without remedy at law*. *Nesmieth v. Bowler*, 3 Bibb. 487; *Kendrick v. Arnold*, 4 Bibb. 235.

The remedy at law must not only be incomplete, but the damages not an adequate compensation, to authorize a court of equity to interpose. In the case of *Bowyer v. Creigh*, 3 Rand. 25, the question of jurisdiction is fully examined, and the position sustained, that equity interferes in no case where the plaintiff claims as *encumbrancer merely*, and, where he claims as owner, only in those cases where, from the *peculiar nature of the property and circumstances of the case, the remedy at law is incomplete*. In the cases of *Wilson v. Butler*, 3 Munf. 559, *Scott et ux. v. Halliday*, 5 Id. 103, and *Sampson v. Bryce*, 5 Id. 175, in which equity exercised jurisdiction, the plaintiff claimed the property, not as security for money, but as belonging of right to himself, and this property was slaves; for this property being capable of possessing moral qualities, and thus rendered invaluable, it was considered that damages would not be an adequate compensation. The court, in *Bowyer v. Creigh*, review the grounds of chancery jurisdiction, and among others present the following: "Where, pending a litigation, *the property in dispute is in danger of being lost*, and the powers of the court in which the controversy depends are insufficient for the purpose, equity will interpose to preserve it." "Equity exercises a jurisdiction to put an end to *the oppression of repeated litigations*, after satisfactory determinations of the question, upon the principle interest reipublicae ut sit finis litium." It would thus seem that, in cases of personal property, the interposition of a court of equity is rare, and only occurs when the legal remedy is incomplete, and damages are not an adequate compensation. The case in 3 P. Wms. 390, of the *ancient silver altar piece*, in 1 Vern. 273, of the *horn by which an estate was*

held, in 3 Ves. 70, of the *silver tobacco box* belonging to a club, and some others, and in Virginia, of *slaves*, are examples of such interference afforded by the books, and show that in those cases the remedy at law was incomplete. Those cases rest upon their own peculiar grounds, and do not affect the rule laid down.

It is said, however, that this is a *bill of peace*, thus giving jurisdiction to a court of chancery, and therefore the injunction was correctly granted, and should not have been dissolved. As this position was strongly urged, it would seem to require particular examination. Maddock, in 1 vol. p. 166, says, "*Bills of peace are made use of* where a person has a right which may be controverted by various persons, at different times, and by different actions, and the court will thereupon prevent a multiplicity of suits by directing an issue to determine the right, and ultimately an injunction. Another occasion where a bill of this kind is resorted to is, where there have been repeated attempts to litigate the same question by ejectment and repeated and satisfactory trials, in which cases the court, upon such a bill, preferred by all the parties interested, or by some of them in the names of themselves and the rest, will grant a perpetual injunction to restrain further litigation."

The examples and authorities referred to by Maddock show the kind of right to which the text applies. It is that which exists between lords of manors and their tenants, and between tenants of one manor and another. *Mayor of York v. Pilkington*, 1 Atk. 282; *Ld. Tenham v. Herbert*, 2 Atk. 483. Such bills also lie for duties, as in the case of the *City of London v. Perkins*, where the city of London brought only a few persons before the court, who dealt in those things whereof the duty was claimed, to establish a right to it. 1 Harr. C. 127. "Where a bill was brought by one tenant of a manor, suggesting a custom for the tenants of the manor of A (of which he was one), to cut turves in the manor of B to quiet him, and to have an issue directed as to the right, the court said, 'this bill is improper and inconsistent with the nature and end of a bill of peace, which is, that where several persons having the same right are disturbed, on application to the court to prevent expense and multiplicity of suits, issues will be directed, and one or two determinations will establish the right of all parties concerned, on the foot of one common interest, and the bill is preferred by all the parties interested, or a determinate number in the name of themselves and the rest; but in this case one only brings the bill on the general right, and not on the foot of any particular right,' and therefore the bill was dismissed with costs." 1 Madd. 172. So a bill of this kind, after five trials in ejectment, and verdicts in them all, has been entertained, and a perpetual injunction granted. *Ld. Bath v. Sherman*, 11 Ch. 261. In the cases in which, to prevent a multiplicity of suits, chancery has entertained jurisdiction, *the plaintiff ought to establish his right by a determination of a court of law in his favor, before his bill in equity*. Mitf. Pl. 128.

The case of the Trustees of Huntington v. Nicoll, 3 Johns. 566, has been cited by the complainant as sustaining his bill. Between that case and the present, little if any analogy is perceived. In that case several actions of trespass were brought, and the subject-matter was land. A verdict in one case was found, and the other cases were ready for trial, and from the nature of the respective claims, litigation would not have been arrested by the suits then pending. The jurisdiction in equity, in that case, was founded on one verdict, the pendency of several actions, the liability to others, the great expense attending those actions, and from the case being within the rule laid down in Tenham v. Herbert, 2 Atk. 483, that there were some cases in which a man, by a bill of peace, might come into chancery before his right was established at law. The distinction was applied to disputes between lords of manors and their tenants, and between the tenants of one manor and another. The court in New York, even with this distinction, was, however, divided as to the jurisdiction. From this view of the law, the bill before us is not entitled to the character of a bill of peace, and cannot be regarded as one.

It is further urged by the complainant that equity will, pending litigation, where property, the subject of litigation, is in danger of being lost, interpose and preserve it. This is unquestionably a ground of jurisdiction, as previously noticed, but it is obviously not presented by the case before us. The litigation pending, such as required, cannot be supposed to apply to the present case, and the record does not furnish evidence of any other. This suit does not constitute such pending litigation, for our courts of chancery are fully competent to make all necessary orders, and to adopt effective means for the preservation of property, the subject of litigation in them. *The litigation is such as is pending in some other court, whose powers are unequal to that object.*

Another ground is assumed: that the transfer by Town to his sureties amounted to a mortgage or security to indemnify them against their liability to the complainant, and that the transfer by the sureties to the complainant did not change the nature of the transaction, and that, consequently, the complainant should enjoy all the advantages of a mortgagee, and be entitled to relief in a court of equity. To this position two objections arise. 1. It does not appear that the transfer was a mortgage, or in the nature of a mortgage; 2. That if it were a mortgage, the conclusion of jurisdiction would not follow.

The bill does not aver that the transfer was conditional, and on its face it is absolute. There is no averment that a defeasance was executed, qualifying the transfer, and no instrument of that kind is made an exhibit. We are referred to Crumbaugh v. Smock, 1 Blackf. 305. That case scarcely has a feature resembling the one before us. That was a suit in equity to foreclose the equity of redemption in a lot in Indianapolis. The assignment of the certificate for the lot was absolute, but the assignee, on the same day, ex-

executed to the assignor a bond binding himself to reassign the certificate on payment of the money lent with interest. The assignment under these circumstances was considered as a security in the nature of a mortgage.

The second objection would seem to be fully answered by turning to the case of *Bowyer v. Creigh*, 3 Rand. 25. That case was as follows: Caldwell being deeply indebted, and suits depending against him for a great amount, on which it was known judgments would go against him in the following May, executed in April, 1820, a deed of trust to John B. Caldwell for the security of a debt due to Bowyer, conveying a tract of land in Ohio, and all his personal property. The creditors obtained judgments, and had executions levied on a part of the property conveyed to the trustee. The trustee and the cestui que trust filed a bill of injunction to stop the sale, claiming the property as security for their debt. The injunction was dissolved, and the court held that a court of chancery had no jurisdiction, because the law gave complete remedy. The other cases cited during this examination all go to establish the same doctrine. These are the most prominent positions taken to sustain the bill, and are obviously insufficient.

The case presented shows a struggle between Town and sureties, and between Henderson and Town & Pulliam and the creditors of the latter; and as the case is not one in which chancery has jurisdiction, and as the dismissal of the bill does not prejudice the rights of the respective parties, we think the circuit court was correct in dissolving the injunction and dismissing the bill, not only of Henderson, but of Pulliam. The complainant, if his case was proper for a court of chancery, has made unnecessary parties, and parties also, who, from the showing of a bill, were unconnected with the principal transaction. Entertaining this view, a majority of the court consider it unnecessary to enter into a particular examination of the bill, or to express an opinion of the claim asserted by Henderson.

See "Execution," Century Dig. §§ 507-510; Decennial and Am. Dig. Key No. Series § 171; "Equity," Century Dig. §§ 121-172; Decennial and Am. Dig. Key No. Series §§ 43-52.

ELY v. EARLY, 94 N. C. 1, 6-9. 1886.

Legal and Equitable Remedies, How Administered Under the Code Practice.

[Action of ejectment to recover two tracts of land. The complaint was in the usual form, and the answer denied the material allegations of the complaint. The plaintiff, by permission of the court, amended his complaint so as to allege that, by mutual mistake of the parties, he had conveyed one of the tracts of land sued for to the defendant; that defendant had admitted such mistake and had consented to a proper correction of the deed. Defendant answered the amended complaint and denied its allegations. The jury found that the land referred to in the amended complaint had been conveyed to the defendant by mistake of

both parties. Defendant moved for judgment non obstante veredicto. Motion overruled, and judgment for the plaintiff. Defendant appealed. For an error in the charge of the judge with regard to the quantum of proof, the judgment was reversed. Only so much of the opinion as discusses the question of jurisdiction, is here inserted.]

MERRIMON, J. . . . Treating the right to have the deed corrected for the causes alleged, as a separate cause of action, as certainly in some cases it might be, the plaintiff might have united it with the cause of action at first alleged. The Code, sec. 267, provides, that, "the plaintiff may unite in the same complaint several causes of action, whether they be such as have been heretofore denominated legal or equitable, or both, when they all arise out of, (1) the same transaction, or transaction connected with the same subject of action . . . (5) claims to recover real property, with or without damages, for the withholding thereof, and the rents and profits of the same." Plainly, the right to have the deed corrected was "connected with the same subject of action"—the land—and it was directly connected with, and affected the claim "to recover real property." The same section provides, that when such causes of action are united, they must affect "all the parties to the action," and so they do in this case. Such causes of action may be united in the same complaint. One chief purpose of the Code is to facilitate litigation, without multiplicity of actions, and the power of the court to complete a litigation begun, by amending the pleadings, is unlimited. *Robinson v. Willoughby*, 67 N. C. 84; *McMillan v. Edwards*, 75 N. C. 81.

But under the circumstances of this case, we think the ground of the equitable relief demanded, constituted a part of the plaintiff's cause of action at first alleged, and he did not need to allege two distinct causes of action. His alleged right to recover the land, and directly in that connection and for that purpose, and as a part of it, to have the deed corrected, constituted his cause of action. The legal and equitable rights in respect to the land were so clearly connected, so essentially one, that they might not improperly be regarded and treated as constituting one cause of action. The defendant had possession of the land, and was seeking in that connection to take an inequitable advantage of a mistake in a deed, whereby the legal title was in him. A part of the plaintiff's cause of action was the right to have the deed corrected.

It is true that, under the common law method of procedure, this could not be so, because, under it, the plaintiff would recover the land by his possessory action at law, after he had had the mistake in the deed corrected in a separate court of equity, wherein alone he could obtain equitable relief; but under the Code method of procedure, as it prevails in this state, legal and equitable relief must be administered in the same court, and may be in the same action, and in some cases, in the same cause of action. The principles, doctrines and rules of law are distinct from those of equity, but they may be administered together by the same court, when it is appropriate and necessary to do so. *McRae v. Battle*, 69 N. C.

98; *Murray v. Blackledge*, 71 N. C. 492; *Farmer v. David*, 82 N. C. 152; *Condry v. Cheshire*, 88 N. C. 375.

Under the present system of civil procedure in this state, issues of fact as distinguished from questions of law, arising in equitable actions, as well as like issues arising in actions at law, are to be tried by a jury. Whether this is wise or not, is not for us to determine, but it cannot be, that a jury should find the facts in respect to a question of mistake, such as that in this case, upon less evidence than a chancellor would do, sitting in a court of chancery. The strength of reason leads to a different conclusion. The law contemplates that a jury shall find such issues, as nearly as may be, as a chancellor would do in passing upon like issues. The court should be careful to instruct the jury in such cases, as to the nature of the issue, the application of the evidence produced before them, and, especially, that the instrument in writing to be corrected, is, of itself, strong evidence of what is expressed in it, that, however, it is not absolutely conclusive; and that from the evidence they should be thoroughly satisfied of the mistake alleged, before they would be warranted in finding the affirmative of the issue submitted to them. The peculiar nature of such issues renders it necessary that this should be done. As we have said above, the court will not, in the exercise of equitable jurisdiction in cases like this, grant relief, unless the proof of mistake be clear and satisfactory. Therefore, if the court should be of opinion, that in no reasonable view of the whole evidence produced on the trial of the issue, it is sufficient to warrant a verdict ascertaining the fact of mistake, then it ought to direct the jury to find the negative of the issue. In the trial by jury of issues arising in equitable matters, the principles, doctrines and rules of equity should be observed and applied, as nearly as may be, in the ascertainment of the facts. Otherwise, it would be difficult to administer equity at all in many cases. *Todd v. Campbell*, 32 Pa. St. 250; *Piersall v. Niele*, 63 Pa. St. 420; *Stockbridge Iron Co. v. Hudson Iron Co.*, 102 Mass. 45.

See *Goldsboro v. Turner*, 67 N. C. 403, for a somewhat different view of equity jurisdiction and practice under the Code system, especially with reference to trial by jury in causes solely cognizable by a court of equity under the old practice. In the judicial system of the United States government the courts of common law and of equity are still as distinct as they were in the time of Coke and Bacon, though the same judge has jurisdiction in each. *Fed. Fed. Pr. (Civ. ed.)* § 4, Section 914, U. S. Rev. Stat. (U. S. Comp. St. 1901, p. 684) requiring the Federal courts to conform to the practice of the state in which they are held, does not apply to the courts of equity of the United States. 1 *Bay. Chas. Pr.* *313, note a. See "Ejectment," *Century Dig.* § 597; *Decisions* and *Am. Dig. Key No. Series* § 76, "Equity," *Cent. Dig.* § 956; *Id.* and *Am. Dig. Key No. Series* § 148.

HOOKER v. STATE, 7 Blackford, 272, 273. 1844.

What Constitutes a Court of Record.

[Action of debt on a judgment of a justice of the peace. Plea of nul tiel record and other pleas. The issues on the plea of nul tiel record was submitted to the jury. Verdict and judgment against the defendant. Reversed.]

The plaintiff below was the State, ex rel. Hayes, and Hooker was the defendant. Only that portion of the opinion which relates to the plea of nul tiel record, is here inserted.]

BLACKFORD, J. . . . There was one issue, viz., that on the plea of nul tiel record, which should have been tried by the court. It was, to be sure, the judgment of a justice of the peace that was in question, but his court must be considered as a court of record. A court that is bound to keep a record of its proceedings, and that may fine or imprison, is a court of record. 3 Bl. Com. 24. A justice's court is within that definition. Judgment reversed.

See "Justices of the Peace," Century Dig. § 1; Decennial and Am. Dig. Key No. Series § 1.

REEVES v. DAVIS, 80 N. C. 209. 1879.

What Constitutes a Court of Record.

[Action commenced in a justice's court upon a former judgment of a justice of the peace. Judgment against defendant, and he appealed to the superior court. In that court judgment was rendered against the defendant, and he appealed. Affirmed. The judge held that a justice's court was not a court of record, and defendant excepted.]

DILLARD, J. The action was commenced in a justice's court on the judgment of a justice, and from his court there was an appeal by the defendant to the superior court of Madison county and thence to this court. On the trial in the superior court the original judgment for the recovery of which the action was brought was offered in evidence, and when proof was being offered by one Creaseman, a justice of the peace, that he gave the judgment and the same was drawn up and signed by him or under his dictation, it was objected by the defendant that the judgment of a justice's court was not provable by law otherwise than by a duly certified transcript of the record from the justice's court, which objection was overruled and the defendant excepted.

The court of a justice of the peace is an inferior court of limited jurisdiction, and although he is required to keep a docket and enter his proceedings therein, it is not under our present system, and was not under our former system, a court of record. Ledbetter v. Osborne, 66 N. C. 379; Hamilton v. Wright, 11 N. C. 283; Carroll v. McGee, 25 N. C. 13. Not being a court of record, the rules of evidence established in relation to the authentication and proof of judgments of courts of record are not applicable to it, and there being no legislative provision as to how their judgments

are to be proved, there can be and is no better way than that which has obtained heretofore in the practice of our courts. The rule has been for many years to admit the judgments of justices' courts in evidence on proof of their handwriting, of their being in office at the time, and of the rendition of the same within their counties, and thereupon the same conclusiveness of effect was attributed to them as to the judgment of courts of record shown forth by transcript under the seal of the court. *Hamilton v. Wright*, and *Carroll v. McGee*, *supra*. We see no reason to depart from the rule on this subject, which has been so long observed in our courts, and in consistency therewith, we hold there was no error in the court below in overruling the objection of the defendant. . . . Affirmed.

As to what constitutes a court of record, see *Bouv. L. D.* 465; 11 *Cyc.* 657. As to whether or not a justice's court is one of record, see 24 *Cyc.* 623. See further as to courts of record, 8 *Am. & Eng. Enc. L.* 36. The principal case was approved in *State v. Griggs*, 117 *N. C.* 715, 23 *S. E.* 164. See *Pell's Rev.* § 1416, and note. See "Justices of the Peace," *Century Dig.* §§ 397, 398; *Decennial and Am. Dig. Key No. Series* § 135.

ACKERSON v. ERIE RAILWAY CO., 31 *N. J. L.* 309, 311. 1865.

Local and Transitory Actions. Jurisdiction and Venue.

[Action brought in New Jersey for damages resulting from an injury inflicted in New York. Defendant demurred on the ground that the action could not be maintained in the New Jersey courts but should have been brought in New York, in which state, as it appeared by the complaint, the alleged negligence and consequent injury occurred. Demurrer overruled, and judgment against defendant.]

HAINES, J. The plaintiff was a passenger on the train of the defendants from Dunkirk to Port Jervis, in the state of New York, and alleges that he was injured by reason of the cars running off the track, through the carelessness of the defendants and their servants. For the injuries thereby sustained he has brought his action in this state. The defendants demur to the declaration and assign for cause of demurrer, in various forms, that the action is *local* and cannot be maintained in this state; but should have been brought in the state of New York, where the alleged carelessness occurred and the injury was done. For the decision of this case, we have only to recur to the well known and well settled rules of *distinction between local and transitory actions*.

Local actions are such as require the venue to be laid in the county in which the cause of action arose. These embrace all actions in which the subject or thing sought to be recovered is in its nature local; such as real actions of waste, when brought to recover the place wasted, as well as damages; and actions of ejectment. They are local because brought to recover the seizin or possession of lands, which are local subjects. *Comyn's Dig. Action No. 1*; *Bacon's Abr. Actions local*; A. n., *Barber's Law Dic.*

tit. Action. Some other actions which do not seek the direct recovery of lands or tenements, are also local, because they arise out of a local subject, or the violation of some local right or interest. Of this class are waste for damages only; trespass quare clausum fregit, trespass on the case for injuries to things real, as nuisances to houses or lands; disturbance of right of way, obstruction, or diversion of ancient watercourses. The action of replevin is local, although it is for damages only, and does not rise out of any local subject, because of the necessity of giving a local description to the thing taken.

Transitory actions are such personal actions as seek only the recovery of money or personal chattels, whether they sound in tort or contract. They are universally founded on the supposed violation of rights, which, in contemplation of law, have no locality. 1 Chit. Pl. 273; 1 Saund. 241, b. note 6. Judge Gould, in his work on Pleadings, ch. 3, sec. 112, says: "It will be found, as a general proposition, that actions ex delicto, in which a mere personalty is recoverable, are by common law transitory." If the action is merely transitory, the venue may be laid in the county where the cause of action arose, or where the plaintiff or defendant resides at the time of instituting the action; or if the defendant be not an inhabitant of this state, in the county in which the process shall have been served. Nix, Dig. 782, pl. 5.

The action in this case is not brought to recover anything local, nor does it arise out of any local subject, or the violation of any local right or interest. It arises out of the alleged negligence of the defendants and their servants, and seeks the recovery of pecuniary damages for personal injuries sustained. It may be brought in this state, and the venue laid in any county in which the defendants can be served with process. The practice in this state, of long continuance, is in accordance with this rule of distinction. The demurrer must be overruled with costs, and judgment rendered for the plaintiff; unless the defendants plead issuably to the declaration within thirty days. Judgment for plaintiff.

Where the statutes of another state authorize a recovery for death by wrongful act, and such statutes are substantially the same as those in North Carolina, an administrator appointed in North Carolina can sue in North Carolina for the death of his intestate which occurred in the other state from negligence there committed. *Harrill v. Railroad*, 132 N. C. 655, 44 S. E. 109, citing 13 L. R. A. 458, 15 L. R. A. 583, 103 U. S. 11, 38 Am. Rep. 491.

For what actions are local and what transitory, see *Bouv. Law Dic.* vol. 2, pp. 272, 1133; *Shipman's Common Law Plead.* pp. 383-386. In transitory actions the amount of the recovery is governed by the *lex loci* and not by the *lex fori*. *North Pac. R. R. v. Babcock*, 154 U. S. 190, 14 Sup. Ct. 978. For jurisdiction of equity over suits affecting realty in another state or country, see 23 L. R. A. (N. S.) 924, and note; over suits affecting non-residents, see 23 *Ib.* 1135. See "Courts," *Century Dig.* §§ 22-31; *Decennial and Am. Dig. Key No. Series* § 6.

CHAPTER XIII.

PROCESS.

SEC. 1. INTRODUCTORY.

JONATHAN WEST, qui tam, v. RATLEDGE, 15 N. C. 31. 1833.

History and Nature of Writs as Process by Which an Action Was Commenced. Variance Between the Writ and the Declaration.

[Action of Debt in which the plaintiff claimed \$213.32 in his writ. The declaration contained two counts: (1) In debt for \$213.32 under the statute against usury; (2) In debt for \$160 under the same statute and for the same alleged usurious transaction. Verdict against the defendant for \$160. Defendant moved in arrest of judgment because of *variances between the writ and the declaration*. Motion overruled. Judgment against the defendant, and he appealed. Affirmed.]

DANIEL, J. In deciding the question, whether a variance between the writ and the declaration can, after verdict, be taken advantage of by the defendant in arrest of the judgment, it becomes necessary to make some observations upon the law and practice of the courts in England, as well as the law and practice of the courts of this state, and also on the decisions that have been made in this court on the subject. In England, when a person is about to commence a suit, the usual course of proceeding is, in the first place, to execute a warrant to an attorney of the court to have the writ issued, and the pleadings in the cause made up. The attorney then gives instructions for the original; these instructions are contained in a paper called the *praecipe*, in which he sets forth the cause of action. Formerly, the practice was to take the warrant and the *praecipe* to the chancery, where the *original writ* was caused to be made out by the Master of the Rolls; which original recited the action as stated in the *praecipe*. The original is a mandatory letter in parchment from the king, tested in his name, and sealed with the great seal. It is directed to the sheriff or other returning officer of the county where the plaintiff intends to lay the venue, and is made returnable to the court either of the King's Bench or the Common Pleas, at Westminster. If the sheriff return on the original non est inventus, the original is then left on file in the court, and a *judicial writ or process* issues, called a *special capias ad respondendum*, which is grounded upon the original. If the sheriff return on the *capias*, non est inventus the plaintiff may then issue an *alias*, and a *pluries*, and so on to outlawry, to compel an appearance by the defendant. When the defendant appears in court in consequence of the service of the original, or an arrest

on any process which issues upon it, the plaintiff then files his *declaration*, and serves a copy on the defendant, who defends either by *demurrer* or *plea*. If he pleads to the action, then the whole of the pleadings to the making up of the issue are completed in the superior court of Westminster. A *nisi prius* record is then made out and transmitted to the *court of nisi prius*, or the assizes of the county where the venue is laid, that the issues may be there tried by a jury. When a trial takes place, and a verdict is rendered, it is entered on the *nisi prius* roll, or some paper attached to it which is called the *postea*, and delivered to the party in whose favor the verdict is rendered, who returns it into the superior court, at Westminster, where the record belongs; and on notice being given to the adverse party, a motion is then made for judgment: which, if no cause is shown to the contrary, is rendered by the court, upon which issues the *execution*.

In modern times the practice of commencing suit by original purchased out of chancery has been tacitly waived by the profession. The practice is now, for the attorney to leave the *præcipe* and a memorandum of his warrant at the *Filazer's office*, and the Filazer thereupon issues a *capias ad respondendum* in the first instance, keeping the *præcipe* as instructions for the original, if such original should afterwards become necessary by the writ of error being brought after a judgment by default, on demurrer, or on plea of *nul tiel record*: for the want of an original is aided after verdict, by stat. 18 Eliz. c. 14. If a writ of error should be brought for the want of an original, in any of those cases where the defect is not cured by the statute of Elizabeth, the plaintiff may, by a petition to the Master of the Rolls, obtain an original and move the court, where the record is, to amend by adding the original, which is always granted; so that the record is complete, when, in obedience to the writ of *certiorari*, it is transmitted into the court of errors. The plaintiff in error will then have nothing in the record upon which he can assign errors, and will fail in his efforts to reverse the judgment. 1 Saund. 318, a; Archb. P. K. B. 73. By the rules of the common law great nicety and exactness were required in the proceedings and pleadings in a suit; small errors and inaccuracies were always sure to be fatal to the party making them: as for instance, in bailable actions, the declaration should always correspond with the writ in the names of the parties, and in the cause of action (*Bingham v. Dickie*, 1 E. C. L. R. 276; Archb. Prac. 68, 69, 124), and if there was a variance in these, or in the sum demanded, between the writ and the declaration, it would be fatal, Archb. 68. The legislature has from time to time endeavored to remedy what it considered an evil, and has passed several statutes of *jeofails* and for the amendment of the law, to prevent justice being strangled in a net of forms and technicalities. The legislature, further to aid the administration of justice, passed the statute 5 Geo. 1. c. 13 (1718). The statute is as follows: "An act for the amendment of writs of error, and for the further preventing the arresting or reversing of judgments after verdict.

“Whereas great delay of justice hath of late years been occasioned by defective writs of error, which, as the law now stands, are not amendable: For the remedy whereof, Be it enacted, etc., that all writs of error wherein there shall be any variance from the original record or other defect, may and shall be amended and made agreeable to such record by the respective courts where such writ or writs of error shall be made returnable; and that where any verdict hath been or shall be given in any action, suit, bill, plaint, or demand, in any of his majesty’s courts of record at Westminster, or in any other court of record within England or Wales, the judgment thereupon shall not be stayed or reversed for any defect or fault, either in form or substance in any bill, writ, original or judicial, or for any variance in such writs from the declaration or other proceedings: Provided, nevertheless, That nothing in this act contained shall extend or be construed to extend to an appeal of felony or murder, or to any process upon any indictment or presentment, or information of or for any offence or misdemeanor whatsoever.” 5 vol. Brit. Stat. 43.

If the aforesaid statute is in force in this state, it cures the defect in this case arising from a variance between the writ and declaration. It becomes us now to inquire whether it is in force or not. When this country was first settled, it was foreseen that the establishment of courts of justice was absolutely necessary for the well being of the society of people who were about to inhabit it. By the fourth clause of the great charter, power is given to the lords proprietors, by and with the consent of the freemen or their delegates in general assembly, to pass laws and make constitutions, establish courts of justice, and appoint judges and magistrates. The first judiciary system established in this state was under this charter. We learn from history, 1 Martin, 303, 304, and from the archives of the province, that there was a *court of chancery held by the governor and council*, and a *great court of common law jurisdiction held by a chief justice and associates*, and *interior courts of limited jurisdiction, called inferior courts, held magistrates*. In the year 1728, the lords proprietors surrendered their power of governing the province into the hands of the king, who in the year 1730 sent out a governor who was empowered with the advice of the council, to call assemblies to exercise legislative powers according to former usage, and to establish courts of justice. I do not discover that any alteration was made in the judiciary system which had before existed, except that the governor and council were authorized to hold a *court of errors*. I learn from the 7th and 20th sections of the act of 1746, that the *suitors in the general court commenced their actions by capias ad respondendum, issued by the clerk and signed by the chief justice*. Swan, 226, 228. The general court held its terms at Edenton. To the year 1746, the assembly passed another law for establishing courts of justice, and regulating the proceedings therein. By this act the *court of chancery and the general or supreme court* were permanently fixed at Newbern. The general court was composed of a

chief justice and three associate justices. *The courts of assize* were to be held by the chief justice twice a year at the district court-houses of Edenton, Wilmington and Edgecombe; *county courts* with limited jurisdiction were established instead of the precinct courts. Writs issuing from the general court were returned into it at Newbern, and the pleadings and proceedings thereon were then carried on and transacted there, until the cause was at issue; when by a *writ of nisi prius*, it was sent down to the proper place for trial according to the practice of the courts of Common Pleas and King's Bench, at Westminster. By the 40th section of the act, it is enacted "that all the statutes of jeofails which are now in force in England are hereby declared to extend to and be in force here; and that the same shall be duly observed by all judges and justices of the several courts of record within this province." The king, after the lords proprietors surrendered the powers of government into his hands, directed that all the provincial acts of assembly should be sent to him, and on revision by himself in council, if they were disallowed, they were to cease having any force. 2 Martin's Hist. 2. In the year 1754, the assembly passed another act concerning the judiciary, which was repealed by the king's proclamation. Davis, 167. The people having spread over a large portion of the province east of the mountains, it became necessary to establish an additional number of district courts. In the year 1768, the assembly passed a new court law dividing the province into six districts, and established a *superior court* of justice in each of said districts. This act was limited to five years. In the 45th section it is declared, that all the statutes of jeofails and amendments, which now are in force in England, are and shall be in force here. Davis, 872. This act went into operation; for it was the only law passed before the revolution which gave the judges power to hold the superior courts at Hillsborough and Salisbury; and we know from history that the superior courts were held at both of those places before the revolution. 2 Martin, 263. In the year 1773, the assembly re-enacted the court law which had just expired by efflux of time, containing the same clause relative to jeofails and amendments. A suspension clause was added restraining its operation until his majesty's pleasure should be known. A dispute arose between the king and the house of assembly, relative to the section in the act authorizing attachments to issue against the property of debtors who were not, and never had been, residents of the province. The house of assembly refusing to strike it out of the bill, the king thereupon refused to ratify the law. 2 Martin, 302. The revolution took place and the province was changed into an independent state. In the year 1777, the legislature passed a court law (Potter's Rev. c. 115), in which is to be found the following section (35): "And be it enacted, that all the statutes of England and Great Britain for the amendment of the law, commonly called statutes of jeofails, and which were heretofore enforced in this territory by any act or acts of the general assembly under the late government, are hereby

declared to have continued and to be now in full force in this state, and shall be duly observed by all judges and justices of the several courts of record within the same, according to the true intent and meaning of the said statutes, unless where the same are or may be altered by this or any other act." We know that the acts of 1746 and 1768 had been in force in this territory, under the provincial government. It would seem then upon this review, that the statute of jeofails and amendments referred to and enforced by these acts of the colonial legislature, including the Stat. of 5 Geo. 1, are as completely embraced within this legislative enactment as though they had been incorporated into the act of 1777, and if so, they must be "duly observed by all the judges and justices of the several courts of record within the same."

[After a full review of the authorities the conclusion reached is that, after verdict, no variance between the writ and the declaration will authorize the court to arrest the judgment.]

See "Pleading," Century Dig. §§ 146-148; Decennial and Am. Dig. Key No. Series § 74; "Bail," Century Dig. § 81.

WIBRIGHT v. WISE, 4 Blackford, 137. 1835.

Nature of the Writ. Form. Defects. Objections How and When to Be Made and How and When Waived.

[Motion by the defendant to quash the writ. Motion sustained, and the plaintiff appealed. Reversed. The writ was a *capias ad respondendum*. The concluding clause or *teste* of the writ was as follows: "Witness Robert N. Williams, clerk of Madison circuit court, and its seal hereto affixed at Andersontown, the 22nd day of July, 1835." The ground of defendant's motion to quash was, that the clerk had failed to subscribe his name at the conclusion of the *teste*. In opposition to the defendant's motion it was insisted: (1) That it was too late to object to the writ because it was claimed the defendant had theretofore entered an appearance; (2) That the writ was sufficient notwithstanding the alleged defects therein.]

STEVENS, J. It may be observed that the common law doctrine as practiced in England respecting process is, in general, applicable to our writs unless altered by statute; and that, therefore, mere errors in our writs are cured by the appearance of the defendant. But there is a distinction between errors that only render the process voidable, and defects that render it void. Simple appearance does not cure the latter. Process in England, and our writs answering to those called process in England, form no part of the record; errors in them cannot be assigned for error; hence the only remedy is to move to set aside the proceedings, and that should be done before appearance unless the writ is wholly void. In the latter case, a mere appearance will not cure the defect. The appearance, however, here spoken of, does not simply mean the coming of the defendant into the court house; it means an appearance to the action, such as perfecting bail, or taking some step in the action towards the defense. The party must come before the

court, or he can make no objection to the writ, and this he cannot do until the writ is returned. The rule appears to be this: The motion must be made as early after the return of the writ, as is convenient and practicable according to the rules of the court, and before any step is taken in the defense. The taking a copy of the declaration out of the office, has been decided to be such a step as will cure errors in process. 3 Bl. Com. 287, n. 10; 1 Sell. Pr. 108. In this case, the party appears to have made his motion in due time; that is, there is nothing of record to show or even raise a presumption to the contrary.

The question then is, should the motion have prevailed? The appellant appears to rest his case upon the common law. The common law will not sustain him. At common law, his writ would have to be tested in the name of the president judge, and then be sealed with the seal of the court, and officially signed by the clerk. The clerk is the keeper of the seal of the court at common law; and when he seals process, he should officially sign it to show that it was sealed at the proper mint of justice. This writ at common law is erroneous. In the state of New York, the common law form exists as to the teste of writs. They are tested in the name of the chief justice; but the clerk must put the seal of the court to them, and officially sign them; and it is error if he fail to sign his name. *Pepoon ats. Jenkins, Col. & Caines' Cas.* 60. Our statute, however, has altered the case. By the 6th section of the act organizing circuit courts, Rev. C. 1831, p. 140, it is enacted, that all writs issuing out of these courts, shall bear teste in the name of the clerk of the proper courts, etc. The clerk, in issuing the writ now before us, appears to have substantially complied with that provision of the statute. The teste is in his handwriting and is these words: "Witness Robert N. Williams, clerk of the Madison circuit court," etc. This appears to us a sufficient signing and a sufficient teste. It is tested in due form as required by the statute; and as that teste contains the name and official character of the clerk in his own handwriting, it appears to be sufficiently signed to show that it issued from the proper mint of justice; and that is all that can be required. Judgment reversed.

See "Appearance," Century Dig. §§ 118-143; Decennial and Am. Dig. Key No. Series § 24; "Process," Century Dig. § 32; Decennial and Am. Dig. Key No. Series § 37.

The principal writs in use under the common law practice are here inserted: (The seal of the court was essential at common law, but in North Carolina it was essential only when the writ issued to another county.)

ORIGINAL WRIT.—TRESPASS ON THE CASE.

State of North Carolina,

To the Sheriff of _____ county, Greeting:

We command you, that you take the body of C. D. (if to be found in your county), and him safely keep, so that you have him before the jus-

tices of our court of Pleas and Quarter Sessions, to be held for the county of ———, at the court-house in ———, on the fourth Monday of May next, then and there to answer A. B. of a plea of trespass on the case, to his damage one hundred and twenty-five dollars. Herein fail not, and have you then and there this writ.

Witness, G. H., clerk of our said court, at office in ———, the fourth Monday of February, 1850, in the seventy-fourth year of our Independence.

Issued the 3rd day of March, 1850.

G. H., Clerk, etc.

Writ in Debt. Strike out the words in italics in the foregoing, and insert, "of a plea that he render unto him the sum of two hundred dollars, which he owes to, and unjustly detains from him, to his damage fifty dollars."

Writ in Debt on Two Bonds. Strike out the words in italics in the first form and insert, "of a plea that he render unto him the sum of three hundred dollars, and the further sum of four hundred dollars, which he owes to, and unjustly detains from him, to his damage seventy-five dollars;" or simply, "of a plea that he render unto him the sum of seven hundred dollars, which he owes to, and unjustly detains from him, to his damage seventy-five dollars."

Writ in Debt Qui Tam. Strike out the words in italics in the first form, and insert, "who sues as well for the state of North Carolina, as for himself, in this behalf, of a plea, that he render unto the said state, and to the said A. B., who sues as aforesaid, the sum of one hundred dollars, which he owes to, and unjustly detains from them."

Writ of Covenant. Strike out the words in italics in the first form, and insert, "of a plea of a breach of covenant, to his damage five hundred dollars."

Writ of Detinue. Strike out the words in italics in the first form, and insert, "of a plea that he render unto him one bay horse of the value of four hundred dollars, and one wagon of the value of two hundred dollars, which he unjustly detains from him, to his damage one hundred and fifty dollars;" or insert, "of a plea that he render unto him one bay horse and one wagon of the value of six hundred dollars, which he unjustly detains from him, to his damage one hundred and fifty dollars."

Writ of Trover. The same as Trespass on the Case.

Writ of Trespass Vi et Armis. Strike out the words in italics in the first form, and insert, "of a plea of trespass vi et armis, to his damage five hundred dollars."

Writ of Trespass Quare Clausum Fregit. Strike out the words in italics in the first form, and insert "of a plea of trespass quare clausum fregit to his damage two hundred dollars."

Writ of Debt Against One Defendant as an Individual, and Another as Executor. Follow the first form down to and including the words "fourth Monday of May next," and then proceed, "and that you summon E. F., executor of G. H., to be before said justices at the time and place aforesaid; then and there to answer A. B. of a plea that they render unto him the sum of five hundred dollars, which the said C. D. owes to, and unjustly detains from him, and which the said E. F., executor of G. H., unjustly detains from him, to his damage fifty dollars," etc.

The above forms are taken from Eaton's Forms, pp. 44-47. See Ib. pp. 40-43, for general directions as to writs.

Replevin. "The action of replevin, though entertained in the superior courts, is not commenced there; and the writs of summons and capias, provided by 2 Will. 4, c. 39, for the commencement of personal suits in the superior courts, are consequently not applicable to this action. A replevin is entertained in the superior courts by virtue of an authority which they exercise of removing suits, in certain cases, from an inferior jurisdiction, and transferring them to their own cognizance. Where goods have been distrained, a party making plaint to the sheriff may

have them replevied, that is, re-delivered to him, upon giving security to prosecute an action against the distreiner, for the purpose of trying the legality of the distress; and, if the right be determined in favor of the latter, to return the goods. The action so prosecuted is called an action of replevin, and is commenced in the county court. From thence it is removed into one of the superior courts by a writ either of *recordari facias loquelam*, or *accedas ad curiam*. In form, it is an action for damages, for the illegal taking and detaining of the goods and chattels." Stephen's Pleading, 19.

In modern times the writ of Replevin was regulated by statute in the several states, and the writ in use in North Carolina prior to the adoption of the Code practice was according to Eaton's Forms, p. 48, as follows:

State of North Carolina,

To the Sheriff ——— county, Greeting:

Whereas, A. B. hath made oath before the clerk of the superior court of law of said county, that a certain bay horse has been in his lawful possession within three years next preceding the date hereof, and that he has been deprived of the possession of said horse by the defendant, C. D., without the consent or permission of him, the said A. B., and that the said horse is of the value of four hundred dollars, and the said A. B. hath also given bond with good security before the said clerk, in the sum of eight hundred dollars, payable to the defendant, and conditioned to perform the final judgment on this writ, and hath also given bond with good security for the prosecution of this suit. We therefore command you, that you forthwith take said horse into your custody, if to be found in your county, and deliver him to the said plaintiff, unless the said defendant shall execute and deliver to you a bond, with good security, in the sum of eight hundred dollars, payable to the said plaintiff, and conditioned to perform the final judgment which shall be rendered in this case; and if the said defendant shall execute and deliver to you a bond as aforesaid, you are to return said bond with this writ. We further command you that you summon the said C. D., if to be found in your county, to be and appear before the honorable the judge of our said court, at the court-house in ———, on the third Monday after the fourth Monday in March next, then and there to answer the said A. B. of a plea of taking and unjustly detaining the said horse, to his damage four hundred dollars. And have you then and there this writ.

Witness, E. F., clerk of our said court, at office in ———, the third Monday after the fourth Monday in September, 1844, and in the sixty-ninth year of our Independence.

E. F., Clerk.

Issued the 1st day of January, 1845.

Writ of Waste. Strike out the words in italics in the first form above given, and insert, "of a plea, why in the houses, land and woods, in the county of ——— which he holds and is legally entitled to for the term of his natural life, under the devise of J. H., he has made waste, spoil and destruction, to the disinheriting of the said A. B., against the provisions of law, and to the damage of the said A. B. of one thousand dollars."

SEC. 2. SUBPOENA IN EQUITY.

ARCHIBALD v. MEANS, 40 N. C. 230. 1848.

Process in Equity.

[Bill in equity. Demurrer by defendants. Demurrer overruled. Defendants appealed. Reversed. The facts appear in the beginning of the opinion.]

RUFFIN, C. J. The merits of the controversy between these parties cannot be determined in the present state of the pleadings.

If any person can be deemed a defendant to the suit, a decisive objection to the bill is, that it is against three married women, without making the husband of either of them a defendant. In the title of the bill it is said to be "against Margaret, the wife of Cornelius McKee," etc., but not to be against McKee himself, or the other husbands. Of course, as the husbands are necessary parties to the account, so as to render it obligatory upon all interested in the estate, the court ought not to entertain the bill and order the cause to an account without them. But the truth is, that *the bill does not properly make any person a defendant*. The bill is entitled, a bill against certain persons; but the title is no part of the bill, whether it precede the statement of the bill, or be written on the back of it. The stating part of the bill ought to contain the case of the plaintiff, showing his rights, and the injury done to him and by whom it was done; and, even then, the persons thus mentioned in the bill, as the authors of the wrong complained of, are not thereby made defendants, but only those against whom process of subpoena is prayed, as the means of compelling their appearance, or under our statute, publication in its stead. Coop. Ch. Pl. 16; Beams El. Pl. 148. In the present bill no persons are named in the stating part of the bill as the heirs or next of kin of the intestate; but it is only stated that "the defendants" are the children of their deceased brothers and a sister of the intestate, and as such are his heirs at law and next of kin. In like manner in the prayer for process, it is against "the defendants," without naming any person. So that in truth there is strictly no suit properly constituted, in which the court ought to have decreed, or this person, John W. Means, ought to have demurred. The decree was therefore erroneous and must be reversed; but as we have observed that this is not an uncommon mode of stating a case and making parties in some parts of the state, and the appellant might have availed himself of the defect more properly by objecting to appearing, instead of demurring, the court is not disposed to give costs in either court. We cannot, however, but express the hope, that more attention will be paid to the framing of the pleadings in an orderly manner, and, to that end, that recourse will be had to the books of precedents of established authority, rather than to the loose and imperfect productions of the circuit. Decree accordingly.

The following form of Subpoena in Equity is taken from Eaton's Forms, 589:

The State of North Carolina,

To C. D. of _____ county:

We command you, that laying aside all other matters and excuses, you be and appear before us in our Court of Equity to be held for the county of _____, at the court-house in _____, on the third Monday after the fourth Monday of March, 1858, to answer to such things as shall then and there be alleged against you by A. B. and further to do and receive what our said court shall direct in this behalf, upon pain of an attachment issuing against your person, and such other process for contempt as the said court shall award. Witness, E. F., clerk and master of said court, at office in _____, the third Monday after the fourth Monday of September, 1857.

E. F. C. M. E.

Issued March 1st, 1858.

For the form and requisites of a Subpoena in Equity in the Federal courts, see Loveland's Forms, p. 501, and Rules XI-XX of the Rules of Practice for the Courts of Equity of the United States, prescribed by the Supreme Court of the United States, to be found in 3 Dan. Ch. Prac. *2375, 2 Foster's Fed. Pac. 1390, Shiras's Eq. Prac. 143. See "Equity," Century Dig. § 322; Decennial and Am. Dig. Key No. Series § 139.

SEC. 3. MESNE PROCESS.

FERGUSON ads. THE STATE ex rel. REEVES, 31 N. J. L. 289, 291. 1865.

Mesne Process Defined.

[Action against Ferguson for a mandamus. There was judgment against Ferguson for costs, inter alia. Among the items taxed in the bill of costs was a charge for serving the writ of mandamus. The law allowed to the sheriff, among other fees, a fee on any Mesne Process. Ferguson moved to relax the costs and strike therefrom this item. Refused. The question is: What is meant by mesne process?]

HAINES, J. . . . The charge for sheriff's fees for serving the writ of mandamus should be allowed. It may, it is true, be served by a person not an officer; but generally the service by an officer is better. It is more authoritative, and less likely to be disregarded or resisted. The true policy as tending to the maintenance of peace and good order, is to have such writ served by an officer. The charge, too, comes fairly within the terms of the fee bill, which allows fees to the sheriff "for every attachment, summons, capias ad respondendum, declaration in ejectment, or any *mesne process* issuing out of the supreme court."

By the term mesne process, is generally understood any writ issued between the original writ and the execution. By original process, the first writ at the common law, is not meant the first process, under our statute. Such original writ is not used here. *All our writs preceding the execution are mesne process.* In Chitty's Practice, 140, it is said, that by mesne process is meant the writ or proceeding in action to summon or bring the defendant into court. . . . Bill relaxed.

Mesne process is that which is issued between the original and the final process. Bouv. Law Dic. "Mesne." See to same effect, Heard's Civil Pl. (Student's Series) 10. See "Costs," Century Dig. § 701; Decennial and Am. Dig. Key No. Series § 176; "Mesne Process," Words and Phrases, vol. 5, pp. 4495, 4496.

SEC. 4. ARREST. COMMON AND SPECIAL BAIL. APPEARANCE.

LEWIS v. BRACKENRIDGE, 1 Blackford, 112, 114. 1821.

Evolution of Arrests in Civil Actions. Shameful Oppression by Imprisonment for Debt. Affidavit.

[Lewis sued Oliver, and Brackenridge became special bail for Oliver. Lewis instituted proceedings against Brackenridge to enforce his liability as such bail. Thereupon Brackenridge moved to set aside the order of bail in the original suit, for want of a sufficient affidavit, and because

Lewis had given Oliver a stay of execution for five months which, Brackenridge claimed, exonerated the bail. The judge set aside the order of bail, and Lewis carried the case to the supreme court by writ of error. Reversed. There was a petition to rehear but the former ruling was affirmed. Only a part of the opinion on the petition to rehear is here inserted.]

BLACKFORD, J. By the common law no man could be arrested in actions upon contract. By a variety of statutes, the law in England was entirely changed, and in process of time every man in such actions became liable to imprisonment without redress. Perhaps the common law was too lenient for a commercial people; but the statute law certainly became *shamefully oppressive*. These evils, however, have been long since remedied. By the statutes of Henry VI. of Eliz., and more especially of Geo. I. the personal liberty of the debtor and the right of the creditor have been carefully attended to. We have a statute regulating arrests in civil cases, somewhat similar to that of Geo. I. and indeed they may be considered substantially the same as to affidavits for bail in cases where by our law such affidavits are required.

In actions founded on tort, as trespass, etc., no particular sum can possibly be sworn to. In such case there must be a positive affidavit of facts stated so much at large, and with such precision, that the court or judge in making the order, may be able to determine the quantum of the bail. In actions on contracts, the affidavit, whether made by the plaintiff himself or by a third person, must show there is at the time of suing out the writ an existing debt then actually due, for which an arrest may lawfully be made. It should be positive as to the sum due, and not rest on belief, or left to be collected by inference. Thus, when the affidavit was as the *deponent verily believes*, it was adjudged insufficient. Str. 1226. So where the affidavit depends upon a reference to further evidence, it is bad, as if it sets out the sum to be due, as appears by an account stated under the defendant's own hand, 1 Will. 121, or as appears by an agreement dated such a day. Burr. 1447. This doctrine is settled by many adjudications. There is one case which was cited in support of the affidavit in the cause before us, that certainly looks another way. Maultley v. Richardson, Burr. 1032. There the affidavit was that the defendant was indebted to the plaintiff in such a sum, as he computes it. The authority of this decision was doubted by Justice Buller, 1 D. & E. 717, and has since been expressly denied to be law. 4 Taunt. 154. It is time to forget it. To this general rule that the affidavit must be positive as to the real amount due, there is an exception in favor of executors, administrators, and assignees. They are permitted from the nature of their situation to swear to their belief. Burr. 1982, 2283. The affidavit must be filed in the clerk's office, or with the judge making the order, before the arrest, that it may be in the custody of the law; for the offender, in case it is false, will be subject to an indictment for perjury, and to an action for damages, by the party injured; and one good reason why so much certainty and precision in the affidavit are required, is, that per-

jury may be clearly assigned on it, if it proves untrue. The sum fixed by order of a judge, or specified in the affidavit, is endorsed on the writ, and the direction of the clerk, or fiat of the judge requiring bail, is in all cases subject, of course, to control of the court. Where the process is returnable, upon proper application, made in due time, the plaintiff may be required to show the cause of action and of arrest; if this is *prima facie* sufficient, and the defendant, without going into the merits, cannot show himself legally excused from the arrest, the rule to show cause will be discharged. No supplementary or counter affidavits should be introduced, nor any evidence relative to the merits of the cause, than that which, according to the statute, was produced to the clerk or judge to procure the endorsement for bail on the writ. When this case was under consideration at last term, we did not determine as to the validity of the affidavit, because, admitting it to be as defective as the defendant wished it to be considered, our opinion was, that the objections were made entirely too late. We think so yet. An affidavit to hold to bail is a component part of the process, used for the purpose of bringing the defendant into court. Advantage can only be taken of any irregularities or defect in it by application to the court in the first instance. Whenever the defendant regularly appears to the action, or voluntarily does an act adopting the process, the object is then accomplished for which the affidavit was made and the writ issued. No objection can afterwards be made to the validity of the one or the other. 7 D. & E. 375; 1 B. & P. 132; 1 East, 18, 81, 330. This doctrine is not interfered with by our statute.

See *Ex parte Hollman*, 79 S. C. 9, inserted at ch. 6, § 3 ante; and *Long v. McLean*, 88 N. C. 3, inserted at ch. 11, § 1, ante. See "Appearance," Century Dig. § 125; Decennial and Am. Dig. Key No. Series § 24; "Arrest," Century Dig. §§ 56, 71; Decennial and Am. Dig. Key No. Series §§ 28, 32.

SEC. 5. WHEN IS A WRIT ISSUED.

HAUGHTON v. LEARY, 20 N. C. 14. 1838.

Writ Signed By the Clerk in May But Not Delivered to the Sheriff Until July.

[Action of assumpsit. Plea of set-off. Judgment disallowing the set-off. Defendant appealed. Affirmed. Only a part of the opinion is here inserted.]

The clerk signed and issued the writ in May, but it was not placed in the sheriff's hands until July 21st. On July 8th the defendant acquired, by assignment, certain notes made by the plaintiff, which notes constituted the set-off in his plea. The question presented is: When is a writ issued and an action commenced?

RUFFIN, C. J. In our opinion the defendant is not entitled to the set-off under either plea. The first is, that the notes were endorsed to the defendant before and at the commencement of this suit. This is not true in point of fact. The assignment was on

the 8th of July and the suit, we think, was commenced on the 8th of May preceeding, on which day the writ is dated, and as stated in the case, truly dated and filled up. The suing out the writ from the proper officer, or purchasing it, as it is called sometimes, is so universally deemed the bringing suit, that no exception is recollected by the court. It is unquestionably so within the statute of limitations, which uses the very words "that all actions shall be commenced or brought within the time and limitation expressed, and not after." While the *teste of the writ on the one hand is not the commencement of the suit, for the benefit of the plaintiff; so on the other, the service of it, or its delivery to the sheriff, or any such thing is not requisite to the commencement of the suit, for the benefit of the defendant: but only getting the writ—impetratio brevis*. Johnson v. Smith, 2 Burr. 950. There are many cases to that effect. The form of pleading also establishes it. The constant form is, "that the defendant did not assume within, etc., ante impetrationem brevis." Why? Because obtaining the writ, sealed and complete in form, is in fact and law the commencing suit. If this standard were departed from, it would be altogether uncertain what would amount to bringing suit—a point that cannot be remaining to be settled at this day. The plaintiff has proceeded on that very writ, and brought the defendant into court under it as the leading process in this action. Its date would determine the commencement of the suit in reference to the statute of limitations, if the defendant had pleaded it. For the like reasons, it determines it for the purposes of the present plea. . . . Judgment affirmed.

See "Action," Century Dig. §§ 726, 727; Decennial and Am. Dig. Key No. Series § 64.

HANCOCK v. RITCHIE, 11 Ind. 48, 51-53. 1858.

Writ Signed By the Clerk in April But Not Delivered to the Sheriff at All. Defendant Appeared Voluntarily in September.

[Action by Hancock to recover upon two promissory notes. The writ issued April 15th, 1853, but was *never delivered to the sheriff*, and on September 26th, 1853, the defendant entered an appearance and filed an answer. The rights of the parties depended upon when the action was commenced. The plaintiff insisted that it commenced on April 15th, and the defendant insisted that it did not commence until September 26th. The judge ruled with the defendant, and rendered judgment against the plaintiff, from which he appealed. Affirmed.]

WORDEN, J. . . . Was the suit commenced on the 15th of April, 1853, or not until the appearance of the defendant in September afterwards? The statement in the record that the writ *issued*, does not, we think, imply that it was placed in the hands of the sheriff for service. It might have been delivered by the clerk to the plaintiff or his attorneys; but the inference is, that it remained in the clerk's office, as he copies it into the record. We are of opinion that a *delivery of the writ to the sheriff for service*,

or something equivalent to such delivery, was necessary, in order that the action might be deemed to have been commenced.

In the case of *Carpenter v. Butterfield*, 3 John. Cas. 146, the writ had been issued and placed in the hands of the officer, who went to arrest the defendant; but the defendant avoided arrest until he procured the assignment of a note, for the purpose of setting it up as an offset to the plaintiff's claim. Held, that the suit was commenced before the note was assigned. This case is made the basis of what is said in reference to this matter in *Clark v. Redman*, 1 Blackf. 379. In this last case, the point was not whether the writ must be delivered to the officer, but whether the filing of a declaration was the commencement of the suit; and the court say that, "in New York it has been decided, that the impletration of the writ, as to every material purpose, is the commencement of the action," citing the case of *Carpenter v. Butterfield*, *supra*. In *Bronson v. Earl*, 17 John. 63, it was said by the court, that "suing out the writ has been held, in several cases, by this court, to be the commencement of the suit; and although there may be some uncertainty or ambiguity in the term 'suing out the writ,' yet there can be no doubt that the delivery of the writ to the proper officer or leaving it at his house as in this case for the purpose of being executed, is to be deemed the actual commencement of the suit." In *Ross v. Luther*, 4 Cow. 188, it was also held, that the suit could not be considered as having been commenced until the actual delivery of the writ to the officer, and in *Underwood v. Tatham*, 1 Ind. 276, which was an action of replevin, where a demand was necessary before bringing suit, and none was made until the writ had been delivered to the officer, it was held that the issuing of the writ to the sheriff (thereby implying its delivery), was the commencement of the suit.

These authorities, we think, settle the question. As the writ was not delivered to the sheriff for service we do not determine whether if it had been delivered in a case like the present where it was not served no property being attached and no one summoned as garnishee and the defendant not notified, the suit would be considered commenced until the appearance of the defendant. The mere making out of a writ without a delivery to the officer for service, either actual or constructive we think leaves the case so far as this question is concerned, as if no writ had been issued, and the case falls within the principle determined in the case of *The State v. Clark*, 7 Ind. 468. We are of opinion that the suit cannot be considered to have been commenced until the appearance of the defendant in September, 1853, and that, therefore, the provisions of the code of 1852 are applicable to the proceedings—that code having taken effect May 6, 1853. . . . Judgment affirmed.

See "Action," Century Dig. §§ 726, 727; Decennial and Am. Dig. Key No. Series § 64.

WEBSTER v. SHARPE, 116 N. C. 466, 471, 21 S. E. 912. 1895.

When is a Writ "Issued" and an Action "Commenced?"

[Action for slander. Plea of statute of limitations. Verdict and judgment against the plaintiff, and he appealed. Affirmed. The summons bore date May 30th, 1893. The defendant contended that it was not issued until July 10th, 1893. If the defendant's contention was correct the action was barred.]

FURCHES, J. . . . If the summons was issued at the time it bears date, it was in time. But, if it was not issued until the 10th of July, it was not in time, and the statute of limitations was a bar. The presumption is that it was issued at the time it bears date, and the burden is on the defendant to show that it did not. To do this, defendant introduced the clerk and the sheriff, and their testimony tended to show that the summons did not issue at the time it bears date, and that, as a matter of fact, it was not issued until the 10th of July, 1893. An action is commenced by issuing a summons. Code, § 199. And an action is commenced when a summons is issued against a defendant. Id. § 161. This involves the question as to what is meant by the word "issue," and we are of the opinion that it means going out of the hands of the clerk, expressed or implied, to be delivered to the sheriff for service. If the clerk delivers it to the sheriff to be served, it is then issued; or if the clerk delivers it to the plaintiff, or some one else, to be delivered by him to the sheriff, this is an issue of the summons; or, as is often the case, the summons is filled out by the attorney of plaintiff, and put in the hands of the sheriff. This is done by the implied consent of the clerk, and, in our opinion, constitutes an issuance from the time it is placed in the hands of the sheriff for service. But a summons simply filled up and lying in the office of an attorney would not constitute an issuing of the summons, as provided for in the Code. Nor would the fact that a summons being filled up and held by the clerk for a prosecution bond (as the evidence in this case tends to show was the fact) constitute the issuing of a summons, until the bond is given, or at least until it goes out by the consent of the clerk for the purpose of being served on the defendant. This being so, we see no error in the judge's charge on the question as to when the summons is sued and the statute of limitations. Judgment affirmed.

To the same effect, see *Smith v. Lumber Co.*, 142 N. C. at p. 30, 54 S. E. 788, et seq.; 32 Cyc. 425. If the summons be delivered to the sheriff by the clerk or justice directly—*there being no intermediary*—the day of such delivery to the sheriff is the day of the issue. *Smith v. Lumber Co.*, supra. See "Limitation of Actions," Century Dig. §§ 529, 530; Decennial and Am. Dig. Key No. Series § 119.

SEC. 6. SUMMONS UNDER THE CODE PRACTICE.

WILSON & SHOBER v. MOORE et als., 72 N. C. 558. 1875.

Common Law Writ. Subpoena in Equity. Summons Under the Code. Variance Between the Process and the Complaint.

[Motion by the defendants to strike out the complaint in a civil action. Motion allowed, and plaintiffs appealed. Reversed. Three grounds were assigned by the defendants in support of the motion: (1) That "the summons commanded the defendants to answer the complaint of *Wilson & Shober alone*," while the complaint was by *Wilson & Shober and all other creditors of the Bank of North Carolina*; (2) The summons was against the defendants individually and as executors, while in the complaint they were charged not only as individuals and executors but as trustees and agents also; (3) The summons concluded with a demand for the relief demanded in the complaint, while the complaint demanded judgment for a specific sum due by contract and for such other and further relief, etc.]

The plaintiffs insisted that these grounds were not sufficient to authorize the granting of defendants' motion; and made a counter motion for leave to amend the summons, should the judge deem the first or second grounds assigned by the defendants sufficient to justify a dismissal. Motion refused; but the court intimated that plaintiffs might amend their complaint if they chose to do so. Plaintiffs declined to amend the complaint.]

BYNUM, J. If this were an action at common law, begun by general process, the plaintiff might have declared *qui tam*, or the defendant might have been declared against in his representative character. But the rule does not hold *e converso*, for if the process is, to answer the plaintiff *qui tam*, and the declaration is in his name only, the variance would be fatal. The rule was, that where the process was *special*, that is to answer the plaintiff suing in a particular capacity or calling upon the defendant to answer in some particular capacity, the declaration must conform thereto. But where the process is to answer *generally*, the declaration may be particular, and if against the defendant in several characters it does not contradict the general process, and is no variance. 1 Tidd's Prac. 450.

In those cases where there was a variance between the writ and the declaration, the rule was, *not to move to set aside the declaration*, as was done here, and for which there seems to be no precedent, but the motion was *to abate the writ*. The defendant craved oyer of the writ, and if, upon reading it, the writ contained any conditions not contained in the declaration, he took advantage of the variance by plea in abatement of the writ. 3 Bl. Com. 299; 2 Lil. Abr. 629. But this indulgence having been abused and made an instrument of delay, the courts of common law made a rule that oyer should not be granted of the original writ, which rule had the effect of abolishing pleas in abatement founded on facts which could only be ascertained by the examination of the writ itself. In consequence of this rule, it was afterwards held, that if the defendant demanded oyer of the writ, the plaintiff might proceed as if no such demand had been made. Doug. 227.

228; Bro. Abr. tit. Oyer, 692; 2 Ld. Raym. 970; 2 Wils. 97; Co. Inst. 320; Gilbert C. P. 52. So if this was an action at common law, the defendant's motion would fail: 1st. because the matter alleged does not constitute a variance; 2nd. if it did, it could only be used as ground of plea in abatement of the writ, and not of the declaration.

But under our new constitution and code we have adopted substantially the practice and procedure of the courts of equity and not of the courts of common law. In equity the bill precedes the subpoena, which issues to bring the parties defendant into court. The prayer of the bill is not "Your orator, therefore, prays that he may have such and such relief;" but it is "to the end therefore that the defendants may answer the interrogatories and that your orator may have the specified relief, may it please your honor to grant a writ of subpoena requiring the defendants to appear by a certain day and answer the bill, and abide by the decree of the court." Adams Eq. 309. The subpoena is used to designate and bring the parties into court only; it neither specifies, as the old common law writ frequently did, in what right the plaintiff claims relief, nor the right in which the defendant is sought to be charged. These matters are set forth in the bill only, and the subpoena points to the bill as containing the causes of suit which are to be answered. As then it is clearly not the office of the subpoena to specify the plaintiff's claim or the defendant's liability, there can be no such thing as a variance on that account; and such a motion as the present is an unheard of proceeding in equity and would not there be tolerated.

The only difference between the practice under the Code and in the court of equity is, that by the Code the summons does not follow, but precedes the complaint. "It shall command the sheriff to summon the defendant to appear at the next ensuing term of the superior court to answer the complaint of the plaintiff." Bat. Rev. ch. 17, sec. 2; C. C. P. sec. 73. In both courts its only operation and office is to give notice of an action begun, the parties to it, and where the complaint will be filed. In our case, these purposes have been answered, and the defendants have had every privilege allowed by the regular course of the court. Their objections seem captious, and for the evident purpose of delay. The whole scope and design of the new code is, to discountenance all dilatory pleas, and to afford the parties a cheap and speedy trial upon the merits of their matter in controversy. To effect this end it is the duty of all courts to allow amendments in the liberal spirit clearly indicated in the code. C. C. P. secs. 128-136. There is error. Judgment reversed.

The parties, plaintiff and defendant, must be named in the summons. A summons for "the heirs of A" will not do. Kerlee v. Corpening, 97 N. C. at p. 334. "We have no recollection of a proceeding at common law against unknown heirs. At common law or in equity, if heirs are required to be made defendants, it is the duty of the plaintiff to render them such by their proper names," therefore, a proceeding against "A and others unknown" will not answer the requirements of a statute

authorizing certain proceedings against non-resident heirs—they must be named. *Powers v. Hurts*, 3 Blackl. at p. 231, inserted at ch. 14, post. See, also, *Archibald v. Means*, 40 N. C. 230, inserted at § 2 of this chapter. By special statutory provision in North Carolina, proceedings in partition may be conducted against non-resident persons whose names are unknown and cannot be ascertained after the exercise of due diligence. Rev. sec. 2490. Summons against feme covert in her maiden name. 19 L. R. A. (N. S.) 984, and note. See "Pleading," Century Dig. §§ 146-148; Decennial and Am. Dig. Key No. Series § 74; "Equity," Century Dig. § 759.

STRAYHORN v. BLALOCK, 92 N. C. 292. 1885.

Service of the Summons.

[Special proceeding before the clerk of the superior court. The defendants entered a special appearance and moved to dismiss the proceeding for alleged defects in the manner of service and in the sheriff's return. The motion was allowed by the clerk, and the plaintiff appealed to the judge. The judge remanded the case to the clerk with directions—what the directions were is not disclosed in the reported case. Defendants then appealed to the supreme court. Both judge and clerk reversed. The facts appear in the opening of the opinion.]

MERRIMON, J. This was a special proceeding begun in the superior court, before the clerk thereof, on the 29th day of August, 1884, commanding defendants to appear on the 12th day of September, 1884. The summons was returned September 5th, 1884, with the following endorsement: "Received ——— 188—. Served September 5th, 1884, on the defendants, D. W. Blalock, A. N. Blalock, J. R. Blalock and Rufas Blalock. Fee \$2.40. J. R. Blalock, sheriff of Durham county."

On the 12th day of September, 1884, the defendants entered a special appearance through their attorney, and moved to dismiss the action for three causes: (1) That the sheriff failed to endorse on the summons the day of its receipt by him; (2) That the defendants had not been served with summons ten days before the return day thereof; (3) That the endorsement of the sheriff on the summons was insufficient, in that it did not state the manner of service as required by law. The clerk granted the motion and entered judgment dismissing the proceeding. From this judgment the plaintiff appealed to the judge at chambers. At the hearing of the appeal, the defendants moved to dismiss it because the action of the clerk was in a matter resting in his discretion, and not subject to review upon appeal. The motion to dismiss the appeal was denied by the judge, and the defendants excepted. The judge remanded the case with directions to the clerk, and the defendants appealed to this court.

The action of the clerk was wholly erroneous. 1. The sheriff ought regularly to have noted on the summons the day of its delivery to him, as required by the statute (The Code, secs. 200 and 280), but his failure to do so did not vitiate or render the summons void. Such notation is not of the essence of the summons, nor of the service of it by the sheriff. Its purpose is to provide evidence convenient to fix the day the summons passed into the

hands of the sheriff for any proper purpose; 2. Nor did the fact that the summons was served less than ten days before the return day thereof render it void, or defeat the proceeding. As this was a special proceeding and the summons was returnable out of term, further time ought to have been allowed to the defendants to appear, as suggested by this court in *Guion v. Melvin*, 69 N. C. 242, and *Weiller v. Lawrence*, 81 N. C. 65; 3. It would be more orderly and complete for sheriffs to make their returns of the service of the summons in actions with more fullness than simply to write on it "served," and the date of service, and sign the entry officially; but this is sufficient—*prima facie* sufficient at all events. The statute (The Code, sec. 214) prescribes that "the summons shall be served in all cases, except as hereinafter provided, by the sheriff, or other officer, reading the same to the party or parties named as defendants, and such reading shall be a legal and sufficient service."

This statute prescribes how the officer shall make service of the summons: it prescribes his duty as to the manner of discharging it. When the sheriff returns that he has "served" the summons, this implies that he has discharged his official duty in that respect—that he has read it to the defendant. *The term "served," as applied to a summons, ex vi termini, implies that it was read to the defendant named in it; except that in a case where the statute provides for other form of service, it means served according to law; in such connection it has a legal and technical meaning.* Bouvier says, "to serve a summons, is to deliver it to him personally, or to read it to him." Webster says, "To serve a writ—to read it to the defendant; or to leave an attested copy at his usual place of abode." In general, to serve a process is to read it, so as to give due notice to the party concerned, or leave an attested copy with him, or his attorney, or at his usual place of abode. *Murf. on Sheriffs*, sec. 839. On the argument stress was laid upon that clause of the statute which provides, in respect to the service of the summons in special proceedings, that, "when executed, he (the sheriff) shall immediately return the summons, with the date and manner of its execution," etc. It was insisted that the word "manner," implies how the service was made, and that it must be fully, descriptively and specifically set forth in the return. We can see no substantial reason why such a literal interpretation should be given the term mentioned. It seems to us that when a sheriff uses a term or form of expression in his return, that implies that he served the summons as the statute directs, that the spirit and the purpose of the law are complied with.

We do not mean to imply by what we have said, that the return of the sheriff is conclusive in respect to the manner of the service of the summons: it is to be taken where he returns it "served," that it was served as the statute requires in that case, until the contrary is made to appear by motion supported by affidavits, or in some other proper and pertinent way. We may add, that if the service of the summons had been insufficient, this was no cause for dismissing the proceedings. A motion to allow the sheriff to

amend his return might have been sustained, if the facts had warranted it. In any view of the matter, the plaintiff was entitled to an alias summons, if the return for any cause was insufficient.

The exception based upon the supposed discretion of the clerk, not reviewable, has no foundation. The clerk has no jurisdiction of the proceeding: the superior court had jurisdiction of it, and the clerk had authority to do certain things in and about it, as and for the court, that stood as the action of the court, unless either party to the proceeding should except to it, and appeal to the judge of the court at chambers or in term, in which case the judgment of the judge would become that of the court, unless his judgment should, on appeal to this court, be reversed or modified, in which case, the judge would be required to accept and act upon the judgment of this court as the proper one in the superior court. *Brittain v. Mull*, 91 N. C. 498.

The judge remanded the case to the clerk of the superior court with directions. This was error. The proceeding was already in the superior court: the court could not remand the case to itself. The court ought to have reversed the judgment dismissing the proceeding entered by the clerk as and for the court, and the clerk having entered the judgment of the judge as that of the court, ought to have proceeded according to law in the proceeding in the superior court. *Brittain v. Mull*, *supra*. The order of the judge must be set aside, and he will give judgment reversing that entered by the clerk, and the clerk having entered his judgment will proceed according to law.

See "Process," Century Dig. §§ 164-187; Decennial and Am. Dig. Key No. Series §§ 132-138, 140.

GREEN v. THE STATE, 56 Wis. 583, 585, 14 N. W. 620. 1883.

Service of the Summons. What is Personal Service.

[Green was convicted of assault and battery and carried the case to the supreme court by writ of error. Affirmed. Green assaulted a man and attempted to justify his conduct by showing that the person assaulted was unlawfully trespassing on his lands. A road had been laid off across the land by certain judicial proceedings and the person assaulted was in such road. *Green contended that the proceedings were void because he had not been duly served with the summons or notice prescribed by the statute.* The statute provided for a notice and added, "which notice shall be served personally, or by copy left with or at the usual place of abode of each occupant of such lands." The notice to Green was served by reading it to him at his residence on the land, and by posting copies of the notice at three public places in the town. The judge ruled that the notice was legally served.]

CASSODY, J. . . . "Notice shall be served personally, or by copy left with or at the usual place of abode of each occupant of such lands." See, 1267, R. S. This clause provides three ways of serving the notice upon the occupant: (1) It may be personally served; or (2) it may be served by copy left with the occupant; or (3) it may be served by a copy left at the usual place of

abode of the occupant. If the notice cannot be "personally served," except by leaving a copy thereof with the occupant, as contended by counsel, then the first method prescribed is the same as the second, and hence without any significance and might be rejected. Of course, leaving a copy with the occupant would be personal service, as ordinarily understood, but it is not the only method of personal service. Here the legislature have expressly prescribed this method *in addition to personal service*, and have, therefore, pretty clearly shown that by declaring that the notice may be personally served, they meant to include something other and different than leaving a copy with the occupant. Such being the legislative intent, we are to determine whether such other and different method includes *reading such notice to the occupant*.

In the late Dictionary of English Law, by Sweet, it is said: "In procedure, service is the operation of bringing the contents or effect of a document to the knowledge of the persons concerned." Burrill says: In practice, service is "judicial delivery or communication of papers; execution of process." One method of serving personally, as stated in Wade on Notice, cited by counsel for the plaintiff in error, "is by reading the notice to the person served." Sec. 1339. We must therefore hold that where the notice by the supervisors of the time and place of meeting and deciding upon the application for the laying out of a highway is served upon the occupants of the land through which such highway passes, by reading such notice to the persons served, the same is served personally, within the meaning of sec. 1267, R. S. The case is, in our opinion, clearly distinguishable from that class of cases cited by counsel, which were decided under statutes requiring notice to be given in writing, but without prescribing different modes of service in the language here employed. Judgment affirmed.

In *White v. Underwood*, 125 N. C. 25, 34 S. E. 104, it is held that a person in jail may be served with summons, as the jail confers no privileges of sanctuary. The opinion says and shows that "this has been the settled rule of law and practice both in England and in this country for a long period of time." The same rule applies even where, by statute, one is rendered civiliter mortuus by imprisonment, unless the contrary be provided. "Indeed the decisions are uniform, that although the right of a convict to prosecute an action is suspended, and his property in some instances forfeited, still he may be sued and the suit against him may be prosecuted to judgment." In Connecticut it is held that if a defendant be in jail, leaving a copy at the jail is a compliance with the statute requiring service by "leaving a copy at the usual place of abode." The opinion cites cases from New York and Connecticut. See 21 L. R. A. (N. S.) 344, and note.

A married woman can accept service, but an infant cannot. *Nicholson v. Cox*, 83 N. C. 44. An attorney cannot, under his general employment, accept service for his client. *Starr v. Hall*, 87 N. C. 381. As to service on infants, see *Roseman v. Roseman*, 127 N. C. 494, inserted at ch. 14, post; and for service on lunatics, see *Stuard v. Porter*, 79 Ohio St. 1, inserted at ch. 14, post. Inducing a party, by fraud, to come within the jurisdiction and there serving him with process. 12 L. R. A. (N. S.) 941. See "Highways," Century Dig. § 64; *Ibid* "Process," §§ 76-82; "Highways," Decennial and Am. Dig. Key No. Series § 30; *Ibid* "Process," § 64.

WHEELER v. COBB, 75 N. C. 21. 1876.

Waiver of Defects in Service. General Appearance.

[Action to recover money, commenced by summons and an attachment issued against the defendant's property. The summons was served by publication. The defendant moved to dismiss the action for want of proper service of process. Motion allowed and plaintiff appealed. Reversed. The docket showed that at the return term of the summons J. P. Whidbee's name was entered as attorney for the defendant, and that defendant was allowed until a certain day after the term to file pleadings. Only that part of the opinion which bears upon the motion to dismiss, is here inserted.]

BYNUM, J. The service of the summons by publication is fatally defective, in that it does not conform to the requirements of the statute. The foundation and first step of service by publication is an affidavit that "the person on whom the summons is to be served cannot, after due diligence, be found within the state." Bat. Rev. ch. 17, sec. 83. This requirement was omitted in the affidavit, why, it is hard to conceive, as it was made by the attorney himself, who, as a prudent practitioner, should have had the statute before him in drafting the affidavit. For this court had repeatedly held that the provisions of this statute must be strictly followed. *Spiers v. Halstead*, 71 N. C. 210. Everything necessary to dispense with personal service of the summons *must appear by affidavit*. The mere issuing of a summons to the sheriff of the county of Paquotank and his endorsement upon it the same day after it came to his hand, that "the defendant is not found in my county," is no compliance whatever with the law, for it might well be that the defendant was at that time in some other county in the state, and that the plaintiff knew it, or by due diligence could have known it, and could have made upon the defendant a personal service of the summons. Every principle of law requires that this personal service should be made, if compatible with reasonable diligence.

But the case states that "the docket shows that at the return term of the court J. P. Whedbee's name is entered as attorney for the defendants," and, at the same time, this entry was made upon the docket: "Defendants allowed until the first of December to file pleadings—order mutual to take depositions upon ten days' notice." *There being nothing in this appearance by attorney qualifying it, the only reasonable construction is, that it was a general appearance—that is, for all purposes.* A general appearance to an action cures all antecedent irregularity in the process, and places the defendant upon the same ground as if he had been personally served with process. *Pollard v. Dwight*, 4 Cr. 421; *Taylor v. Longworth*, 14 Pet. 172; 14 Pet. 293. It was, therefore, too late, at a subsequent term of the court, to raise the objection to the regularity of the service. The court will the more readily give this effect to an appearance entered without qualification, because such objections, raised by the defendant himself, who appears in court to make them, are generally for delay, and to avoid

an answer to the merits of the action. . . . Judgment reversed.

See *Wibright v. Wise*, 4 Blackf. 137, inserted at sec. 1, ante, in this chapter. "The purpose of the *summons* is to bring the parties into court, and give the court jurisdiction of them: that of the pleadings, to give jurisdiction of the subject-matter of the litigation and the parties in that connection—and this is orderly and generally necessary; but when the parties are voluntarily before the court, and by agreement, consent or confession, which in substance are the same thing, a judgment is entered in favor of one party and against another, such judgment is valid, although not granted according to the orderly course of procedure." *Peoples v. Norwood*, 94 N. C. at p. 172, citing *Farley v. Lea*, 20 N. C. 307; *State v. Love*, 23 N. C. 264; *Stancill v. Gay*, 92 N. C. 455. See further, as to the effect of a voluntary general appearance, 7 L. R. A. 511. A general appearance, even before a referee, cures all antecedent irregularities in the process and its service. *Roberts v. Allman*, 106 N. C. 391, 11 S. E. 424; *Heilig v. Stokes*, 63 N. C. 612. See further, for general and special appearance, the next succeeding case. See "Appearance," *Century Dig.* §§ 91-102; *Decennial and Am. Dig. Key No. Series* § 20; "Process," *Century Dig.* §§ 108-120; *Decennial and Am. Dig. Key No. Series* § 96.

SCOTT v. LIFE ASSOCIATION, 137 N. C. 515, 50 S. E. 221. 1905.

General, Special, and Quasi Appearance. When, How, and for What Purposes, a Special Appearance May be Entered.

[Scott obtained a final judgment against the defendant company, in May, 1902. At November term, 1904, the defendant company made a motion in the cause to set aside such judgment. The judge refused to set aside the judgment, and defendant appealed. Affirmed.]

The defendant was a non-resident corporation and the summons was served upon the Insurance Commissioner of North Carolina, pursuant to ch. 54, Laws 1899. At February term, 1902, judgment by default and inquiry was rendered against the defendant company. At May term, 1902, the inquiry was executed and judgment for damages was entered. At a subsequent term the defendant entered an appearance for the first time. The entry was made of record in the following terms: "The defendant, appearing for the purpose alone of making this motion, moves to set aside the judgment entered at May term, 1902, as irregular, and to find the facts set forth in C. W. Camp's affidavit, or to pass upon said proposed findings of fact." Only so much of the opinion as discusses *general, special, and quasi appearance*, is here inserted.]

WALKER, J. The case was argued before us as if the defendant had entered a special appearance, and the plaintiff's counsel insisted that, having done so, the defendant could not have the relief it seeks, nor could it appeal to this court; citing *Clark v. Mfg. Co.*, 110 N. C. 111, 14 S. E. 518. The argument of both counsel was based upon a misconception of the true nature of the appearance entered by the defendant. In the first place, it does not, on its face, purport to be a special appearance. It is true, the defendant appeared solely for the purpose of moving to set aside the judgment; but, as such a motion involves only the merits of the case, and is not confined to the one objection that the court is without jurisdiction, it follows that an appearance entered solely for the purpose of making that motion is essentially a general appearance.

The test for determining the character of an appearance is the relief asked; the law looking to its substance, rather than to its form. If the appearance is in effect general, the fact that the party styles it a special appearance will not change its real character. 3 Cyc. pp. 502, 503. The question always is what a party has done, and not what he intended to do. If the relief prayed affects the merits, or the motion involves the merits—and a motion to vacate a judgment is such a motion—then the appearance is, in law, a general one. *Id.* pp. 508, 509. The court will not hear a party upon a special appearance except for the purpose of moving to dismiss an action or to vacate a judgment for want of jurisdiction, and the authorities seem to hold that such a motion cannot be coupled with another based upon grounds which relate to the merits. An appearance for any other purpose than to question the jurisdiction of the court is general. 2 Enc. of Pl. & Pr. 632. In *Insurance Co. v. Robbins*, 59 Neb. 170, 80 N. W. 484, the court says: "The effort of the company evidently was to try the matter, and obtain a judgment on the merits, while standing just outside the threshold of the court. This it could not do. A party cannot be permitted to occupy so ambiguous a position. He cannot deny the authority of the court to take cognizance of an action or proceeding, and at the same time seek a judgment in his favor on the ground that his adversary's allegations are false, or that his proofs are insufficient. 'A special appearance,' says Mitchell, J., in *Gilbert v. Hall*, 115 Ind. 549, 18 N. E. 28, 'may be entered for the purpose of taking advantage of any defect in the notice or summons, or to question the jurisdiction of the court over the person in any other manner; but filing a demurrer or motion which pertains to the merits of the complaint or petition constitutes a full appearance, and is hence a submission to the jurisdiction of the court.' Whether an appearance is general or special does not depend on the form of the pleading filed, but on its substance. If a defendant invoke the judgment of the court in any manner upon any question, except that of the power of the court to hear and decide the controversy, his appearance is general." See, also, *Handy v. Ins. Co.*, 37 Ohio St. 366; *Pry v. Railroad*, 73 Mo. 123; *Cohen v. Trowbridge*, 6 Kan. 385; *Briggs v. Humphrey*, 83 Mass. (1 Allen) 373; *Crawford v. Foster*, 84 Fed. 939, 28 C. C. A. 576. "There are cases where the defendant may make a quasi appearance for the purpose of objecting to the manner in which he is brought before the court, and in fact to show that he is not legally there at all; but, if he ever appears to the merits, he submits himself completely to the jurisdiction of the court, and must abide the consequences. If he appears to the merits, no statement that he does not will avail him; and, if he makes a defense which can only be sustained by an exercise of jurisdiction, the appearance is general, whether it is in terms limited to a special purpose or not." *Nichols v. People*, 165 Ill. 502, 46 N. E. 237; 2 Enc. Pl. & Pr. 625.

We must hold, upon principle and authority, that the defendant has made a full appearance in the case, and will be bound in all respects by the orders and decrees of the court, even if not already bound by reason of the service of process. But the latter is in itself sufficient for that purpose. *Biggs v. Ins. Co.*, 128 N. C. 5, 37 S. E. 955; *Moore v. Ins. Co.*, 129 N. C. 31, 39 S. E. 637; *Ins. Co. v. Scott*, 136 N. C. 157, 48 S. E. 581; *Fisher v. Ins. Co.*, 136 N. C. 217, 48 S. E. 667. . . .

See "Appearance," Century Dig. §§ 23-41; Decennial and Am. Dig. Key No. Series § 9.

GRAHAM v. O'BRYAN, 120 N. C. 463, 27 S. E. 122. 1897.

Special Appearance to Move to Dismiss. General Appearance, Upon Such Motion Being Overruled. Practice in Such Cases.

[When this action was called for trial, the judge dismissed it and the plaintiff appealed. Affirmed. The facts appear in the opinion. Only that part of the opinion which discusses the *practice* when a special appearance is entered for the purpose of moving to dismiss and such motion is overruled, is here inserted.]

CLARK, J. The judge held that the plaintiff could not recover, and rendered judgment in favor of the defendants for costs. The judgment must be affirmed, for several reasons. The defendants, entering a special appearance, moved to dismiss for want of legal service of summons and for want of jurisdiction. The plea was overruled. The defendants having excepted, their subsequent appearance did not bring them into court as a general appearance otherwise would have done. *Farris v. Railroad Co.*, 115 N. C. 600, 20 S. E. 167. The record shows only a summons and a return that the defendants "could not be found in the county." The appellees' counsel, however, admits that the record is defective, and that in fact the defendants were served by publication, but contends that, being nonresidents, and no attachment having been served, the service was not a legal service. Upon that state of facts, the proposition of law is correct. *Bernhardt v. Brown*, 118 N. C. 700, 24 S. E. 527, 715; *Long v. Insurance Co.*, 114 N. C. 465, 19 S. E. 347. . . . Affirmed.

If the defendant enter a special appearance and move to dismiss and his motion be overruled, he should except and proceed with his defense. He does not thereby waive his rights under his motion; for, if his motion be improperly overruled in the lower court, it will be allowed on appeal and the whole case dismissed notwithstanding the fact that it has been tried on the merits, *Mullen v. Canal Co.*, 114 N. C. 8, 19 S. E. 196; but if the defendant fail to except to a ruling refusing his motion to dismiss, and proceed with his defense, his appearance becomes a general appearance for all purposes, *Moody v. Moody*, 118 N. C. 926, 23 S. E. 933. No appeal lies from the refusal to dismiss, until final judgment in the action, for the judgment overruling the motion to dismiss is merely interlocutory and is not such a judgment as can be appealed from at once. If the summons be void, the defendant may wholly ignore it or he may enter a special appearance and move to dismiss, just as he

prefers, *Houston v. Lumber Co.*, 136 N. C. 328, 48 S. E. 738. When there is a dispute about the fact as to whether a defendant entered a general or a special appearance, the findings of the lower court are final and not reviewable, *Long v. Ins. Co.*, 114 N. C. 465, 19 S. E. 347. "There is no appearance unless of record, for whether he appeared or not ought to be tried by the record, 6 Com. Dig. 8; 1 Tidd, 213; and an appearance to the writ should be entered in the filazer's office, by plea, or motion, or entry on the docket, or some official act, *Crabb's Hist. Com. Law*, 559." *Shirley v. Hagar*, 3 Blackf. at p. 226. See "Appearance," *Century Dig.* §§ 53, 54; *Decennial and Am. Dig. Key No. Series* § 10.

DOYLE v. BROWN, 72 N. C. 393. 1875.

Effect of Failure to Duly Serve Lawful Process.

[Petition to set aside a decree for the sale of lands for partition. Decree set aside and defendant appealed. Affirmed. Upon the trial of the petition it appeared that the sale was decreed in a cause in equity with the service of process on the petitioners in this cause, and that they entered no appearance in such cause in equity.]

READE, J. Where a defendant has never been served with process, nor appeared in person, or by attorney, a judgment against him is not simply voidable, but void; and it may be so treated whenever and wherever offered, without any direct proceedings to vacate it. And the reason is, that the want of service of process and the want of appearance is shown by the record itself, whenever it is offered. It would be otherwise if the record showed service of process or appearance, when in fact there had been none. In such case the judgment would be apparently regular, and would be conclusive until by a direct proceeding for the purpose, it would be vacated.

A plaintiff needs not to be brought into court; he comes in. A judgment is of no force against a person as plaintiff, unless the record shows him to be plaintiff. If the record shows him to be plaintiff, when in fact he was not, then it stands as where the record shows one to be defendant, when he was not. In both cases the record is conclusive until corrected by a direct proceeding for that purpose. Here the record sought to be impeached shows that the plaintiff in this case was plaintiff in that; although in fact she was not. The record must therefore stand against her until it is vacated. And so the defendants insist that this action cannot be maintained; because, they say, the plaintiff is estopped by the record. . . . Judgment affirmed.

See "Judgment," *Century Dig.* § 25; *Decennial and Am. Dig. Key No. Series* § 17.

LONG v. INSURANCE CO., 114 N. C. 465, 19 S. E. 347. 1894.

Service by Publication. When Constitutional. Actions In Rem and In Personam. Manner of Service on Non-residents. Doctrine of Pennoyer v. Neff.

[The summons was issued from a superior court of the state of North Carolina and served by an officer of the state of Louisiana in that state, pursuant to a statute of North Carolina making such a service valid in

those cases wherein it would be lawful to serve such process by publication. Defendant entered a special appearance and moved to dismiss upon the ground that the affidavit, upon which the summons was issued to the officer in Louisiana, was insufficient. Motion refused. Permission given to the plaintiff to amend his affidavit and the defendant allowed time to answer. At a subsequent term defendant again entered a special appearance and again moved to dismiss because of the insufficiency of both the original and amended affidavits, in that they failed to show that the defendant had property in North Carolina—it being admitted that the defendant was a non-resident and this action simply in personam. Plaintiff made a counter motion for judgment for want of an answer, insisting that the defendant had entered a *general appearance*. The judge found as a fact that the defendant's appearance was only *special*, and rendered judgment against the plaintiff dismissing his action. Plaintiff appealed. Affirmed.]

CLARK, J. The finding of the court below that the appearance of the defendant at August term was a special appearance is not reviewable. Act 1891, c. 120, authorizing service of summons and other process upon a nonresident by an officer of the county and state where he resides, is, as the act expresses it, only "in lieu of publication in a newspaper." It can only be done in those cases in which publication could be made, and has only the effect publication would have, except it may be that, when the actual notice is brought home by such service to a nonresident, he has not the right allowed the defendant, when publication is made by Code, § 220, to defend after judgment. But as to this we need not decide now. "Substituted service by publication, or in any other authorized form, may be sufficient to inform parties of the object of proceedings taken, where property is once brought under the control of the court by seizure, or some equivalent act. . . . Such service may also be sufficient in cases where the object of the action is to reach and dispose of property in the state, or of some interest therein, by enforcing a contract or lien respecting the same, or to partition it among different owners, or, when the public is a party, to condemn and appropriate it for a public purpose. In other words, such service may answer in all actions which are substantially proceedings in rem. . . . Process from the tribunals of one state cannot run into another state, and summon parties there domiciled to leave its territory, and respond to proceedings against them." *Pennoyer v. Neff*, 95 U. S. 714, 727; *Wilson v. Seligman*, 144 U. S. 41, 44, 12 Sup. Ct. 541. "There is a large class of cases which are not strictly actions in rem, but are frequently spoken of as actions quasi in rem, . . . in which property of nonresidents is attached and held for the discharge of debts due by them to citizens of the state, and actions for the enforcement of mortgages and other liens." *Freeman v. Alderson*, 119 U. S. 185, 7 Sup. Ct. 165; *Hornthal v. Burwell*, 109 N. C. 10, 13 S. E. 721. Where the proceeding is for the enforcement of mortgages or other liens, or the condemnation of a right of way or other easement, or the partition of realty and the like, the jurisdiction as to nonresidents only authorizes a judgment acting upon the property. Where the en-

forcement of a debt or other personal liability is sought by subjecting property of the nonresident, the jurisdiction is based upon the seizure of the property, and only extends to the property attached. In neither case can any personal judgment be rendered against the defendant, not even for the costs, nor affecting other property of his, even within the state. *Winfree v. Bagley*, 102 N. C. 515, 9 S. E. 198. The act (1891, c. 120) allowing service of process of this state upon a nonresident where he resides does not and cannot extend the jurisdiction. It is a convenient, and probably a more sure, way of bringing home to the nonresident the notice which formerly was made solely by publication. It is optional with the plaintiff which mode he shall use. *Mullen v. Canal Co.*, 114 N. C. 8, 19 S. E. 106. But the service of process in another state is valid only in those cases in which publication of the process would be valid. 22 Am. & Enc. Law, 137; *York v. State*, 73 Tex. 651, 11 S. W. 869. This is true, also, in actions for divorce. *Burton v. Burton*, 45 Hun. 68.

In the present case, the action being for the recovery of a debt, publication of summons would have been invalid, because there was no attachment of the property of defendant, to confer jurisdiction. *Winfree v. Bagley*, *supra*. As no publication of summons would have been valid, the actual service in another state "in lieu thereof" was equally invalid. The plaintiff declined the leave given him to amend his proceedings to bring the defendant into court, and the judge, therefore, properly dismissed the action. Not only has the process issuing from one state no extra-territorial effect when served in another state (except as notice of a proceeding in rem, or quasi in rem, which could be served by publication of the notice), but even in the federal courts, whose jurisdiction extends throughout the Union, a personal judgment can be had against a defendant only when sued in the district where he resides. *Toland v. Sprague*, 12 Pet. 300. A personal judgment against a nonresident can only be obtained in a state court when he can be found and served with process while in the state (*Peabody v. Hamilton*, 106 Mass. 217; *Smith v. Gibson*, 83 Ala. 284, 3 South. 321), or, if a corporation, by service on its agent there. It should be noted that the statute now (Code, § 347), as amended by chapter 77, Acts 1893, is materially different from the act in force when *Wilson v. Manufacturing Co.*, 88 N. C. 5, was decided. An attachment now lies for unliquidated damages arising out of breach of contract, or for injury to personal or real property, but not for any other torts,—such, for instance, as libel, which was the cause of action in *Winfree v. Bagley*, *supra*. No error.

See "Process," Century Dig. § 136; Decennial and Am. Dig. Key No. Series § 109.

VICK v. FLOURNOY, 147 N. C. 209, 60 S. E. 978. 1908.

Different Methods of Making Due Service of Process. Effect of Service Other Than Personal Service Within the Territorial Jurisdiction of the Court. Proceedings In Rem and In Personam. Amendment of the Summons.

[Vick sued in the superior court to redeem certain lands in North Carolina from a mortgage, and to enforce a contract with respect to such lands. All the defendants were non-residents and process was served on them in strict compliance with Rev. sec. 448. Defendants entered a special appearance and moved to dismiss upon the ground assigned, "that the court had no jurisdiction of the persons of the defendants, for want of proper service of process." Motion sustained and action dismissed. Plaintiff appealed. Reversed.

The subject matter of the action was real estate situate in North Carolina: the plaintiff was the executor and sole heir at law of the mortgagor and a resident of North Carolina; the defendants were the real and personal representatives of the deceased mortgagee and were all non-residents.]

HOKE, J. The principal question presented in this appeal, on the right of plaintiff to proceed as a matter of jurisdiction in the court, has been resolved against the defendants' position in several decisions of this court, notably the case of Bernhardt v. Brown, 118 N. C. 701, 24 S. E. 527, et seq. In that well-considered opinion the present chief justice points out the different methods by which a court may acquire jurisdiction of a cause and of parties litigant, and, among other rulings, holds as follows: "(1) There are three modes for the 'due service of process'—(a) by actual service, or, in lieu thereof, acceptance or waiver by appearance; (b) by publication, in cases where it is authorized by law, in proceedings in rem, in which case the court already has jurisdiction of the res, as to enforce some lien on or a partition of property in its control; (c) by publication of the summons, in cases authorized by law, in proceedings quasi in rem, in which cases the court acquires jurisdiction by attaching property of a non-resident, absconding debtor, etc. A judgment obtained under process served by the two last-named methods has no personal efficiency, but acts only on the property; (2) A proceeding to enforce a mechanic's lien being in rem, the service of summons by publication is authorized by section 218 (4) of The Code, if the defendant cannot after due diligence be found in the state, whether he be a non-resident or a resident; (3) In an action to enforce a mechanic's lien and in all other proceedings in rem it is not necessary, as in proceedings quasi in rem, to acquire jurisdiction by actual seizure or attachment of the property—the mere bringing of the suit in which the claim is sought to be enforced being equivalent to seizure." And, in *Graham v. O'Bryan*, 120 N. C. 463, 27 S. E. 122, the same judge, for the court, said: "A service by publication on a non-resident, in an action affecting property, is valid without attachment." And again, in *Long v. Ins. Co.*, 114 N. C. 465, 19 S. E. 347, and in

other cases, it has been held that, while personal service of process in another state on a non-resident defendant is in lieu of service by publication and only available in cases where such service would be sufficient, yet, when the statute so provides and its terms are complied with, both methods are valid as to actions substantially in rem or quasi in rem, and where the relief sought is restricted (1) to an application of the property seized by process in the cause, (2) or to a judgment affecting the title to property or some interest therein, or lien thereon, which had its situs within the limits of the court's jurisdiction.

The cases *supra* are in accord with the decisions of the supreme court of the United States on the same subject. *Pennoyer v. Neff*, 95 U. S. 715; *Arndt v. Griggs*, 134 U. S. 316, 10 Sup. Ct. 557. In this last case, being an action to determine the interest of certain claimants to real estate situated within the state of Nebraska, and to quiet the title thereto, Mr. Justice Brewer, delivering the opinion of the court, quotes with approval from the case of *Beebe v. Doster*, 36 Kan. 666, 675, 677, 14 Pac. 150, et seq., as follows: "Mortgage liens, mechanics' liens, materialmen's liens and other liens are foreclosed against non-resident defendants upon service by publication only. Lands of non-resident defendants are attached and sold to pay their debts; and, indeed, almost any kind of action may be instituted and maintained against non-residents to the extent of any interest in property they may have in Kansas, and the jurisdiction to hear and determine in this kind of cases may be obtained wholly and entirely by publication. *Gillespie v. Thomas*, 23 Kan. 138; *Walkenhorst v. Lewis*, 24 Kan. 420; *Rowe v. Palmer*, 29 Kan. 337; *Venable v. Dutch*, 37 Kan. 515, 519, 15 Pac. 520. All the states, by proper statutes, authorize actions against non-residents and service of summonses therein by publication only, or service in some other form no better; and, in the nature of things, such must be done in every jurisdiction, in order that full and complete justice may be done where some of the parties are non-residents." And again, quoting from *Boswell's Lessee v. Otis*, 9 How. 336, 348: "Turning now to the decisions of this court: In *Boswell's Lessee v. Otis*, 9 How. 336, 348, was presented a case of a bill for specific performance and accounting, and in which was a decree for specific performance and accounting, and an adjudication that the amount due on such accounting should operate as a judgment at law. Service was had by publication, the defendants being non-residents. The validity of a sale under such judgment was in question. The court held that portion of the decree and the sale made under it void, but, with reference to jurisdiction in a case for specific performance alone, made these observations: 'Jurisdiction is acquired in one of two modes - first, as against the person of the defendant, by service of process, or, secondly, by a procedure against the property of the defendant within the jurisdiction of the court. In the latter case the defendant is not personally bound by the judg-

ment beyond the property in question. And it is immaterial whether the proceeding against the property be by an attachment or bill in chancery. It must be substantially a proceeding in rem. A bill for the specific execution of a contract to convey real estate is not strictly a proceeding in rem in ordinary cases; but where such a procedure is authorized by statute on publication, without personal service of process, it is substantially of that character.' And on the question before them the court held: '(1) A state may provide by statute that the title to real estate within its limits shall be settled and determined by a suit in which the defendant, being a non-resident, is brought into court by publication; (2) The well-settled rules that an action to quiet title is a suit in equity, that equity acts upon the person, and that the person is not brought into court by service by publication alone, do not apply when a state has provided by statute for the adjudication of titles to real estate within its limits as against non-residents, who are brought into court only by publication.'''

This is an action to establish plaintiff's title to a tract of land situated within the jurisdiction of the court, and to relieve the same from any and all liens that the defendants may hold on the same. The terms of the statute providing for personal service beyond the state have been duly complied with. Revisal, sec. 448. And a correct application of the principles in the foregoing decisions clearly determines that, if the facts are established as alleged, the court has jurisdiction to afford the relief demanded. There is no doubt of the correctness of the position urged upon us by the defendants' counsel, that a valid judgment strictly in personam cannot be had unless there has been a voluntary appearance by defendant or there has been service of process upon him within the jurisdiction of the court, and that personal service of process beyond the jurisdiction does not affect the principle or render such a judgment valid. But the relief sought here is not strictly in personam, and, while it may not be with exactness a proceeding in rem, the decisions all treat it as substantially in rem, and the question of the court's jurisdiction comes clearly within the principles we hold to be controlling, and the facts bring the case within the express terms of our statute providing for service by publication. Revisal, sec. 442. Such service may be had whenever the defendant is a proper party relating to real property, and (subsection 3) "where he is not a resident of this state, but has property therein and the court has jurisdiction of the subject of the action;" (subsection 4) "where the subject of the action is real or personal property in this state and the defendant has or claims a lien or interest, actual or contingent, therein, or the relief demanded consists wholly or partly in excluding the defendant from any lien or interest therein."

Objection is further made to the summons served for that the same is not under seal of the court. We are inclined to the opinion that, under section 431, Revisal, a seal is required—certainly

it is always desirable when a summons is sent to a distance. Its presence may serve to assure the officer of another state that the proceedings are in good faith and under official sanction; but when it appears that the defendants have been actually notified, as in this case, not only of the time and place when they are required to appear, but also fully informed of the nature and purpose of the action, the objection that there is no seal to the summons is not of the substance. If the officer has acted without it, the absence of a seal is only an irregularity, which may be cured now by having the seal affixed, and the same may be said as to the form of the summons. It is sufficient to notify the parties, and is a substantial compliance with the statute, accompanied as it is by a sworn statement of the nature of the action. The power of amendment to the extent indicated has been upheld by express decision. *Henderson v. Graham*, 84 N. C. 496; *Clark v. Hellen*, 23 N. C. 421.

We hold that the court had acquired jurisdiction and there was error in dismissing the action. Error.

See note to next succeeding case and the cross references there given. See "Judgment," Century Dig. §§ 25-33; Decennial and Am. Dig. Key No. Series § 17.

BACON v. JOHNSON, 110 N. C. 114, 14 S. E. 508. 1892.

Prerequisites to Valid Service by Publication. Essentials of the Affidavit.

[Action for specific performance of a contract to convey real estate situated in North Carolina. The defendants were non-residents and the summons was duly issued, and returned by the sheriff endorsed "not to be found in my county." Thereupon the attorney of the plaintiff made his affidavit, the material part of which is as follows: "That defendants, upon whom service of summons is to be made, cannot, after due diligence, be found within the state of North Carolina, and he is informed and believes they are residents of the state of Maryland; that a cause of action exists against them in favor of plaintiff, and that they are proper parties to the same, which said action relates to real property in this state, to-wit, specific performance of a contract to convey a tract of land lying in Craven county. Therefore affiant prays that service of summons upon defendants be ordered by publication, as required by law in such cases." Upon motion of plaintiff, founded upon this affidavit, the court made its order directing that publication be made of the summons and notice to defendants in the Newbern Journal, a newspaper, for six weeks, requiring them to appear. Such publication was made; and at spring term, 1891, of the superior court, the plaintiff filed his complaint, and, the defendants failing to appear, he obtained judgment by default final for want of an answer. Thereafter defendants entered a special appearance and moved "to set aside and declare void and irregular" the judgment theretofore entered, upon the ground that the service by publication was void for non-compliance with the statutory requirements and, consequently, the court had no jurisdiction. Defendants also moved to be allowed to come in and defend the action notwithstanding the judgment by default—basing such motion on sec. 220 of The Code (Revisal sec. 449). Both motions were denied and defendants appealed. Reversed.]

MERRIMON, C. J. The service of the summons or notice as original process in the action by publication must be made strictly in accordance with the requirements of the statute. Code, §§ 218, 219. This method of service of process and giving the court jurisdiction is peculiar, and out of the usual course of procedure. The statute prescribes with particularity and caution the cases and causes that must exist and appear by affidavit to the court in order that it may be allowed. The court must see that every prerequisite prescribed exists in any particular case before it grants the order of publication; otherwise the publication will be unauthorized, irregular, and fatally defective, unless in some way such irregularity shall be waived or cured. *Spiers v. Halstead*, 71 N. C. 209; *Windley v. Bradway*, 77 N. C. 333; *Wheeler v. Cobb*, 75 N. C. 21; *Faulk v. Smith*, 84 N. C. 501. The statute cited above, among other things pertinent here, prescribes and requires that, in order to obtain an order that service of notice of the action be made by publication, it must appear by affidavit "that a cause of action [exists] against the defendant in respect to whom service is to be made, or that he is a necessary party to an action relating to real property in this state" in a case wherein that party "is a non-resident of this state, but has property therein, and the court has jurisdiction of the subject of the action;" or that "the subject of the action is real or personal property in this state, and the defendant has or claims a lien or interest, actual or contingent, therein; or the relief demanded consists wholly or partly in excluding the defendant from any lien or interest therein." Such prerequisites must appear in their substance at least. It is not sufficient to state generally that a cause of action exists against the defendants, or that they are necessary parties to the action. A brief summary of the facts constituting the cause of action or of the facts showing that the parties are necessary parties to the action should be stated, so that the court can see and determine that there exists a cause of action, or that the parties are necessary for some appropriate purpose. The party demanding the order shall not be the judge to determine that a cause of action exists, or that the parties sought to be made parties are necessary parties. It is the province and duty of the court to see the facts and determine the legal question as to whether there is a cause of action or not. Nor is it sufficient to state that the party is a necessary party to an action to compel specific performance of a contract to convey land in a particular locality. The facts must be stated with sufficient fullness to develop the contract and the relation of the parties to it; otherwise the party demanding the order will determine that he has a cause of action, while the statute requires the court to do so upon facts appearing by affidavit. *Claffin v. Harrison*, 108 N. C. 151, 12 S. E. Rep. 895, and the cases cited *supra*. The affidavit upon which the order of publication was made in this case failed to state the facts on which the plaintiff relied to constitute his cause of action.

and other facts to show that the appellants were necessary parties. The court failed to see and determine upon evidence appearing as required that there was a cause of action, and that the defendants were necessary parties to the action for some proper purpose. Nor did it appear that the defendants had property in this state. This is material when the purpose is to allege a cause of action against the defendant. The order of publication was therefore improvidently granted. Publication was not made according to law, and the court should have set the judgment complained of aside. It does not appear that the irregularity was cured or waived in any way.

We may add also that the court should have found the facts upon which it founded its conclusion "that no just or reasonable cause has been shown why the said judgment should be set aside as irregular and void, or that the defendants be allowed to come in and defend said action," etc. It may be that the court erroneously decided that there was no legal cause, and exercised its discretion upon that ground in refusing to allow the appellants to make defense. Whether there was such cause or not is a question of law, and the decision of the court in that respect is reviewable in this court. The court recites in its judgment that it finds from "the record and the said affidavit that no just or reasonable cause has been shown," etc. It should have found the facts, and set them forth in the record, so that its decision of the question of law arising upon the facts might be reviewed. In the absence of demand that the facts be found, it might not be error to fail to set the findings of fact forth in the record. But the contentions of the defendants in this case imply a demand that the facts be found. The court drew its conclusions from facts not set forth. *Utley v. Peters*, 72 N. C. 525. There is error. The judgment must be reversed, and further proceedings had in the action according to law. To that end let this opinion be certified according to law. It is so ordered.

See *Mullen v. Canal Co.*, 114 N. C. 8, 19 S. E. 106; *Lemly v. Ellis*, 143 N. C. 200, 55 S. E. 629; *Penniman v. Daniel*, 91 N. C. at p. 434, inserted at ch. 11, sec. 4, ante; *Haddock v. Haddock*, 201 U. S. at p. 566, 26 Sup. Ct. 525, inserted at ch. 12, ante; *Grocery Co. v. Bag Co.*, 142 N. C. 174, 55 S. E. 90; *Best v. Brit. & Am. Co.*, 128 N. C. 351, 38 S. E. 923. A civil action must ordinarily be commenced by the issue of a summons, but it is not necessary to do so where the defendant is not within the reach of process of the court and cannot be personally served. In these last mentioned instances it is sufficient to file the requisite affidavit and proceed to serve the process by publication. *Grocery Co. v. Bag Co.*, 142 N. C. 174, 55 S. E. 90. Publications for feme covert in her maiden name, will it do? 19 L. R. A. (N. S.) 984. See "Process," *Century Dig.* §§ 108-120; *Decennial and Am. Dig. Key No. Series* § 96.

CHAPTER XIV.

PARTIES.

HAYS v. LANIER, 3 Blackford, 322. 1833.

Necessity for Naming the Plaintiffs. Actions by a Copartnership.

[The firm of Stapp, Lanier & Co. brought an action against James W. Hays and Thomas Heck (trading under the style and name of Hays & Heck) and John W. Wheatly. The summons did not give the individual names of the persons composing the plaintiff firm. Hays & Heck moved to quash the writ. Motion overruled. They then demurred and the demurrer was overruled, and they carried the case to the supreme court by writ of error. Reversed.]

STEVENS, J. . . . The only question before the court is, whether the defendants in error can, in their collective capacity, under the style and name of Stapp, Lanier & Co., prosecute and maintain this action. There is no principle more certainly and satisfactorily settled than that, in all actions, the writ and declaration must both set forth, accurately, the Christian and surname of each plaintiff and each defendant, unless the party is a corporation, and is authorized to sue and be sued in such corporate name. This rule of law and practice is sustained by reason, justice, and the highest authorities. In the case now before us, the defendants in error are not a corporation known to the law by the artificial name of Stapp, Lanier & Co.; they are natural persons, and must sue in their individual names. It is also equally well settled that in all cases of contracts, if it appears upon the face of the writ or declaration that there are other obligees who are not named, it is fatal on demurrer. In this case, the note and writ both show that there are other obligees who are not named; this is fatal on demurrer. 1 Chit. Pl. 7; 2 Johns. Cas. 384; Bentley v. Smith, 3 Caines, 170; Anderson v. Martindale, 1 East, 497. . . . Suppose the writ in this case, instead of issuing in the form it did, had issued in the name of Milton Stapp, James F. D. Lanier, etc., partners, trading under the style and firm of Stapp, Lanier & Co., would there have been any difficulty? It is apprehended that there could not have been any; the record, proceedings and judgment could have followed the writ, and all might, perhaps, have been correct. Judgment reversed.

See *Heath v. Morgan*, 117 N. C. 504, 23 S. E. 489, to the same effect as the principal case. See "Partnership," Century Dig. § 360; Decennial and Ann. Dig. Key No. Series § 197.

PALIN v. SMALL, 63 N. C. 484. 1867.

Naming the Plaintiffs When Copartnership Sues.

[Action for breach of warranty of the soundness of a horse. The summons or "writ was in the name of William Palin, John Palin and Joseph Palin, partners, trading under the firm and style of Palin & Brothers." The defendant insisted that it was necessary that plaintiffs not only show that the warranty was made to them, but also that plaintiffs were copartners. The judge ruled otherwise and there was a verdict and judgment against the defendant, and he appealed. Affirmed.]

SETTLE, J. Had the writ in this case been issued in the firm name of "Palin & Brothers," without reciting the individual names of the persons composing the firm, the defect would have been fatal; for it is well settled that the writ must set forth accurately the name of each plaintiff and defendant. But here the writ does set forth the full names of all the plaintiffs, with the addition that they are "partners trading under the firm and style of Palin & Brothers." It is not pretended that the contract was not made with the plaintiffs, William Palin, John Palin, and Joseph Palin, but the defendant insists that as the writ recites that they were "partners trading under the firm and style of Palin & Brothers," the fact of partnership under such name should have been proved upon the trial. *His honor held this to be unnecessary, and was of the opinion that these words in the writ should be regarded as surplusage.* In this we concur. The addition of the firm name to the individual names composing the firm was not necessary, but being added it can do no harm, and will not subject the plaintiffs to any additional proof. Judgment affirmed.

See "Partnership," Century Dig. § 360; Decennial and Am. Dig. Key No. Series § 197.

POWERS v. HURST, 3 Blackford, 229, 231. 1833.

Necessity for Naming the Defendants.

[Hurst instituted a suit against "Clement Powers and others whose names are unknown, heirs of Walter E. Powers, who all are not residents of the state." This was held sufficient by the judge. Powers carried the case to the supreme court by writ of error. Reversed.]

McKINNEY, J. . . . The proceeding is instituted against Clement Powers and others unknown, alleged to be the heirs of the judgment defendant, who, it is said, "are not all residents of Indiana." This statement of non-residence is indefinite, and clearly insufficient. If a part of the heirs were residents, they could not be joined with those who were non-residents. From the expression used, "who are not all residents of Indiana," a part at least must be considered as being residents, and therefore, exclusive of other objections, the affidavit would be defective. The statute authorizing the proceeding against non-resident heirs,

does not authorize it against them eo nomine, but leaves to the rules of the common law the mode of enforcing their liability, subject to the particular provisions of the statute. We have no recollection of a proceeding at common law against *unknown heirs*. At common law or in equity, if heirs are required to be made defendants to a suit, it is the duty of the plaintiff to render them such *by their proper names*. . . . Judgment reversed.

See *Wilson & Shoher v. Moore*, 72 N. C. 558, and note, inserted at ch. 13, sec. 6. See "Attachment," Century Dig. § 295; Decennial and Am. Dig. Key No. Series § 111.

GAMLY v. BECHINOR, 2 Levinz, 197. 1678.

Naming the Defendants.

Assumpsit; whereas quidam ——— Allison was indebted to the plaintiff, who intended to sue the said ——— Allison, the defendant; in consideration the plaintiff would forbear the said ——— Allison promised him to pay the debt. After judgment upon verdict for the plaintiff in C. B. in non assumpsit, error was brought in B. R. and it was assigned that it does not appear what Allison was intended in the case; for it is quidam Allison without christian name, and so it may be any Allison in the world; and Rainsford, Chief Justice, and Twysden held this an error. But Wyldé and Jones contra: Be it what Allison it will, the defendant hath promised, and that is so found, and this judgment may be pleaded in bar to any other action brought in consideration of forbearance of any Allison without christian name, with an averment that he is the same person; and rather than reverse it for this cause, they would intend quidam was his christian name. Quare adjournat.

See "Parties," Century Dig. § 108; Decennial and Am. Dig. Key No. Series § 66.

WILSON v. THE STATE, 6 Blackford, 212, 213. 1842.

Result of a Defect of Parties in a Court of Law. Misjoinder and Non-joinder.

[Wilson, as principal, and McCarty, as surety, entered into a recognizance in the sum of \$400, payable to the state, to be void upon condition that Wilson appear at court, etc. Wilson did not appear according to the terms of the recognizance, and the state proceeded against Wilson alone to enforce the recognizance. Wilson contended that the proceeding could not be sustained because it was against him alone and not against him and McCarty—they two being jointly liable on the recognizance. The judge ruled against Wilson and gave judgment against him for \$400, and Wilson carried the case to the supreme court by writ of error. Affirmed. While Wilson duly pleaded that McCarty was jointly liable with him, he failed to plead that McCarty was living at the commencement of the proceeding—but for that he would have defeated the state.]

DEWEY, J. . . . Some of the doctrines which have been established in relation to the joinder of parties seem to be somewhat arbitrary. In actions founded on contract, if any of those living to whom the promise or obligation *is made be omitted* as plaintiffs, or any to whom *it is not made be joined*, and the fact appear in the declaration, it is fatal on demurrer, in arrest of judgment, or in error; and if the defect is not shown by the pleadings, it is ground of nonsuit under the general issue. 1 Chit. Pl. 13; Vernon v. Jeffreys, 2 Stra. 1146; Anderson v. Martindale, 1 East. 497; Scott v. Godwin, 1 B. & P. 67. [Not so in *equity*—the cause is continued that proper parties may be made. Park v. Ballentine, 6 Blackf. 223, post.] But when the action is by executors or administrators, either on contract or tort, and there is a co-executor or administrator not joined, objection to the nonjoinder can be taken only (after over of the letters testamentary or of administration) by a plea in abatement, that the omitted executor or administrator is living and not made a party. 1 Chit. Pl. 20; 1 Saund. 291, g. n. 4. The same rule is applicable to all actions founded on tort, though the nonjoinder of a person jointly interested with the plaintiff appear of record. 1 Saund. 291, g. h. n. 4. In actions *ex contractu*, if a part only of several joint contractors be sued, and the defendant wish to avail himself of the omission of the others, he must do it by a plea in abatement; if he omit to do so, he cannot afterwards urge the objection in any form, though the declaration set out a joint contract. 1 Saund. 154, n. 1; Rees v. Abbott, Cowp. 832, per Buller, J.; Hawkins v. Ramsbottom, 6 Taunt. 179. So, to an action on a specialty, part of the obligors being omitted, the defendant cannot have over and demur; he must still plead in abatement. Cabell v. Vaughan, 1 Saund. 291, a. n. 2. The plea in abatement for the nonjoinder of a contractor, must show not only that the omission has been made, but that the contractor omitted is living. Cabell v. Vaughan, 1 Saund. 291, a. b. n. 4. If, however, the declaration, or other pleading of the plaintiff, expressly show what it would be necessary to aver in the plea—that there are joint contractors who are not joined, and who are living—then the defendant may demur, move in arrest of judgment, or sustain error. 1 Chit. Pl. 46; 1 Saund. 291, b. n. 4, and the authorities there cited; Dillon v. The State Bank, 6 Blkfd. 5. We are aware that in *scire facias* on a recognizance, and also on a bond to the crown, it has been held, that if the declaration show that a part only of the cognizors or obligors are sued, though it does not appear that the others are living, the nonjoinder is fatal on demurrer. Rex v. Young, 2 Anstr. 448; Rex v. Chapman, 3 Id. 811. Believing these cases to be irreconcilable, in principle, with the decisions which have been made in regard to nonjoinder of parties to ordinary contracts, we do not feel disposed to adopt the supposed distinction on which they are founded. The record before us shows only, that there was a joint recognizor, who is not a party to the *scire*

facias; but it does not show that he was living at the commencement of the suit. The circuit court, therefore, committed no error in rendering judgment in favor of the state. Judgment affirmed.

See, to the same effect as the principal case, *Wilcox v. Hawkins*, 10 N. C. 84, which also rules that a defect of parties may be cured by amendment, if leave to amend is moved for in apt time, in the lower court. But in *Grant v. Rogers*, 94 N. C. 755, it is held that such an amendment will be allowed in the supreme court, though not moved for in the lower court, in proper cases. See also *Mordecai's L. L.* 1152. See "Recognizances," *Century Dig.* § 40; *Decennial and Am. Dig.* Key No. Series § 12.

PARK v. BALLENTINE, 6 Blackford, 223. 1842.

Result of a Defect of Parties in a Court of Equity.

[A trustee filed a bill in equity for the sole purpose of obtaining relief for his cestui que trust, which cestui que trust was not joined as a party. The judge dismissed the bill on the final hearing because of the defect of parties. The trustee appealed. Reversed.]

DEWEY, J. . . . The dismissal of the bill is against established practice. It is true, the bill could not be maintained in the name of Park, who is shown to be a mere trustee for Dutton. The latter should have been a party. *Malin v. Malin*, 2 John. Ch. 238, and authorities there cited. Between the present parties, the cause is not in a situation to be heard upon its merits; but the bill should not have been dismissed. The cause should have stood over, that the proper parties might have been made. *Anon.* 2 Atk. 15; *Jones v. Jones*, 3 Atk. 111.

See next preceding case, as to effect of a defect of parties in actions at law. See "Equity," *Century Dig.* §§ 759, 786; *Decennial and Am. Dig.* Key No. Series §§ 362, 375.

LEWIS v. McNATT, 65 N. C. 63, 66. 1871.

Result of a Defect of Parties Under the Code Practice.

[Action of trespass vi et armis commenced in 1860, before the adoption of the Code practice, and tried in 1870, after the adoption of the Code practice. The action was brought by Lewis alone. The evidence showed that the injury complained of was to the joint property of Lewis and another. The defendant insisted that plaintiff could not recover because of a failure to join the other joint owner as a party plaintiff. The judge ruled that the plaintiff could recover his share of the damages incident to the injury to the joint property, and he so instructed the jury. Defendant excepted and appealed. Affirmed as to this ruling, but reversed on another ruling not germane to the subject under consideration.]

DICK, J. . . . The question of pleading raised on the trial by the defendant's counsel is attended with some difficulty on account of the change in our system of procedure. At common

law in actions in form *ex delicto*, which are not for the breach of a contract, if a party who ought to join be omitted, the objection can only be taken by a plea in abatement, or by way of apportionment of damages on the trial; and the defendant cannot, as in actions in form *ex contractu*, give in evidence the nonjoinder as a ground of nonsuit on the plea of the general issue. 1 Chit. Pl. 76.

Under the C. C. P., sec. 8, par. 1, all civil actions pending in the courts when the present constitution was approved by congress, and which were not founded on contract, are to be governed by the C. C. P., "as far as may be according to the state of the progress of the action, and having regard to its subject and not to its form." A different provision is made as to actions founded on contracts made previous to the C. C. P. *Merwin v. Ballard*, 65 N. C. 168. The C. C. P., sec. 62, provides that the parties who are united in interest must be joined as plaintiffs or defendants, etc. If a necessary party to an action be omitted, and the defect appears upon the face of the complaint, the nonjoinder must be taken advantage of by demurrer. C. C. P. sec. 95. If it does not appear upon the face of the complaint the objection may be taken by answer. C. C. P. 98. "If no such objection be taken, either by demurrer or answer, the defendant shall be deemed to have waived the same." C. C. P. sec. 99. It does not appear from the transcript at what term of the court the issues were joined in this case, and the defendant might have put in a plea in abatement at any time before pleading in bar of the action. If the issues were not joined when the case was transferred to the superior court, he would have been entitled to have objected to the nonjoinder of a necessary party by answer, as the defect does not appear in the pleadings. As the defendant went to trial without taking any such objection, the charge of his honor must be sustained.

A defect of parties—a failure to join those who should be joined—must be taken advantage of by demurrer if it appear on the face of the complaint, and by answer if it does not so appear; but the misjoinder of unnecessary parties is a mere matter of surplusage under the Code practice. *Tate v. Douglas*, 113 N. C. 190, 18 S. E. 202; *Pell's Rev.* at p. 218. See "Parties," *Century Dig.* §§ 123-125; *Decennial and Am. Dig.* Key No. Series § 80.

HAY v. M'COY, 6 Blackford, 69. 1841.

Corporations as Parties.

A count in a declaration in debt commenced as follows: Andrew P. Hay and others (naming them), being a body corporate and politic, known by the name of the board of trustees of the Clark county seminary, and being the regular successors in office of John C. Parker and others (naming them), were summoned to answer, etc. It then stated that the last named persons, Parker

and others, being the board of trustees, etc., by an agreement sealed with the seals of the trustees last mentioned, promised, etc., that neither they, nor the defendants, being their successors, had paid, etc. Held, that this count was insufficient: that the addition to the defendants' names of the words "being a body corporate, etc.," was a mere descriptio personarum: that the defendants must be considered, under this count, as being sued in their individual capacities, on a contract to which they were not parties, and by which they were not bound. Held, also, that if, as the plaintiff contended, the agreement sued on was binding on the board of trustees of the Clark county seminary as a corporation, *the suit should have been brought against the corporation by its corporate name.* . . .

See "Corporations," Century Dig. § 1954; Decennial and Am. Dig. Key No. Series § 505.

SHIRLEY v. HAGAR, 3 Blackford, 225, 227. 1833.

Infants as Parties Plaintiff or Defendant. Prochein Amy. Guardian ad Litem.

[Action on the case for slander, brought by Mary Ann Hagar, by John Hagar her father and next friend, against Shirley. Among a number of defenses—including a motion to quash, a demurrer and four pleas, all of which were overruled—the defendant objected to the character in which the plaintiff sued. This objection was also overruled and there was a verdict and judgment against Shirley who carried the case to the supreme court by writ of error. Reversed. There was no allegation in the declaration that Mary Ann Hagar was an infant, nor was there any allegation that John Hagar had been admitted by the court to act as her prochien amy.]

McKINNEY, J. . . . We will proceed to examine the objection made to the character in which the plaintiff sues. She sues by prochein amy, without any averment of infancy in the declaration, or of the admission of the prochein amy by leave of the court. This is assigned as error, and it is contended by the defendant in error, that the objection is not well taken, because the law will presume infancy, and therefore its averment is unnecessary.

At common law, an infant could neither sue nor defend, except by guardian. Lawes on Pl. in Assump., 432; Harg., note 1, to Co. Litt., 135, b. By the statutes of Westm. 1, 13 Edw. 1, ch. 49, and Westm. 2, 13 Edw. 1, ch. 15, he is authorized to sue by prochein amy. In all cases, however, it is error if an infant, though sued with others, does not defend by guardian. Harg., notes 1, 2, to Co. Litt., 119, 120. In either character, as plaintiff or defendant, prior to the statutes of Westminster, and subsequent thereto when defending, the guardian is by special appointment of the court. Ibid. The reason why an infant, irresponsible for costs, and without the maturity of judgment such as the law re-

quires to give validity to contracts, should sue by prochein amy, is thought obvious. It is to meet a liability for costs, to restrain from ruinous litigation, and to afford to the inexperience of legal minority, through the intervention of the court, a necessary protection. A prochein amy, therefore, sues by the permission of the court, *and the fact of such permission being given, should appear in the declaration, or it is error*; 2 Saund. 117 f. n. 1; and it is the duty of a court, if informed that a suit by prochein amy is not for the interest of the infant, to arrest the proceeding. This power, possessed by the court, is connected with its general superintending control over infants. 2 Saund. Pl. and Ev. 580; Gould's Pl. 249; Bac. Abr. Infancy, K. 2. The presumption of infancy is never indulged. As a ground of relief, it must be shown; and of defense, be either pleaded or given in evidence. It is said, he ought to appear to be an infant; for, if he sues at full age by guardian or prochein amy, it is error. 6 Com. Dig. Pl. 2, c. 1, p. 302; 2 Inst. 261. The right to sue is inseparably connected with the legal interest, and the fact that the legal interest in the action remains in the infant, though suing by prochein amy, is demonstrated by the exercise of the rights by courts, to dismiss the prochein amy for various causes, for misconduct in the management of the cause, if required as a witness, or from lapse of time, if the infant before the end of the suit attains full age. The right then to sue by prochein amy being dependent upon minority, and the admission of the prochein amy by the court, these facts should appear in the declaration, or it is error.

Being of opinion that the suit was improperly brought, the question occurs, in what manner should the objection have been taken? The defect appears on the declaration, and is the subject of demurrer. A demurrer to the declaration would have reached it, but as the demurrer to the declaration was withdrawn on being overruled, the objection was available on the issue at law to the pleas, as that issue assumed on the part of the plaintiff the sufficiency of the declaration. We are, therefore, of opinion that the judgment of the circuit court must be reversed.

See "Infants," Century Dig. § 278; Decennial and Am. Dig. Key No. Series § 92.

HOUGH v. CANBY, 8 Blackford, 301. 1846.
Equity Practice When Infants are Defendants.

[Canby filed a bill in equity against Hough and others who were infants. The relief sought was the enforcement of a vendor's lien. No subpoena was served on the infants, but the court appointed a guardian ad litem to defend on their behalf. The guardian ad litem appeared, but did not answer. No evidence was offered. In this state of the record the judge decreed a sale of the infants' lands to satisfy the alleged liens. Appeal by the infants. Reversed.]

DEWEY, J. . . . This decree is erroneous. Process should have been served upon the infant defendants in the same manner as if they had been adults. 1 Smith's Ch. Pr. 146. And to enable them to plead, answer, or demur, an assignment of a guardian was necessary. Ib. 255. It was irregular, according to the English practice, to assign a guardian for the infants before service of process upon themselves. But we do not mean to say that, under our practice, it is essential that the service of process should precede the appointment of a guardian: the record, however, must show both to have been done. Such not being the fact in the cause before us, it was erroneous to proceed to a decree. It was also erroneous to decree against infants without proof of the matters alleged in the bill. *Hough v. Doyle*, 8 Blackf. 300. . . . Decree reversed.

A decree will not be made against infants upon mere admissions in the pleadings. There must be proof in the same manner as if the bill had been denied. *Hough v. Doyle*, 8 Blackf. 300. The infant should be personally served with process. Pell's Rev. p. 171. See "Infants," Century Dig. §§ 195, 257; Decennial and Am. Dig. Key No. Series §§ 78, 89.

MORRIS v. GENTRY, 89 N. C. 248. 1883.

Practice in Appointment of Prochein Amy or Guardian ad Litem for Infant Parties. Common Law and Code Practice. How far Infants Bound by Fraudulent Judicial Proceedings.

[Ejectment to recover lands which plaintiffs inherited from their father, but which had been sold under a decree of a court of equity and purchased by one under whom the defendant claimed by mesne conveyances. The decree of sale was rendered in an ex parte petition for a sale for partition. The petition purported to be filed by the mother of the plaintiffs while they were infants—she apparently assuming to act as their next friend. While the plaintiffs were ostensibly parties to the proceedings, they knew nothing of it—neither did their mother. The land was worth \$2500, but was sold for \$469. The commissioner reported that the price bid was not a fair value, but, notwithstanding this report, the sale was confirmed and title ordered to be made to the purchaser. Title was made as directed. Thereafter the defendant acquired the title of the purchaser. The defendant bought at a bankrupt sale and had full knowledge of the above facts. Such was the substance of the complaint. Defendant demurred on the ground that it appeared in the complaint that the court had jurisdiction of both the subject-matter and the parties and, hence, the decree could not be set aside. The demurrer was overruled and an order entered permitting the plaintiffs to amend their complaint and the defendant to answer. Defendant appealed. Reversed. The petition under which the land was sold, was filed in the court of equity prior to the adoption of the Code practice; but the decree of sale and other subsequent proceedings were had in the superior court after the adoption of the Code practice.]

MERRIMON, J. It is an essential and fundamental principle of the law, that all properly constituted judicial proceedings must be upheld as regular, warranted by the facts and the law applicable to them, valid and effectual, until the contrary shall be shown

and established by some competent proceeding for that purpose. Hence, wherever it appears upon the face of the record in any action or other judicial proceeding, that the court had jurisdiction of the parties litigant and the subject-matter in litigation, the law presumes that the court got jurisdiction in a regular or proper way, and that its orders, decrees and judgments are valid and effectual, however irregular or fraudulent, until the irregularity and invalidity, because of fraud or other sufficient cause, shall be duly established, and such proceedings, orders, decrees and judgments shall be declared invalid by proper decree. To allow the records of courts of justice, their judgments and decrees, to be questioned and held to be inoperative in the same tribunal that made them, or in other tribunals, would be subversive of judicial authority and destructive of public and private justice. The law is too true to itself, and too thorough in its life and vigor, to allow of such practical absurdity; it requires that its courts shall be careful to see that their judgments settle and establish rights, and when once made must prevail everywhere. The courts making them will be slow to disturb them, and never, except for adequate cause shown in a direct proceeding for the purpose.

It is likewise well settled that courts will protect third persons who honestly do acts and acquire rights under their judgments, although such judgments may be afterwards reversed. All that such persons need be careful to see, is, that the court had jurisdiction of the parties and of the subject matter, and that the order or judgment, upon the faith of which such acts were done or rights acquired, authorized the same to be done or acquired. As, where land was sold by an order of court, it is only necessary that the purchaser should see that the court had jurisdiction of the parties and had authority to order the sale, and that the order did authorize it. This implies however, that the third person purchased honestly on his part, and without knowledge of fraud on the part of others in procuring or bringing about the sale. He will not be allowed to take advantage of his own fraudulent conduct or that of others, of which he had knowledge at the time of the purchase. *University v. Lassiter*, 83 N. C. 38; *Ivey v. McKinnon*, 84 N. C. 651; *Sutton v. Schonwald*, 86 N. C. 198; *Gilbert v. James*, 86 N. C. 244.

Now, the late court of equity and the superior court succeeding to its jurisdiction in Stokes county had authority upon the *ex parte* petition of the plaintiffs, while they were infants, suing by their mother as next friend, to order and make a valid sale of their land mentioned, for partition, and to pass the title thereto through its commissioner appointed for the purpose. The Code, sec. 1602. *Ex parte Dodd*, 62 N. C. 97; *Rowland v. Thompson*, 73 N. C. 504; *George v. High*, 85 N. C. 113; *Ivey v. McKinnon*; *Sutton v. Schonwald*, *supra*.

According to the allegations in the complaint, the record upon its face shows that an *ex parte* petition was filed by the plaintiffs.

then infants, suing by their mother as next friend, suggesting that the land in question ought to be sold, that an order of sale was made and confirmed by the court, the purchase money was paid, and by the like order title was made to the purchaser. Irregularities, important ones, in the proceeding to sell the land are alleged, but it was sufficient for the purchaser, (taking it that he purchased honestly and fairly and without the knowledge of fraud on the part of any one in procuring the sale to be made, and the contrary is not suggested or alleged) to see that the court had jurisdiction of the parties and of the subject-matter, and that the order authorized the sale to be made. All this appeared to him.

It is said, however, that the plaintiffs and their mother, represented as being their next friend, in fact, had no knowledge of the filing of the petition or of the sale of the land until recently, long after it was made, and that they never authorized or sanctioned the same. But the presumption of law is that they had knowledge and notice of the whole proceeding, and it must be taken that they had; that they by themselves, or by an attorney of the court, filed the petition with the practical knowledge and sanction of the court, and the whole was done at their instance, by the court, it having proper regard for the interests of the infants, and they must be bound by the decrees until, by proper action, the whole of the proceeding shall, because of material irregularities, be set aside; or, because of fraud on the part of some one in procuring the sale to be made, declared and decreed to be void; and even then, the sale to the purchaser will remain good and effectual, unless the plaintiffs can allege and prove that he fraudently procured or participated in the fraudulent procurement of the sale to be made, or had knowledge at the time of the sale of such fraud on the part of others, or such information as put him on inquiry.

It is not alleged that the purchaser, William H. Gentry, purchased otherwise than honestly, nor is there any suggestion in the complaint unfavorable to him, except that he bought the land at greatly less than its reasonable value; but it is alleged that his son, the defendant Sterling Gentry, purchased from the assignee in bankruptcy "with full knowledge of the manner in which his father became the purchaser." This allegation is vague and indefinite. So far as appears from the complaint the purchase by the father was bona fide. If the purchaser of the father was tainted with fraud and the son was cognizant of this, or participated in the fraud, then the plaintiffs ought to have so alleged. The allegation that the defendant Joyce had knowledge of "the nature of said Sterling Gentry's title" at the time he purchased, is so indefinite as that it has neither force nor point. The complaint is vague, uncertain and indefinite, and it is difficult to determine whether the action was brought to recover the possession of the land, treating the sale in equity as void, or whether the object is to impeach the decree therein for fraud. But be this as it may,

in the absence of a denial of what is alleged, we have a painful apprehension that a flagrant fraud was practiced by some person or persons upon the plaintiffs, while they were infants, and, in an important sense, in contemplation of law, under the care and protection of the court. As it now appears to us, to say the least, the court was not circumspect; it allowed itself to be imposed upon by designing and dishonest persons in a respect and about a matter wherein it ought to have given special and careful attention.

This is another sad illustration of the loose and careless practice that too generally prevails in the courts, of allowing guardians ad litem and next friends of infants to be appointed almost as of course, upon a suggestion, and frequently without that, who, however careless and faithless as to the trust reposed in them, are by implication recognized, and must in the nature of judicial proceedings be treated as recognized by the court. It is the duty of courts to have special regard for infants, their rights and interest, when they come within their cognizance. The law makes this so, for the good reason, they cannot adequately take care of themselves. It is a serious mistake to suppose that a next friend or a guardian ad litem should be appointed upon simple suggestion; this should be done upon proper application in writing, and due consideration by the court. The court should know who is appointed, and that such person is capable and trustworthy. The appointment of guardians ad litem and their duties are prescribed by statute. The Code, sec. 181. But while the statute (sec. 180) allows infants to sue by their next friends, the manner of the appointment of them and their duties are left as at common law. As to their appointment, Tidd in his work on Practice says, at page 100: "To constitute a *prochein amy* or guardian, the person intended, who is usually some near relation, should come with the infant before the judge at his chambers, or else a petition should be presented to the judge on behalf of the infant, stating the nature of the action, and, if for the defendant, that he is advised and believes he has a good defense thereto, and praying in respect of his infancy that the person intended may be assigned him as his *prochein amy*, or guardian, to prosecute or defend the action. This petition should be accompanied by an agreement signifying the assent of the intended *prochein amy*, or guardian, and an affidavit made by some third person that the petition and agreement were duly signed. On being applied to in either of these ways, the judge will grant his fiat, upon which a rule or order should be drawn up and filed with the clerk of the rules in the King's Bench, for the admission of the *prochein amy*, or guardian," etc. 2 Arch. Pr. 154, 2 Sell. Pr. 65, Appendix (Forms) 504; Story's Eq. Pl. sec. 57, 58, and note. It would have been better if such practice, or the substance of it, had prevailed in this state from the beginning, but a loose practice has been recognized and pursued by the courts, and we cannot now disturb rights that have been acquired under it. If the strict methods

in this respect of the English courts had prevailed, it could scarcely be possible that calamitous cases, like this seems to be, and many similar ones that have come before this court, and many that have not, could happen. This evil, in the future, may be easily and thoroughly corrected.

We think the court erred in overruling the demurrer. If the action was brought to recover possession of the land, the complaint states facts showing the title thereto in the defendants; if it may be treated as an action to impeach the decree directing a sale of the land for partition, there is no sufficient allegation that the defendants were in any way connected with or had knowledge of the procurement of the sale so as to affect the validity of their title. So the complaint, as it stands, "does not state facts sufficient to constitute a cause of action," and the demurrer ought to have been sustained. There is error. But the court, in overruling the demurrer, granted leave to the defendants to answer over, and to the plaintiffs to amend the complaint. . . . The case will be remanded with instructions to reverse so much of the judgment as overrules the demurrer, and to enter judgment sustaining the same, and dismissing the action, unless the plaintiffs avail themselves of the leave granted to amend the complaint, in which case the action will proceed according to law. It is so ordered. Reversed.

Persons having any interest, real or nominal, antagonistic to that of the infant, must not be selected to prosecute or defend on behalf of such infant. *George v. High*, 85 N. C. 113. A plaintiff, though he be but a mere nominal party with no real interest in the controversy, must not act as guardian ad litem for an infant defendant. *Ellis v. Massenburg*, 126 N. C. 129, 35 S. E. 240. The plaintiff's attorney must not advise or draw pleadings for the guardian ad litem of an infant defendant. *Moore v. Gidney*, 75 N. C. 34. For the present law of North Carolina governing the practice when infants are plaintiffs or defendants, see *Pell's Rev. secs. 405-407*, where all the important rulings are briefly but clearly stated. See also "Rules of Practice in the Superior Court," 140 N. C. 683, 53 S. E. xiv, Rules 15-18. The court in which the action or proceeding is pending appoints a next friend or guardian ad litem. *Mordcaï's L. L.* 400, n. 17. A justice of the peace may appoint a next friend for an infant to the end that he may prosecute an action on behalf of the infant in such justice's court. *Houser v. Bonsal*, 149 N. C. 51, 62 S. E. 776. See further, as to next friend and guardian ad litem, *Mordcaï's L. L.* 404-405, 89-90. For validity of the payment of a judgment to the next friend of an infant, see 140 N. C. 683, rule 15; 11 L. R. A. (N. S.) 913, and note; for right of the next friend and guardian ad litem to compromise, see 21 *Ib.* 338, and note. See "Infants," *Century Dig.* § 92; *Decennial and Am. Dig. Key No. Series* § 41.

WHITE v. MORRIS, 107 N. C. 92, 98, 99-101, 12 S. E. 80. 1890.

How to Proceed When There are Infant Defendants. Infant Appearing by Attorney.

[Mary White sued the defendants, who were infants, for the re-execution of a deed which, she alleged, had been made to her by the ancestor of such infants, but which had been lost before being registered. There

was a judgment according to the prayer of the complaint. The infants, having arrived at age, moved in the cause to set aside such judgment on the ground that it was irregular and void. Motion overruled, and defendants appealed. Affirmed.]

DAVIS, J. . . . In this case the defendants insist that the judgment was irregular and void, upon several grounds. The first is that there was no personal service on the infants. Formerly an infant was brought into court just as any other defendant was. If he had a general guardian, process was served upon the guardian; if there was no general guardian, the court acquired jurisdiction by service of process upon the infant, and appointed some suitable person—frequently some officer of the court—as guardian ad litem, who accepted service, and defended for him; but since the Code of Civil Procedure (section 217) the service upon a minor under the age of 14 years must be upon him personally, and also his father, mother, or guardian, or, if there be none in the state, then upon any person having the care and control of such minor, or with whom he shall reside, or in whose service he shall be employed. In the present case, process was not served upon the defendants personally, as was required, but upon their grandfather, with whom they lived. . . . In *Marshall v. Fisher*, 1 Jones, (N. C.) 111, it is said that a judgment against an infant appearing by attorney, though erroneous, “is of full force and effect until it be reversed,” and the objection, says Pearson, J., could only be taken advantage of by a writ of error. As writs of error are now abolished in civil actions, and appeals substituted therefor, (Code, § 544 et seq.,) it can now be only by an appeal. See, also, *Turner v. Douglass*, supra. The defendants rely upon *Stancill v. Gay*, 92 N. C. 464; *Larkins v. Bullard*, 88 N. C. 35; and *Perry v. Adams*, 98 N. C. 167, 3 S. E. Rep. 729. There is a very clear distinction between those cases and this. In them, there was no service of process at all on anybody, no guardian ad litem appointed to protect their rights, and no answer by any one of them; and the curative act of 1879, neither by its letter nor spirit, was intended to make the proceedings and judgments valid in such cases. In *Perry v. Adams*, the present chief justice said: “The object of the curative statute is to cure the judgment and proceeding, when such personal service was omitted, but it does not embrace cases where no service was made upon the infant, or any other person in his behalf, as the statute requires to be done.” In the case before us, there was service upon the grandfather of the infants, with whom they lived, and an appearance and answer for them.

The defendants say, secondly, that there was no evidence before the court to support the finding of fact that “W. L. Reid filed an answer as guardian ad litem for the defendants, or of his appointment as guardian ad litem.” The recitals and facts appearing in the record constitute evidence in themselves to support the finding, and this objection cannot be sustained. The law is

careful in protecting the rights of infants, and when they are brought within the jurisdiction of the courts, by proper or sufficient process, a guardian ad litem should be appointed for them, who shall, "if the cause in which he is appointed be a civil action, file his answer to the complaint within the time required for other defendants," and the requirements of the Code, § 181; and the present chief justice said, in *Ward v. Lowndes*, 96 N. C. 378, 2 S. E. Rep. 591: "This statute should be strictly observed, but mere irregularities in observing its provisions, not affecting the substance of its purpose, do not necessarily vitiate the action or special proceeding, or proceedings in them." In *Williamson v. Hartman*, 92 N. C. 239, it is said: "Generally a judgment will be set aside only when the irregularity has not been waived or cured, and has been or may be such as has worked, or may yet work, serious injury or prejudice to the party complaining interested in it." While, as has been said, the courts will always be careful of the rights of infants, it will not set aside irregular judgments against them as a matter of course; and, before doing so, it ought to appear from the record or otherwise that the infant has suffered some substantial wrong or injury. Of course it may be impeached for fraud, and will also be set aside if void. . . . Judgment affirmed.

See "Infants," Century Dig. §§ 257, 304; Decennial and Am. Dig. Key No. Series §§ 89, 105.

ROSEMAN v. ROSEMAN, 127 N. C. 494, 498, 37 S. E. 518. 1900.

Service of Summons on Infants.

CLARK, J. . . . The last objection is as to service of summons upon the children of Mrs. Newsom under 14 years of age. Summons was served by delivering a copy to each of them personally, as prescribed by Code, § 217(2). A guardian ad litem was regularly appointed. Summons was served upon him, and he filed answer. The statutory requirement has been sufficiently complied with. The objection that a copy of the summons was not also left with the "father, mother, or guardian" is a refinement, and cannot invalidate the judgment when a guardian ad litem has been duly appointed, and has filed answer, and there is no suggestion of fraud; most especially when (as in this instance) the mother is a party to the action, has filed her answer consenting to the only relief asked, the appointment of a substituted trustee, and has filed a consent judgment. Affirmed.

A copy of the summons must be served upon the infant and also upon his father, mother or guardian, etc., only when the infant is under the age of fourteen. Rev. secs. 439, 440 (2), and Pell's notes thereto. An infant cannot lawfully accept service of process; but if he does accept service and a guardian ad litem is thereafter appointed who properly represents him, such defect in the service of the process is cured. Pell's Rev. p. 171. See "Infants," Century Dig. §§ 255-264; Decennial and Am. Dig. Key No. Series § 89.

DEAL v. SEXTON, 141 N. C. 157, 56 S. E. 691. 1907.

Infant in Ventre sa Mere as a Party.

[Ejectment by a plaintiff who was in ventre sa mere at the time the locus in quo was sold by order of court for partition. The defendant's title was based upon such sale. The plaintiff, being in ventre sa mere at the time of the commencement of the proceedings for partition and at the time of the sale, was in no manner made a party to such proceedings. The question presented is: Are infants in ventre sa mere estopped by judicial sales of realty in which they have a vested interest, they not being parties to such proceedings?]

Brown, J. . . . The question presented upon this appeal is important and perplexing, because of the fact that the defendant is a purchaser for value, and because of the great difficulty in purchasers at such judicial sales protecting themselves, having no knowledge of the existence of an unborn child in its mother's womb. If we hold, as we must, that the inheritance vested immediately in the plaintiff, while en ventre sa mere, upon the death of the father, the conclusion must follow that such inheritance ought not to be divested and the child's estate destroyed by judicial proceedings to which it was in no form or manner a party, and for which not even a guardian ad litem was appointed. It may be that our civil procedure is defective in not providing for such contingencies, but that is no reason why the vested estate of the unborn child in esse should be taken from it. The general rule in this country and the acknowledged rule of the English law is that posthumous children inherit in all cases in like manner as if they were born in the lifetime of the intestate and had survived him, and for all the beneficial purposes of heirship a child en ventre sa mere is considered absolutely born. This has been the recognized law of this state since *Hill v. Moore*, 5 N. C. 233, decided in 1809, down to *Campbell v. Everhart*, 139 N. C. 503, 52 S. E. 201, decided in 1905. It is also recognized generally by the text-writers and judicial decisions in other states. Kent's Com. (13th Ed.) vol. 4, p. 413; Washburn on Real Property (5th Ed.) vol. 3, page 16; Tiedeman on Real Property, § 673; 14 Cyc. 39, where the decisions are collected. The statute law of this state treats the unborn child in its mother's womb with the same consideration as if born. By the seventh canon of descent (Revisal of 1905, § 1556), a child born with 10 lunar months after the death of the ancestor inherits equally with the other children. By section 1582, an infant unborn, but in esse, is rendered capable of taking by deed or other writing any estate whatever in the same manner as if he were born. *Campbell v. Everhart*, supra. From most remote times the common law of England regarded such child as capable of inheriting direct from the ancestor as much so as if born. *Doe v. Lancashire*, 5 T. R. 49; *Thelluson v. Woodford*, 4 Vesey, Jun., 227; *Harper v. Archer*, 4 Smedes & M. (Miss.) 99, 43 Am. Dec. 474, where all the cases are collected. The old writ

of *de ventre inspiciendo* was devised by the courts for the purpose of examining the widow, and was granted in a case where a widow, whose husband had lands in fee, married again soon after his death and declares herself pregnant by her first husband, and under that pretext withholds the land from the next heir. Such writ commanded the sheriff or sergeant to summon a jury of 12 men and as many women, by whom the female is to be examined "*tractari per ubera et ventrem.*" 1 Black. Com. 456; Viner's Ab. vol. 21, p. 546. Of course, no such unseemly proceeding would be tolerated in this age, but the General Assembly could easily protect the unborn child as well as the innocent purchaser by prohibiting the sale of land for partition until 12 months after the intestate's death.

The question as to the status of the purchaser was considered by the supreme court of Kentucky, in the case of *Massie v. Hiatt's Adm'r*, 82 Ky. 314, in which it is held: (1) A child born within 10 months of the death of the intestate is entitled to a share in his estate, as if born and in being at the time of intestate's death. (2) The court had jurisdiction to sell the land on the petition of the guardian of the two other children; but the sale affected only their rights. The right of the unborn child could not in any wise be affected. (3) Having an interest in the land, she could not be deprived of it by any proceeding to which she was not a party, and may recover such interest from a remote vendee of the purchaser at the judicial sale. The supreme court of Illinois reaches the same conclusion, and says that a person must have an opportunity of being heard before a court can deprive him of his rights, and that an unborn child, not having been made a party, can recover from those claiming his title, as his rights are not cut off by the decree. *Botsford v. O'Conner*, 57 Ill. 72. The case of *Giles v. Solomon*, in New York, 10 Abb. Prac. (N. S.) 97, note, is very much in point. In that case a bill to foreclose a mortgage executed by the deceased father was filed in January, 1841. A daughter was born to his widow in April, 1841, two days after foreclosure decree was entered. The daughter, not being a party to the foreclosure proceedings, brought her action in 1866 to redeem. The court held she was not barred by the decree of 1841, and permitted her to redeem her one-seventh by paying one-seventh of the mortgage and interest, and charged the purchaser with back rents. In South Carolina at one time the courts declined to proceed with a suit to partition the property of the ancestor until 12 months after his death, so as to avoid the possibility of entering judgment which might conflict with the rights of an unborn child. As there was no statute on the subject, the courts of South Carolina discontinued this practice for some reason, and then held that a child *en ventre sa mere* must be regarded as a person in being who could not be bound by a judgment in partition to which he was not a party. *Pearson v. Carlton*, 18 S. C. 47.

It is true that Judge Freeman, in his elaborate note to *Carter v.*

White, 101 Am. St. Rep. 869, 870, repudiates this doctrine, and says: "It is believed, however, that the rule cannot prevail, and that such a child must be regarded as not in being for the purpose of the suit, and as being represented by the parties before the court," etc. The authority cited by the learned annotator is the opinion of the supreme court of the United States in *Knotts v. Stearns*, 91 U. S. 638, 23 L. Ed. 252, which seems to sustain him. The fallacy in the position seems to us to be in supposing that the living children can represent the unborn child. It is not a case of class representation. The interests are conflicting, and not mutual. It is to the interest of the living heirs to make the division as short as possible, and therefore to keep out the heir who has not yet made his appearance. The cases of *Ex parte Dodd*, 62 N. C. 97, and many similar cases, to *Springs v. Scott*, 132 N. C. 548, 44 S. E. 116, have no application here, as the object of a partition proceeding is to dis sever the interests of the parties, and there is no class representation about it. The tenant in common who is not made a party personally, or by guardian ad litem, or in some legal way, is not bound by it. In the forcible language of counsel for plaintiff in their brief: "If the court could take what the law said was hers and sell and convey to another without her even having knowledge of it, or representation, our boasted 'process of law' doctrine is iridescent—a constitutional hallucination." Affirmed.

See further, on the subject of the principal case, 16 Am. & Eng. Enc. L. 260; 31 Am. Rep. 29; 8 Rose's Notes, 744, and 1 Supplement to Rose's Notes, 1147. See "Judgment," Century Dig. § 1213; Decennial and Am. Dig. Key No. Series § 690.

GREGORY v. PAUL, 15 Mass. 31. 1818.

Married Women as Parties Plaintiff and Defendant.

[Deborah Gregory sued Paul, as executor of Charles Warburton, to recover a legacy given to her by the will of Warburton. The defendant pleaded in abatement the coverture of the plaintiff and that her husband was living and resided in Great Britain. The plaintiff replied that she had been deserted by her husband before this action was brought; that she had supported herself as a single woman for five years preceding the action; and that her husband was an alien who never had been within the United States. To this replication the defendant demurred, and the plaintiff joined in the demurrer. Demurrer overruled.]

PUTNAM, J. It appearing from the pleadings that the plaintiff's husband was living at the commencement of this suit, the writ must be abated, unless the reasons contained in the replication are sufficient to entitle the plaintiff to sue as feme sole; for the general rule of law is very clear, that the wife cannot sue alone, but must join with her husband; and that a gift or legacy to the wife, and even the rewards of her personal labor, during the coverture, vest in the husband, and he may release them. In

deed, the husband and wife are considered as one. Her will is merged in his; and the power which she might have had, as a feme sole, to make contracts, is suspended. For these disabilities she is liberally recompensed by the obligations which the marriage imposes upon the husband to provide for her support during the coverture, and by a claim for dower after its dissolution. She has also many exemptions from civil and criminal process, to which he alone is liable, although both may have participated in the benefit of the contract or commission of the crime, during the continuance of the matrimonial connection.

But the rule was anciently relaxed, from necessity, in cases where the reasons upon which it was formed ceased to exist. Thus, where the husband, Sir Thomas Belknap, was exiled, his wife was permitted to sue in her own name. And the same reason applying where the husband had abjured the realm, the wife, in that case, was allowed to sue, as a widow, for her dower. In such case, also, she has been permitted to alien her land without her husband. And she is, in such cases, exempted from the disabilities of coverture. She may maintain trespass; she may sue for her jointure; and she may be sued, also, as a feme sole. *Dubois v. Hale*, 2 Vern. 614. She may also make her will; and, as the court well observed, she might in all things act as if her husband were dead; and that the necessity of the case required that she should have such a power. The wife of an alien enemy has also been held liable to suits, as the husband was not amenable to the process of the court. *Derry v. Duchess of Mazarine*, 1 Ld. Raym. 147. Other cases have been considered as within the exceptions to the general rule; as where husband and wife live separately by agreement, he allowing her a separate maintenance; Lord Mansfield considering that, in such cases, the wife was liable, principally on account of the separate allowance for her support. But this class of cases has been overruled, in the year 1800, in the case of *Marshall v. Rutton*, 8 D. & E. 545; Lord Kenyon, who delivered the opinion of the judges, observing that there is no authority in the books, "that a woman may be sued as a feme sole, while the relation of the marriage subsists, and she and her husband are living in this kingdom." This last case was twice argued before all the judges, excepting two; and all who heard agreed to the opinion, as delivered by Lord Kenyon. It may also be observed, that this opinion was in conformity to that of the justices of the Common Pleas in the year 1778. *Lean v. Schutz*, 2 Wm. B. 1195.

But whatever difference may have existed as to the legal effect of a voluntary separation and maintenance, it has been uniformly considered that banishment or abjuration was a civil death of the husband. And the banishment of the husband, even for a limited time, operates a removal of the disabilities of the coverture, so far as to enable the wife to sue and be sued as a feme sole, although the time of banishment had expired when the action was brought.

Newsome v. Boyer, 3 P. W. 37. Thus, where the husband was attainted of felony and transported, but was afterwards pardoned, and, after the pardon, a share of an estate descended to the wife, it was decreed to her, it not appearing that the husband had returned after the pardon—yet there was no lawful cause to prevent his return. And the facts and circumstances which should be considered as proof of having abjured the realm, have been liberally regarded. Thus, where the husband resided abroad, leaving his wife to trade and gain credit as a *feme sole*, this has been considered as sufficient to entitle her to obtain credit, and to render her liable to be sued, as a *feme sole*. *De Gaillon v. L'Aigle*, 1 B. & P. 357. This case was much like that at bar; for it did not appear that the husband was ever in England, or intended to go thither. He could not complain if his wife should be taken and imprisoned for debt, for he had renounced her society. Upon the same reasoning, the case of *Walford v. The Duchess de Pienne*, 2 Esp. 554, was decided. The duke was a foreigner, who left England in 1793, with an intention of returning soon. The suit was commenced in 1797; the court held that his absence, thus continued, should be considered as a desertion of the wife, and as sufficient to enable her to contract on her own account. *Kay v. Duchess de Pienne*, 3 Camp. 123. And the law is the same, when applied to her situation as plaintiff. In a late case, where the term for which the husband was transported had expired, the wife was permitted to sue as if unmarried; the defendant not proving that her husband had returned. *Carroll v. Blencow*, 4 Esp. 27. Miserable, indeed, would be the situation of those unfortunate women whose husbands have renounced their society and country, if the disabilities of coverture should be applied to them during the continuance of such desertion. If that were the case, they could obtain no credit on account of their husbands, for no process could reach him, and they could not recover for a trespass upon their persons or their property, or for the labor of their hands. They would be left the wretched dependents upon charity, or driven to the commission of crimes, to obtain a precarious support. Nor does the late decision, cited by the counsel for the defendant in this action, 11 East, 303, militate with the principles I have stated. The wife, in that case, was not permitted to sue as a *feme sole*, although the husband had gone beyond sea without making any provision for her support. But it was admitted by the demurrer, that the husband was born within the realm, was then a subject, had not been banished, and had not abjured. His absence, under such circumstances, might be considered as temporary, and of course, as not varying the rights of the husband or the wife.

The case at bar comes within the spirit of the rule of the common law, founded in reason and necessity, in cases of exile and abjuration. The plaintiff has been domiciled here many years as a *feme sole*. Her husband is an alien, and never was, and is not expected ever to be, in this country. He abandoned his wife, and

for a great number of years made no provision for her support in his own country. He has not, it is true, abjured his country; but he has compelled his wife to abjure it. This should not make the case better or worse for her. If the husband had been a native citizen, and had deserted his wife, and become a subject of a foreign state, the law would be clear for her, upon the adjudged cases. We are satisfied that the plaintiff may acquire property, and be permitted to sue, and is liable to be sued, as a feme sole; and that her release would be a valid discharge for the judgment she may recover. The replication is adjudged good, and a respondeat ouster is awarded.

That a married woman, whose husband is an alien who never was in the United States, stands upon the footing of a feme sole for purposes of bringing and defending actions, etc., see *Levi v. Marsha*, 122 N. C. 565, 29 S. E. 832, which approves the principal case. See "Husband and Wife," Century Dig. §§ 738-743; Decennial and Am. Dig. Key No. Series § 203.

SACKETT v. WILSON, 2 Blackford, 85, 86. 1827.

Marriage of a Feme Sole Party Pendente Lite.

[Sackett sued Wilson, as executrix. The defendant was a feme sole when the action was commenced, but she married while the action was pending. The plaintiff suggested the marriage and moved that the defendant's husband be made a party, which motion was overruled. The judge dismissed the plaintiff's action, and the plaintiff appealed. Reversed.]

BLACKFORD, J. . . . The court correctly overruled the motion to make the husband a party; that could only be done by scire facias. But the plaintiff was not obliged to proceed against the husband. Upon the failure of his motion to make the husband a party, he offered to proceed in the cause against the defendant alone. This we conceive he had a right to do. The marriage of the feme defendant did not in any respect affect her liability. At the commencement of the action, she was a feme sole; and she could not by taking a husband, abate the suit, or prevent its progressing against her alone. Chit. Pl. 45; Hamm. on Part. 227 (2). The circuit court, therefore committed an error in dismissing the suit. Judgment reversed.

The ruling of the principal case is given in 2 Bish. on the Law of Mar. Wom., sec. 319, where several authorities to the like effect are cited. See "Abatement and Revival," Century Dig. §§ 182-190; Decennial and Am. Dig. Key No. Series § 34.

WARD v. WARD, 17 N. C. 553. 1824.

Married Women as Parties in Equity.

[Mary Ward, being entitled to a separate estate under a marriage settlement, filed a bill against her husband, Seth Ward, and others, for the removal of the trustee in the deed of settlement, for an account, and for the securing of the trust fund. Demurrer, on the ground that the plain-

tiff being a feme covert she could not sue alone. Demurrer overruled, and defendants appealed. Reversed.]

DANIEL, J. A feme covert having a separate estate may, in a court of equity, be sued as a feme sole, and be proceeded against without her husband; for in respect of her separate estate she is looked upon as a feme sole. In *Dubois v. Hale*, 2 Ver. 614, Mr. Raithby, the annotator, has collected and digested all the authorities on this question. In a court of equity, baron and feme are considered as two distinct persons and therefore a wife, by her *prochein amy*, may sue her own husband. The question to be settled on this demurrer is, can she sue alone, in *forma pauperis*. The courts of equity, as well as the courts of law, permit persons to sue in *forma pauperis*, when proper affidavits are made. 2 Mad. Ch. 256. But I can find no case where a wife has been permitted to sue her husband in that character. I cannot find any case, where the wife has been permitted to sue alone in a court of equity. Where the husband is made a party defendant, the invariable practice is, for the feme covert to sue by her *prochein amy*. The rule is established, I suspect, not only to secure costs, but to have a responsible person who would be liable if the process of the court should be abused, and also that a proper and fit adviser might interpose to prevent domestic feuds, and at the same time protect the feme from the frauds and power of the husband. 3 P. Wms. 39. The plaintiff asks leave to amend her bill by adding a *prochein amy*. This is an appeal under the late act of assembly, from an interlocutory decree. This court has no power to make any order or decree in the cause, except on the point appealed from. We are of opinion that the court below erred in overruling the demurrer: it should have been sustained. Decree overruled.

"In no case need she prosecute or defend by a guardian or next friend." Revisal, sec. 408 (2). See "Husband and Wife," Century Dig. § 744; Decennial and Am. Dig. Key No. Series § 203.

MANNING v. MANNING, 79 N. C. 293, 297, 28 Am. Rep. 334. 1878.

Married Women as Plaintiffs Under the Code Practice.

[Caroline Manning sued her husband to recover her real estate from him and for damages caused by his appropriation of the rents and profits of her lands. Defendant demurred on the ground that his wife could not sue him. Demurrer overruled, and appeal by defendant. Affirmed on this point. Only so much of the opinion as discusses the right of the feme plaintiff to sue, is here inserted.]

BYNUM, J. . . . It seems now to be generally settled, after great confusion in the decisions growing out of the conflicting statutes of the several states, that a married woman is invested with the *legal title* to her property, and may maintain in her own name any appropriate action to preserve and secure it to her

own use. *Miller v. Bannister*, 109 Mass. 289; 10 Kan. 56; 19 Iowa, 236; 2 Bish. L. M. W. secs. 130, 131, where the authorities on both sides of the question are cited. In this state, by statute, the wife may sue alone in two cases,—first, where the action concerns her separate property, and second, where the action is between herself and her husband; in all other cases where she is a party her husband must be joined with her. C. C. P. sec. 56. No difficulty is therefore presented as to the parties to the action. The demurrer admits the facts set forth in the complaint and the single question is—do they present a cause of action? The relief demanded is: First, the possession of the land, and second, damages for withholding the rents and profits. We think the plaintiff is entitled to both—to be let into possession, and to damages against the husband for appropriating to his own use, against her consent, the rents and profits.

The principal case is approved in *Perkins v. Brinkley*, 133 N. C. at p. 159, 45 S. E. 541. See "Husband and Wife," *Century Dig.* § 738; *Decennial and Am. Dig. Key No. Series* § 203.

VICK v. POPE, 81 N. C. 22, 25. 1879.

Married Women as Defendants Under the Code Practice.

[Plaintiff sued William Pope and his wife on a note executed by them jointly, during the coverture, for the debt of the husband—which note contained no clause charging it upon the wife's separate estate. Both defendants were served with the summons. No defense being interposed, judgment was rendered against both defendants and an execution issued. The feme defendant then moved to set aside the judgment. The above facts were found by the judge upon the hearing of the motion. The judgment was vacated and plaintiff appealed. Reversed. After disposing of the contention that the feme defendant was entitled to relief on the ground of mistake and excusable negligence, the opinion proceeds:]

SMITH, C. J. . . . The second point made is that the proceeding in the action is irregular, and the judgment erroneous, and as such liable to be set aside. The new system of practice requires that "when a married woman is a party, her husband must be joined with her," except that, first, "when the action concerns her separate property she may sue alone," and secondly, "when the action is between herself and her husband, she may sue alone, and in no case need she prosecute or defend by a guardian or next friend." C. C. P. sec. 56.

The summons must be served on the husband, as well as on the wife, when the action is intended to subject her or her separate estate to liability; and he is allowed on motion, and with her consent, which we must assume to have been given to warrant the action of the court, and because no suggestion to the contrary appears in the affidavit, "to defend the same in her name and behalf." *Bat. Rev.* ch. 69, sec. 15.

It is manifest that to her husband's management and protection are entrusted the interests of the wife in an adversary suit, and in the absence of collusion or fraud on his part with the plaintiff, the judgment must be conclusive as to antecedent matters, and as effectual as in other cases. More especially must this be so, since the law dispenses with a guardian or prochein any, and now leaves to them alone to set up and establish any defense that either may have against the plaintiff's demand. If it were otherwise, how could a valid judgment ever be obtained against a married woman, and how could her liability be tested? If she is disabled from resisting a false claim, how can she prosecute an action for her own benefit, when nothing definite is determined by the result? It is no sufficient answer to say that the defendant's execution of the note with her husband did not bind her. The judgment conclusively establishes the obligation, and such facts must be assumed to exist as warranted its rendition, inasmuch as neither coverture nor any other defense was set up in opposition to defeat it. As then a married woman may sue and with her husband be sued on contracts, they and each of them must at the proper time resist the recovery as other defendants, and their failure to do so must be attended with the same consequences. The duty of making defense for both or for either now devolves upon the husband alone, and he must employ counsel to make such defense effectual and in proper form.

3. An appearance by attorney for both the husband and wife is legal and proper, and, therefore, says Taylor, C. J., "if an action be brought against a husband and wife, if the husband appear by attorney, he shall enter an appearance for both;" and he adds, that this may be done when the wife is under age, "because the husband may by law make an attorney and appear both for himself and wife." *Frazier v. Felton*, 8 N. C. 231. "Married women," says Ruffin, J., in a case where relief was sought in the court of equity, "are barred by judgments at law as much as other persons with the single exception of judgments allowed by the fraud of the husband in combination with another;" and referring to the allegation of its injustice and wrong, he adds, "That was a thing that might have been shown on the trial at law, and, therefore, cannot itself be heard now. She must charge and prove that she was prevented from a fair trial at law by collusion between her adversary and her husband, preceding or at the trial." *Green v. Branton*, 16 N. C. 504.

The present application has in it no such meritorious element as would have entitled the feme defendant to relief in equity, and it does not call for nor authorize the interposition of this court, in the manner proposed. It is true an irregular judgment, not taken according to the course of the court, may be set aside and reformed at any time as has been often held. *Keaton v. Banks*, 32 N. C. 381; *Monroe v. Whitted*, 79 N. C. 508, and numerous other cases. While the judgment sought to be set

aside is neither erroneous nor irregular, if it were irregular, the motion should have been made in a reasonable time, and not after its transfer to an innocent holder for full value with nothing upon its face nor in the record to indicate any infirmity. *Winslow v. Anderson*, 20 N. C. 1. We think, therefore, the ruling of the court was not warranted by any facts contained in the affidavit, and the judgment ought not to have been disturbed for any of the causes assigned. **Reversed.**

To what extent the principal case is shaken by subsequent decisions, see *McLeod v. Williams*, 122 N. C. 451, 30 S. E. 129, and *Roseman v. Roseman*, 127 N. C. 494, 37 S. E. 518; *McAfee v. Gregg*, 140 N. C. 448, 53 S. E. 304. For the statute law of North Carolina regulating the practice when a feme covert is a party, plaintiff or defendant, and the interpretation of such statutes, see *Pell's Revisal*, sec. 408, and notes. See "Husband and Wife," *Century Dig.* §§ 836, 856; *Decennial and Am. Dig.* Key No. Series §§ 230, 239.

DORSHEIMER v. ROORBACK, 18 N. J. Eq. 438. 1867.

Lunatics as Parties.

[“This was a motion on the part of the defendant to order the bill to be taken from the files, on the ground that the complainant was an idiot, and the bill was filed in her name by one Couse, as her next friend, he not having been appointed her guardian upon inquisition found, or been authorized by this court in this case to file the bill as her next friend.”]

THE CHANCELLOR. The motion is made by the defendant, and not on part of the idiot, or any one in her behalf. But in this case, where it is alleged in the bill that complainant is an idiot a nativitate, and unable to manage her affairs, and sues by a person calling himself her next friend, without any appointment, if the proceeding is not according to law, and not binding on the idiot, the defendant must make this motion to protect himself from being obliged to defend a suit brought without authority.

Idiots and lunatics may sue at law by next friend, to be appointed by the court; but in equity, must sue by the committee or guardian of their estates duly appointed. When the idiocy or lunacy is not partial, and in all cases, when it has been found on an inquisition, a court of equity will not allow a suit to be brought by an idiot or lunatic *in his own name, or that of a next friend*, nominated by himself, or appointed by the court; his guardian or committee must join in the suit. When a person is only *partially incapable*, as one merely deaf and dumb, the court will appoint a next friend to be joined with him in the suit, and to conduct it for him.

The authorities all agree that idiots and lunatics must *sue in equity by their committees or guardians*. In this state, the persons to whom the estates of idiots and lunatics are committed upon inquisition found, are styled their *guardians*; in many of

the other states, and in England, they are called their *committees*. Shelford on Lunatics, 415, says: "Idiots and lunatics must sue in courts of equity by their committees." In Story's Eq. Pl. sec. 64; 1 Dan. Ch. Pr. (3rd Ed.) 79; Stock on Non Compotes Mentis, 33; Mitford, Eq. Pl. 29, and 2 Barb. Ch. Pr. 224, the same rule is laid down; and it is further stated by some of these authorities, that a suit ought not to be brought, even by the committee, without the direction of the court, upon an inquiry made, whether it is for the benefit of the idiot or lunatic. I find no case or authority in which it is held that they may sue by a *next friend*, either a volunteer or appointed for the purpose. The only semblance of authority found, is the passage in Shelford, 416, and copied in 1 Dan. Ch. Pr. 81: "If a person exhibiting a bill, appear upon the face of it to be either an idiot or a lunatic, and no next friend or committee is named in the bill, the defendant may demur." Daniell cites Fuller v. Lance, 1 Ch. Cas. 19, which has nothing in it on this point. Shelford cites Mitford on Pl. 153, which says: "If an infant or a married woman, an idiot or a lunatic, appear to be such on the face of the bill, and no next friend or committee is named, the defendant may demur." Lord Redesdale evidently intends to refer singula singulis, and does not mean to imply that a next friend is proper for an idiot or lunatic, any more than that a committee is necessary for an infant or feme covert. This passage has been adopted by the other writers, without noticing that the words "next friend" were not applicable to the subject of which they were then treating—idiots and lunatics.

The rule is a wise one. It should not be permitted that any volunteer should, by styling himself the next friend of an idiot, bring a suit for him, and lose or jeopard his rights by an action brought inopportunately, and it may be, prosecuted without skill or honesty. The idiot would have no security for the amount recovered by such next friend, and the defendant could not pay him, or settle with him, safely. The motion to take the bill from the files must be granted.

"We think it well settled that *where there has been no inquisition* the lunatic may sue by *next friend*. The jurisdiction is expressly recognized and upheld by English chancery courts. See Beall v. Smith, L. R. 9, ch. 85, 91; Jones v. Lloyd, L. R. 18, Eq. 265, 274, 275. In the latter case Jessel, M. R. said: 'Can a suit be instituted by the lunatic, not found so by inquisition, by his next friend? I have no doubt it can. There is authority upon the subject, and it seems to me so distinct that I have no occasion really to refer to the reasons, for I think the cases of Light v. Light, 25 Beav. 248, and Beall v. Smith, L. R. 9, ch. 85, are such authorities; but, independently of the unreported case of Fisher v. Melles, where I know the point was discussed, and, independently of authority, let us look at the reason of the thing. If this were not the law, anybody might, at his will and pleasure, commit waste on a lunatic's property, or do damage or serious injury and annoyance to him or his property without there being any remedy whatever.' To the same effect is Busw. Insan. sec. 120, where it is said that 'when a person is in fact, insane, *but has not been so adjudged* by a competent tribunal, or placed in charge of a committee or guardian, the courts, whether of

law or equity, have jurisdiction to entertain suits *brought by one as the next friend* of the insane person.' These authorities are decisive against the defendant upon the question of jurisdiction." *Smith v. Smith*, 106 N. C. at p. 503, 11 S. E. 188.

"First a motion is made by defendants to dismiss the bill, because it is brought in the name of 'Daniel Shaw, guardian of Penelope Green, etc.,' when it should have been brought in the name of the lunatic, by Shaw, *as her committee*. Actions at law, in behalf of lunatics, can be brought in no other name than theirs; *they must not be brought in the name of the committee*. Stock on Non Compos Mentis, 33; Cocks v. Darson, Hob. 215; Nay, 27; Pop. 141. And they appear by guardian or attorney, according as they are within age or not. *Ibid.* But, in equity, this incapacity to sue or defend is more considerable. In this court, after an inquisition has taken place, and a committee has been appointed, the joinder of the name of the lunatic, though usual, is merely a formality. Stock, 33; Wyatt's Pr. Reg. 272; Ridler v. Ridler, 1 Eq. Cas. Ab. 279; Ortleay v. Messere, 7 John. Ch. 139; Calvert on Parties, 303. In England, the practice is to bring the bill in the name of the committee, as is done in the present case. Either way will be good. The motion is therefore overruled." *Shaw v. Burney*, 36 N. C. at p. 150. The matter of appearance by parties non compos mentis—whether plaintiff or defendant—is now regulated by statute in North Carolina. See Pell's Revisal, secs. 405, 406, and notes. For actions by or on behalf of lunatics, sec. 2 L. R. A. (N. S.) 961, and note. See "Insane Persons," Century Dig. §§ 162-165; Decennial and Am. Dig. Key No. Series §§ 92-94.

STUARD v. PORTER, 79 Ohio State, 1. 85 N. E. 1062. 1908.

Lunatics as Parties. Service of Summons on Insane Defendants. Guardian as a Party. Venue.

[Wood Stuard killed Horace G. Porter and, being acquitted of a charge of murder on the plea of insanity, was sued in the court of common pleas, by the administrator of Porter, for damages "for the wrongful death of plaintiff's decedent." The action was brought against Wood Stuard and his duly appointed guardian Dal. P. Stuard. Dal. P. Stuard waived service of the summons and entered a general appearance. The summons was served on Wood Stuard and on the superintendent of the State Hospital for the Insane, in whose custody Wood Stuard then was. The service was by delivery of a copy to each of them. The sheriff made the service. Dal. P. Stuard demurred on the ground that there was a misjoinder of parties because both the insane person and his guardian were made defendants. Thereupon the plaintiff, Porter, dismissed the action, entering a nol. pros., as to the guardian. Thereafter the guardian was permitted to withdraw his demurrer. He thereupon moved to quash the service of the summons which had been made on the insane defendant. Motion sustained. Thereupon an alias summons was issued and served just as the original had been served—except that the original was issued to and served by the sheriff of the county in which the *State Hospital was located*, and the alias was issued to and served by the sheriff of the county in which the *insane defendant resided prior to his confinement in the State Hospital*. This service of the alias was also quashed on motion of the guardian of Wood Stuard, and judgment rendered against Porter dismissing his action. Upon a petition in error the circuit court reversed their judgment and ordered the action to proceed. The Stuards then carried the case to the supreme court by writ of error. The judgment of the circuit court is affirmed.]

DAVIS, J. . . . The question to be determined is whether there was a legal service of summons upon the insane defendant.

Wood Stuard, or if not, whether the court had obtained jurisdiction of his person through the guardian. Two facts must be, and practically are, conceded, viz., that Dal. P. Stuard is the legally appointed guardian of Wood Stuard, and that at the time of the appointment of his guardian both Wood Stuard and his guardian were residents of Morgan county. It cannot be presumed, from the circumstances of this case, that when the ward was removed to the state hospital in Athens county, there was any intention, on the part of himself or anybody else, to change the place of his legal residence. In fact the change of location was involuntary, and for a temporary purpose, and he was in law incapable of making a voluntary change of residence. In case of his recovery it is made the duty of the officers of the law to return him to his home in the county from which he was sent. Sections 709, 7243, Rev. St. 1908. These considerations lead to the conclusion that Wood Stuard not only was, but now is, a legal resident of Morgan county. The statutes of this state do not specifically prescribe any particular method for service of summons upon an insane defendant. Ordinarily the service of summons upon a defendant would be by leaving a true copy of the writ at his usual place of residence, or by delivering a copy to the defendant in person. Neither of these modes of service was adopted in this case, and we are thus led to the inquiry whether the court of common pleas has acquired jurisdiction of the person of Wood Stuard in any other manner.

Waiving consideration of the proposition that the guardian of an insane person is not a necessary party defendant in an action of this kind, it seems to us very clear that he is at least a proper party. Our Code of Civil Procedure, in the chapter entitled "Parties to Actions," provides that "the defense of an insane person must be by his legally appointed guardian," or in certain cases by a trustee for the suit, appointed by the court. Section 5000, Rev. St. 1908. Elsewhere our statutes (sections 6269, 6304, par. 5, Rev. St. 1908) makes it the duty of a guardian for a lunatic "to appear for and defend, or cause to be defended, all suits against such ward." Not only is the duty to appear for and defend distinguished by the statute from causing a defense to be made, but it would seem that the very act of appearing and defending would involve the necessity of filing all necessary pleadings in the case, and to do any of these required things implies notice to the guardian. No mode of notifying the guardian is provided. Can it be said to be illegal to serve him as a party with summons along with his ward? The guardian cannot be a merely nominal party, lacking any substantial interest, in a controversy of this kind. His ward's estate is not bound by a debt or lien existing before the guardianship. The liability for a tort becomes a lien only from the date of judgment and the plaintiff was not an ascertained creditor whom the guardian was bound to recognize in the administration of his ward's estate. *Evans et al. v. Lewis*, 30 Ohio St. 11. The guardian was therefore not merely required by law to see

that a defense was made, but he was interested as a trustee, to the extent that it was his duty to see that the trust estate was not unduly burdened. Hence, if he was not a necessary party to the action, he was at least a proper party defendant; and so the authorities seem to hold.

In 22 Cyc. 1224, the law is stated thus: "An insane person may be sued the same as a sane person. At common law the rule was the same after inquisition of lunacy and the appointment of a guardian or committee; but now, if there be a committee or guardian, it is generally necessary to join him as a party defendant." In 10 Ency. Pl. & Prac. 1228, we find this: "If the party be under the management of a committee or guardian, service of process should be upon the committee, or upon both the committee and the lunatic." In 9 Ency. Pl. & Prac. 935, we read the following: "Although it may not be necessary in all cases to make the guardian a party to an action or proceeding affecting the ward solely, yet it is usually proper to do so, that he may protect the ward's interests." In *Carter v. Burrall*, 80 App. Div. 395, 81 N. Y. Supp. 30, the court held that the committee of a lunatic, if he so elects, is entitled to come in and defend an action against his ward, and if he declines to do so, the plaintiff may apply for leave to make him a party defendant. The supreme court of Massachusetts, in *Whitecomb v. Jacobs*, 9 Gray, 255, said that a guardian should be made a party to proceedings against the ward; but the same court, in *Taylor v. Lovering*, 171 Mass. 303, 50 N. E. 612, remarked that "this is not strictly true. He should have notice of the proceedings." This is, in effect, saying that it is not necessary to make the guardian a formal party, but the court does not go to the extent of saying that he would be an improper party. However, the court did hold that the court below, "on being informed that the defendant was an insane person, under guardianship in this commonwealth, properly ordered notice of the pendency of the action to be given to the guardian; and, if the guardian had appeared in the action in the name of the defendant, this probably would have cured the want of service on the defendant." We shall refer to this further on. The supreme court of Illinois impliedly held that the guardian of an insane person, who had been made a defendant and served with process, was a proper party, because it held that, being made a party, he might take an appeal for the ward, notwithstanding the cause had been defended by a guardian ad litem, who might also have appealed. *Sill v. Sill*, 185 Ill. 591, 57 N. E. 812.

Both the lunatic himself and his legally appointed guardian being residents of Morgan county, and the latter being a proper party to the action, this action against both was rightly brought in that county (section 5028, Rev. St. 1908), and the mode of service is clearly provided for in section 5035, Rev. St. 1908. Jurisdiction of the person of the guardian was obtained by waiver of process and entry of appearance by him. Possibly, as suggested by the

supreme court of Massachusetts, *Taylor v. Lovering*, supra, this may have cured a want of service on the insane defendant himself; but we need not resort to that extremity in this case. Under the statute summons was properly directed to the sheriff of Athens county, which was personally served on the insane defendant in that county. The court had jurisdiction of the person as to both the ward and the guardian from that time until the dismissal without prejudice as to the guardian, a period of more than two months. The dismissal from the case of the guardian, if he was a proper party in the first instance, could not affect the jurisdiction over the person of the ward already properly acquired. Its only effect would be to dispense with the presence of the guardian as a party until, at some future stage of the action, the court should find it necessary to bring him in again.

It follows that the judgment of the court of common pleas quashing the service made on Wood Stuard by the sheriff of Athens county and the judgment of that court dismissing the plaintiff's petition for want of jurisdiction over the person of the defendant were erroneous, and the judgment of the circuit court is therefore affirmed.

See "Insane Persons," Century Dig. §§ 166, 169; Decennial and Am. Dig. Key No. Series § 95.

WILLIAMS v. BANKHEAD, 19 Wallace. 563, 570. 1873.

Parties in Equity.

[Bill in equity in the circuit court of the United States for the eastern district of Arkansas, to subject a fund to the satisfaction of a mortgage on real estate situate in Arkansas. Bankhead filed the bill and Williams and others were defendants. For reasons stated below, the defendants insisted that the widow of the mortgagor was a necessary party. The judge ruled otherwise and rendered a decree against defendants, Williams and others, and they appealed. Reversed. Some time prior to 1854, James Branch contracted to purchase a tract of land in Arkansas from Isaac Bolton. Branch paid part of the purchase money and took from Bolton a contract to convey when the residue of the price should be paid. In 1854, Branch mortgaged his equitable estate in such land to Bankhead. Bankhead, in a suit in equity, sought a foreclosure of his mortgage. While such proceeding was pending, a state court decreed a rescission of the contract of sale and purchase, made by and between Branch and Bolton, and that the purchase money paid by Branch be refunded to his widow—she claiming the same under a marriage settlement. Bankhead then filed this bill, in the circuit court of the United States, seeking to subject the money directed by the state court to be refunded to Branch's widow, to the satisfaction of the mortgage made to him by Branch. To this bill the defendants were Williams—who was in possession of the land covered by the contract to convey and the mortgage—the administrator of Branch, and the devisee of Bolton; but Branch's widow was not a party. The defendants insisted that no decree could be made subjecting the fund to Bankhead's mortgage because the widow was an indispensable party. Bankhead insisted that he was excused from making her a party because she did not reside in Arkansas and therefore could not be served with process.

After disposing of another point presented by the appeal, the opinion proceeds:]

BRADLEY, J. . . . The other ground of appeal, namely, that the widow was an indispensable party, presents a more serious question. On the one hand it is said that, not being a party, her rights were not concluded; and that the only inconvenience arising from proceeding with the case without her was the double liability to which Bolton and the administrator of Branch became exposed by having to pay her and Bankhead both, under contrary decrees of different courts. The general rule as to parties in chancery is, that all ought to be made parties who are interested in the controversy, in order that there may be an end of litigation. But there are qualifications of this rule arising out of public policy and the necessities of particular cases. The true distinction appears to be as follows: First, Where a person will be directly affected by a decree, he is an indispensable party, unless the parties are too numerous to be brought before the court, when the case is subject to a special rule. Secondly, Where a person is interested in the controversy, but will not be directly affected by a decree made in his absence, he is not an indispensable party, but he should be made a party if possible, and the court will not proceed to a decree without him if he can be reached. Thirdly, Where he is not interested in the controversy between the immediate parties litigant, but has an interest in the subject-matter which may be conveniently settled in the suit, and thereby prevent further litigation, he may be a party or not, at the option of the complainant.

In the present case, if the question were one of mere personal liability on the part of Bolton, McNeill, and Williams, it might have been admissible to proceed without making the widow of Branch a party, inasmuch as she was not a resident of Arkansas, and could not at the time be made a party in the circuit court without being served with process in the district of Arkansas or voluntarily appearing to the suit. The act to further the administration of justice, by which an order of publication for the appearance of non-resident defendants is provided for, if it would apply to the case, had not been passed. But this is not a case of mere personal liability. It concerns the disposal of a specific fund, in which the widow claims an interest. If the sum of \$3,666.66 mentioned in the decree is not paid, the plantation is directed to be sold in order to raise the amount of Bankhead's claim. And this plantation is in the possession of the widow by her tenants. She is to receive the rents and profits thereof until her claim is satisfied by the payment of the said sum of \$3,666.66 and the interest due thereon, awarded her by the Desha county court. Her interests, therefore, are directly affected by the decree. Under these circumstances we think that she was an indispensable party. The decree, therefore, must be reversed, and the cause remanded to be proceeded in according to law.

See "Equity," Century Dig. §§ 246-253; Decennial and Am. Dig. Key No. Series §§ 89-96.

STEVENSON v. AUSTIN, 3 Metcalf (Mass.) 474, 480. 1842.

Parties in Equity. Very Numerous Parties. Trustees and Cestuis que Trust as Parties. A Few of a Class Sufficient. When.

[Bill in equity seeking to reach a certain fund in the hands of Austin. James Bruce became insolvent and made a deed of assignment to trustees for the benefit of his creditors. Among the assets so assigned was a claim to the fund in question. Austin, Bruce and the trustees were made defendants; but the creditors secured by the deed of assignment were not made defendants. The defendants insisted that such creditors were necessary parties. These creditors consisted of nineteen individuals and firms—some of whom were non-residents, one firm being resident in Europe—and seven corporations.]

WILDE, J. . . . It appears that Bruce, having become insolvent, has assigned his property and effects, including his equitable claim to the funds in the hands of Austin, to Stevenson & Curtis, in trust for the use and benefit of his creditors. The assignees are made parties defendants in this suit; but it is objected, that the creditors, who have become parties to the assignment, ought also to be made defendants in this suit. The general rule is, that all parties interested in the subject of the suit should be made parties, plaintiffs or defendants, so that the court may settle the rights of all parties interested, and may thereby prevent future litigation. But there are many exceptions and qualifications to the general rule. When the parties interested are very numerous, so that it would be difficult and expensive to bring them all before the court, and all the different interests may be fairly tried, the court will not require a strict adherence to the rule. It is said that the creditors in this case are numerous, some residing out of the commonwealth, and the residence of others being unknown. We think, therefore, that it is sufficient to make the assignees parties, who alone have a right to claim the property (they having the legal title), and who are empowered, and whose duty it is, to represent the interests of and to act for all the creditors interested in the trust.

In *Adair v. The New River Co.*, 11 Ves. 445, it is said by Lord Eldon, that it is not necessary to make all the individuals, who are interested, parties: "The court therefore has required so many, that it can be justly said, they will fairly and honestly try the right between themselves, all other persons interested, and the plaintiff." So in *Lloyd v. Loaring*, 6 Ves. 779, Lord Eldon says, "I have seen strong passages, as falling from Lord Hardwicke, that where a great many individuals are jointly interested, the court will let a few represent the whole." So in *Vernon v. Blackerby*, 2 Atk. 145, Lord Hardwicke refers with approbation to a case decided in 1720, where several persons were interested, who had given a general power and authority to some few only.

and therefore to avoid inconvenience from making numerous parties, the court restrained them to those particular persons who were intrusted with the general power. It is laid down in *Mitford*, Pl. 3d ed., 142, that "trustees of real estate for the payment of debts or legacies may sustain a suit, either as plaintiffs or defendants, without bringing before the court the creditors or legatees for whom they are trustees; and the rights of the creditors or legatees will be bound by the decision of the court against the trustees." And this rule seems supported by the current of the authorities. In *Meux v. Maltby*, 2 Swanst. 277, several of these and some other authorities are referred to, and the question as to parties in similar cases was very fully considered. In that case, on a bill against the treasurer and directors of a joint stock company, it was held that it was not necessary that the rest of the proprietors, being very numerous, should be made parties. Sir Thomas Plumer, master of the rolls, after referring to several authorities, says: "Here is a current of authority, adopting, more or less, a general principle of exception, by which the rule, that all persons interested must be parties, yields when justice requires it, in the instance either of plaintiffs or defendants. The rigid enforcement of the rule would lead to perpetual abatements. This, therefore, cannot be regarded as a new point, or as creating a difficulty. It is quite clear that the present suit has sufficient parties, and that the defendants may be considered as representing the company."

Nor is there anything inconsistent with this principle of exception in the decision of the case of *Newton v. The Earl of Egmont*, 4 Simons, 585, and 5 Simons, 130, cited by the defendants' counsel. In that case, the plaintiff claimed priority of his incumbrance to the claims of sundry creditors for whose use and benefit the estates incumbered had been conveyed in trust; and it was held that all the creditors must be made parties. The Vice Chancellor says, "I accede to the rule laid down in *Adair v. The New River Co.* That rule, however, applies only to cases where there is one general right in all the parties; that is, where the character of all the parties, so far as the right is concerned, is homogeneous. In this case, where the question is priority of charge, the very nature of the question makes it necessary that all the creditors should be parties. It implies a contest with every other person claiming an interest in the land." 5 Simons, 137.

From these authorities it seems very clear that there is no defect of parties in the present case, and that it is unnecessary that the creditors of Bruce should be made parties, which must be attended with great delay, expense and difficulty, without subserving, in any respect, the administration of justice between the parties interested. The interests of these creditors are similar, which the trustees are bound to enforce and defend.

See "Equity," *Century Dig.* § 252; *Decennial and Am. Dig. Key No. Series* § 96.

CLINE v. GREEN, 1 Blackford, 52. 1820.

How Long a Party Is Considered to be in Court. When Notice of a Motion Is Required.

[Cline obtained a final judgment against Green; execution issued and Green's property was sold thereunder. Green then made a *motion in the cause* to quash the execution, which motion was granted. Reversed. The cause in which the motion was made had been concluded by the entry of a *final judgment*. No notice was given to Cline that Green intended to make the motion to quash.]

HOLMAN, J. The grounds on which this motion was sustained are unimportant, inasmuch as a previous notice of the motion was indispensable. Every individual has an unquestionable right to be heard when his interest is jeopardized by legal proceedings; but unless he has notice of these proceedings, he has no opportunity of being heard. While a suit is *depending*, the plaintiff is considered in court, and ready to support his right; but when the *judgment is obtained*, judicial proceedings are at an end, and the plaintiff is considered in court no longer. Every objection afterwards made to the manner in which the judgment is executed, is, in legal intendment, made without his knowledge, unless he is specially notified thereof. There can, therefore, be no question but that the plaintiff should have had notice of the time when this motion was intended to have been made, that he might have been prepared to have defended himself against its effect. Judgment reversed.

A cause is pending for purposes of motions until the judgment is *fully performed—satisfied*. (But after *final judgment* the opposite party must be given *due notice of an intended motion*, as is ruled in the principal case.) *Lynn v. Lowe*, 88 N. C. at top p. 484, citing many cases; see also *Lanier v. Heilig*, 149 N. C. 384, 63 S. E. 69. See "Execution," Century Dig. § 475; Decennial and Am. Dig. Key No. Series § 163.

PALMER v. CROSBY, 1 Blackford, 140. 1821.

Joint Parties. Several Parties. Joint and Several Parties.

[Crosby sued Palmer and five others in trespass for assault and battery. Four of the defendants were served with process but two were not served. There was a verdict and judgment against the four who were served and they carried the case to the supreme court by writ of error. Affirmed.]

Palmer and the three others who were served insisted that Crosby should have sued out an alias writ for the two defendants who were not served, before proceeding to judgment against those who were served.]

BLACKFORD, J. In support of the first point, the plaintiffs in error have cited 1 Str. 473, 2 Str. 1269, and 1 Wils. 78. These are all actions founded on *contract*, and if the present were a case of that kind, the objection would be a sound one, and the authorities in point: there could have been no proceedings in the cause

against the defendants summoned, until the sheriff had returned that the others were not inhabitants of the county, which return is substituted by our statute for the English process of outlawry. Even where a contract is joint and several, though the plaintiff may go against *one or all* of the contractors, yet he ought not to sue an *intermediate* number. When he sues more than one, he depends upon the joint contract, and then all the joint contractors living should be parties; if they be not, it is good ground for a plea in abatement. *The King v. Young*, 2 Anst. 448; 1 Will. Saund. 291, n. 4; *Leftwich v. Berkeley*, 1 Hen. & Munf. 61. Neither can the plaintiff enter a nolle prosequi as to any of the defendants in an action on contract, except where they sever in pleading, and one pleads something which goes to his personal discharge. *Noke v. Ingham*, 1 Wils. 89. *But the law is very different in actions founded on tort.* The persons guilty are separately liable to the party injured, and he has a right to sue one or all, or any number of them. 1 Will. Saund. 291, n. 4. If the plaintiff commence suit against several, he may, at any time before judgment, enter a nolle prosequi as to any of them. Even after a joint plea in an action of trespass, and after a verdict that the defendants are jointly guilty, the plaintiff may enter a nolle prosequi as to some, and take judgment against the others. 1 Will. Saund. 207, n. 2. The case before us is one of assault and battery, in which the writ was served on, and the judgment entered against, four only of the six persons against whom the plaintiff complained. Why is this wrong? As the action might have been originally instituted against these four, so, at any time before final judgment, the plaintiff might elect to take his damages against them alone, and abandon his action against the others. He might, even after his verdict against the four, have entered a nolle prosequi as to two, and taken judgment only against the rest. It is no objection to the proceedings now under consideration, that there was no entry of a nolle prosequi as to the two upon whom the process was not served: that was unnecessary, because they were no more parties to the action than if their names had not been in the writ. Where suit is only against some of the trespassers, it is usual to declare against them *simul cum quibusdam ignotis*, and it was once thought that if the plaintiff, in such a case, declared *simul cum A and B*, the action should abate, because, it was said, as the plaintiff knew the other trespassers, he ought to have joined them in the suit. *Hob. 164, 199.* But this objection was cured by a verdict. *Henly v. Broad*, 1 Leon. 41. In the case under consideration, the declaration is that six committed the trespass, which is, in substance, the same as if it were that the four *simul cum* the other two committed it. So that, according to the case of *Henly v. Broad*, no objection could be made, after verdict, that the other two were not parties to the action. The distinction made in those cases from *Hobart & Leonard* has been long since done away; it is now considered immaterial whether the other trespassers were known or

unknown to the plaintiff; and the exception to the declaration here urged for the reversal of the judgment, would not have been good had it been pleaded in abatement. 1 Will. Saund. 291, n. 4; *Rose v. Oliver*, 2 Johns. 365. . . . Judgment affirmed.

See Revisal, secs. 412, 413. For effect of releasing one joint tortfeasor, see 19 L. R. A. (N. S.) 618. See "Assault and Battery," Century Dig. § 65; Decennial and Am. Dig. Key No. Series, § 45.

See "Parties," 30 Cyc. 1-144; for parties in equity, see 1 Foster's Fed. Prac. §§ 42-62. See 2 L. R. A. (N. S.) 1089, 7 Ib. 415, 11 Ib. 676, 15 Ib. 129, 18 Ib. 643, 19 Ib. 984, and notes (under what name a party may sue or be sued, *idem sonans*); 5 Ib. 611, and note (wife as plaintiff against husband in an action on a contract); 2 Ib. 961, and note (action by and on behalf of insane persons); 22 Ib. 454, and note (only the personal representative can sue for personal assets of the estate of a decedent); 4 Ib. 657, and note (action by foreign executor—ancillary administrator appointed *pendente lite*); 20 Ib. 221, 21 Ib. 1021, and see also 477, 22 Ib. 492, and notes; also *Sergeant v. Stryker*, 16 N. J. L. 464, and note, inserted at ch. 8, sec. 3, (b), *McIntosh Cont.* 408-423, 3 Page Cont. ch. 60, *Clark Cont.* 351-359, 7 Am. & Eng. Enc. L. 104-110, 30 Cyc. 59-67, 52 L. R. A. 305, 61 Ib. 509, 63 Ib. 727, 15 Ib. 375, 21 Ib. 653, 23 Ib. 146, 25 Ib. 257, 28 Ib. 532, 51 Ib. 241, 653, 53 Ib. 390, 609, and notes (right of a stranger to sue on a contract *inter alios*—privity); 15 L. R. A. (N. S.) 399, and note (action by one for whose benefit a clause is inserted in a contract *inter alios*); 19 Ib. 475, 8 Ib. 249, and notes, 143 N. C. 386, 394, *McIntosh Cont.* 422 (parties to actions against a telegraph company for negligence, etc., in transmission of messages); 19 L. R. A. (N. S.) 984, and note (action against a *feme covert* in her maiden name); 16 Ib. 276, and note (foreign sovereign as a defendant); 12 Ib. 941, and note (a defendant fraudulently induced to enter a state that service of process might be had on him).

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